

# THE AIR FORCE LAW REVIEW



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*DAVID A. SCHLUETER*

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## THE AIR FORCE LAW REVIEW

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TIME TO RECONSIDER IN-COURT REPRESENTATION  
OF LEGAL ASSISTANCE CLIENTS

COLONEL FELIX A. LOSCO\*

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\* Col Felix A. Losco, Judge Advocate, United States Air Force (J.D., Mercer University (1984); M.S., Northwestern University (1977); B.S., Penn State University (1975)) serves as the Deputy Staff Judge Advocate at Headquarters, Air Mobility Command, Scott Air Force Base, Illinois. He is a member of the Massachusetts Bar. The author wishes to express his appreciation and thanks to Lt Col Christopher C. Bazeley for his thoughtful review and helpful comments.

## I. INTRODUCTION

As this article goes to press, The Judge Advocate General (TJAG) is reviewing a new version of the Air Force Instruction (AFI) on Legal Assistance.<sup>1</sup> Previous versions of the instruction contained a provision stating representation of a legal assistance client in “a court or administrative proceeding” was outside the scope of permissible representation.<sup>2</sup> That provision effectively prevented legal assistance attorneys from providing in-court representation for their clients. The pending version is not so restrictive. Once approved, the new instruction will permit Air Force legal assistance attorneys or participants in an Expanded Legal Assistance Program (ELAP) to represent eligible clients in a civilian court.<sup>3</sup> The only restriction placed on the attorneys is the requirement to coordinate their representation through their Major Command (MAJCOM) Staff Judge Advocate and obtain approval from AFLOA/CLSL.<sup>4</sup> The Navy and Army also provide for ELAP. Unlike the Air Force, these services require attorneys not licensed in the state where they are stationed to comply with state licensing requirements before letting them appear in civilian courts where they are stationed.<sup>5</sup> As explained in this article, this is a service-imposed restriction that unnecessarily limits attorney participation in an ELAP. Because the Air Force’s proposed revision of its legal assistance instruction is not burdened with this restriction, the Air Force has the opportunity to have a more proactive and robust legal assistance practice. Rather than almost never exercising the option for in-court representation, the Air Force could recognize there are recurring categories of cases where its attorneys ought to be able to represent eligible clients in civilian courts. Our base legal offices cannot be converted to a full-service civilian-type attorney’s office. Even if desirable, resource and statutory limitations make that impossible. Instead, this article proposes the Air Force permit in-court representation

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<sup>1</sup> E-mail from Lt Col Thomas F. Collick, Chief, Community Legal Services Division, to author (Nov. 24, 2014 16:08 CT) (on file with author). The new instruction will be entitled: U.S. DEP’T OF AIR FORCE, INSTR. 51-504, LEGAL ASSISTANCE, SPECIAL VICTIMS’ COUNSEL, NOTARY, PREVENTIVE LAW, AND TAX PROGRAMS.

<sup>2</sup> U.S. DEP’T OF AIR FORCE, INSTR. 51-504, LEGAL ASSISTANCE, NOTARY, PREVENTIVE LAW, AND TAX PROGRAM, para. 1.2 (October 27, 2003) discusses the scope of legal assistance. It lists nine situations where legal assistance attorneys are prohibited from forming an attorney-client relationship. Para. 1.2.9 forbids representation of a client in a court or administrative proceeding. On January 24, 2013, The Judge Advocate General (TJAG) amended this provision through a Guidance Memorandum (which was re-issued without change on October 22, 2014). The revised paragraph 1.2.9 reads: “Representation in a court-martial or administrative proceeding, unless acting as a SVC [Special Victims Counsel].” Because this change applied to courts-martial and not all “courts,” the change appeared to remove the previous version’s blanket prohibition against providing representation in courts or administrative proceedings. In a November 24, 2014 e-mail, Lt Col Collick confirms no expansion of representation was intended by this change. *See supra* note 1.

<sup>3</sup> *Id.* at para. 1.2.8.

<sup>4</sup> *Id.* at para. 1.3. AFLOA/CLSL is the Air Force Legal Operations Agency, Community of Legal Issues Division.

<sup>5</sup> U.S. DEP’T OF ARMY, Reg 27-3, ARMY LEGAL ASSISTANCE PROGRAM, para 3-7(g)(4) (21 Feb. 1996), and U.S. DEP’T OF NAVY, NAVY LEGAL ASSISTANCE PROGRAM, JAG Instruction 5801.2B, para 13-4(b) (15 Feb 13).



in appropriate cases on a routine basis. While such representation may never be “common” it ought to be more frequent than seldom or exceptional.

This article addresses the preemptive nature of the 2006 amendment to 10 U.S.C. § 1044 and shows the amendment eliminated the requirement for legal assistance attorneys to comply with state licensing requirements. The article is divided into three sections. The first section will provide an historical review of in-court legal assistance. The second will discuss how Section 1044(d) of Title 10 preempts state licensing requirements. The third will review the advantages of making in-court representation a part of Air Force practice, suggest areas where such a program could be effective, and discuss issues which could arise should the Air Force use ELAPs more frequently.

## II. A BRIEF HISTORY OF LEGAL ASSISTANCE AND IN-COURT REPRESENTATION BY AIR FORCE LAWYERS

### A. The Early Years

The services began a formal military legal assistance program in 1943.<sup>6</sup> Between its inception through the late 1960s, the legal services provided were largely confined to providing general advice.<sup>7</sup> Most legal work was referred to civilian attorneys.<sup>8</sup> Of course, civilian counsel charged for their services but bar associations, then as now, assisted military clients by finding competent and sympathetic counsel who would provide assistance at reduced fees.<sup>9</sup> In 1969, Congress passed the Carey Amendment to the Economic Opportunity Act.<sup>10</sup> This act provided indigent military members and their families with legal assistance through the Office of Economic Opportunity (OEO). The OEO Director, however, could not expand his legal operations to accommodate this new entitlement for military personnel “...unless and

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<sup>6</sup> The Army established the first legal assistance program with the publication of WAR DEP’T CIRCULAR 74, LEGAL ADVICE AND ASSISTANCE FOR MILITARY PERSONNEL (16 Mar 43). Three months later, the Navy created their own program. *See* Letter, JAG:J:JL, Legal Assistance for Navy Personnel (26 Jun 1943), reprinted in Dep’t of Navy, Navy Bulletin R-1164 (1 Jul 1943). In December 1943, the Army Air Force established its legal assistance program. *See* Dep’t of Army-Air Forces Reg. 110-1 (23 Dec 1943). In 1947, the Air Force became a separate service. Initially, the Air Force provided legal assistance in accordance with a directive inherited from the Army. On 17 Mar 1950, the Air Force published its first legal assistance regulation, AFR 110-1. Prior to the enactment of 10 U.S.C. § 1044, the statutory authority for legal assistance was derived from the service secretaries’ obligation for “Administering (including the morale and welfare of personnel)” and assigning officers to perform these duties as set out in 10 U.S.C. § 8013(a)(2)(b)(9) and 10 U.S.C. § 8013(g)(1). The Army and Navy have identical statutes for their services at 10 U.S.C. § 3013 and 10 U.S.C. § 5013, respectively.

<sup>7</sup> Col Alfred F. Arquilla, *The New Army Legal Assistance Regulation*, ARMY LAW, May 1993, at 1-5.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> 42 U.S.C. § 2809 (1981), *repealed by* Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35, § 683(a), 95 Stat. 519 (1981).

until the Secretary of Defense assumes the cost of such services...<sup>11</sup> Rather than transfer Department of Defense (DoD) funds to the OEO, the Secretary of Defense opted to establish a DoD alternative to the OEO. After an 18-month study involving all the services, the Defense Secretary directed the services to create a pilot program expanding legal assistance based on the OEO model.<sup>12</sup> The program included in-court representation of legal assistance clients in both criminal and civil matters by judge advocates.<sup>13</sup> Like the current legal assistance program, the services did not receive either additional funding or manpower to support the pilot program. They were required to use existing manpower and resources. The Air Force's experience with this pilot program illustrates both the benefits and problems to be expected in an expanded legal assistance program.

## B. The Air Force's Pilot Expanded Legal Assistance Program

After receiving DoD approval, the Air Force chose four bases on which to establish its pilot program: Elmendorf Air Force Base, Alaska; Barksdale Air Force Base, Louisiana; Richards-Gebaur Air Force Base, Missouri; and Scott Air Force Base, Illinois.<sup>14</sup> Most programs were initiated by February 1, 1971. Representation was limited to Airman in grades E-4 and below who had less than four years of service.<sup>15</sup> After two years, the Air Force reported significant positive results.<sup>16</sup> During the pilot program, Air Force lawyers handled a total of 585 cases and made 290 court appearances. All of these cases were "expanded cases," which could not be handled under the Air Force's then existing "no representation" rule.<sup>17</sup> The types of cases were about evenly split between civil and criminal.<sup>18</sup> Of the former, most involved family law issues of divorce, adoption and non-support.<sup>19</sup> Criminal cases included the entire spectrum of misconduct from first degree murder to traffic offenses.<sup>20</sup> Brigadier General (then Colonel) Joseph R. Lowry, the Staff Judge Advocate at

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<sup>11</sup> *Id.*

<sup>12</sup> Captain Jack S. Bender, III & Captain Alessandro J. Ranciglio, *The Air Force Pilot Expanded Legal Assistance Program*, 14 A.F. L. REV. 173,176.

<sup>13</sup> F. Raymond Marks, *Military Lawyers, Civilian Courts, and the Organized Bar: A Case Study of the Unauthorized Practice Dilemma*, 56 MIL. L. REV. 1 (1972). The intent of the pilot program was to provide representation to needy military personnel and their families to the same extent as provided by the OEO.

<sup>14</sup> Bender & Ranciglio, *supra* note 12, at 177.

<sup>15</sup> *Id.* The Air Force used the OEO's financial guidelines to determine which of their legal assistance clients would be eligible for this program.

<sup>16</sup> *Id.* at 181.

<sup>17</sup> *Id.* at 181. The legal assistance regulation at the time, A. F. Reg. 110-22, paras 4(a) and 4(b), stated legal assistance attorneys "...cannot appear in person or by pleading before any domestic or foreign court, tribunal, or government agency."

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

Richards-Gebaur, MO, was an enthusiastic supporter of the pilot program.<sup>21</sup> He stated, “The young JAGs in the office just loved these cases and they worked feverishly on them.”<sup>22</sup> He added, “The result of the program was not only good representation for the young military people, but it provided excellent experience for the young JAGs.”<sup>23</sup> He believes the pilot program “...brought out the best in the young JAGs.”<sup>24</sup> While the Judge Advocates involved enjoyed the challenge, they encountered significant obstacles. The most significant and intractable was gaining access to the civilian courts for legal assistance attorneys not licensed in the state where they were stationed.

Of the four states involved in the pilot program, only one granted out-of-state military lawyers access to their courts.<sup>25</sup> Officials in Louisiana, Illinois, and Alaska declined to open their courts to legal assistance attorneys not licensed in their states.<sup>26</sup> Indigent clients at Barksdale Air Force Base, Louisiana and Scott Air Force Base, Illinois were represented by JAGs licensed and stationed in those states.<sup>27</sup> Alaskan officials believed already existing organizations such as the Alaskan Legal Service or the Public Defender should provide this service.<sup>28</sup> In their view, if the military desired to help indigent legal assistance clients, they should assign their attorneys directly to those organizations.<sup>29</sup> Missouri officials did permit out-of-state military lawyers to represent legal assistance clients in their courts. Their willingness to assist was not solely due to a concern for indigent military personnel.<sup>30</sup> At the time, it was the practice for Missouri courts to appoint counsel for indigent defendants but without fee or reimbursement for expenses.<sup>31</sup> Under these circumstances, the Executive Director of the Missouri Bar reported he was “...quite pleased to have this responsibility shifted to those of you who are military lawyers.”<sup>32</sup>

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<sup>21</sup> BRIGADIER GENERAL JOSEPH R. LOWRY, ORAL HISTORY OF BRIGADIER JOSEPH R. LOWRY (RET), UNITED STATES AIR FORCE HISTORY OFFICE, MAXWELL AFB AL, 17 Apr 1996, 94-95.

<sup>22</sup> *Id.* at 94.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> Bender & Ranciglio, *supra* note 12, at 177.

<sup>26</sup> *Id.* at 178. At the time referenced in the article, the authors reported Illinois officials had “... rebuffed all attempts to gain approval for the use of out-of-state attorneys in the program...” Later, the Illinois Supreme Court adopted a rule permitting Air Force legal assistance attorneys access to their courts. See *infra* note 93.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.* at 177.

<sup>29</sup> *Id.*

<sup>30</sup> *Id.* at 180. On Feb. 1, 1972, the Missouri Supreme Court adopted Rule 9.04 permitting Judge Advocates to represent indigent military personnel or their dependents provided those individuals could not pay a fee for the service involved. The rule was amended Nov. 20, 1990 and is still in effect.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

In addition to courtroom access, the pilot program also surfaced additional issues. Among these were worries about malpractice liability, costs associated with representation, and continuity of representation for clients who left the service.<sup>33</sup> Some participants were concerned the Federal Tort Claims Act (FTCA) was not an exclusive remedy for dissatisfied clients.<sup>34</sup> They speculated a client could wait for the FTCA's statute of limitations to run and then take advantage of state law which provided for a longer period of time in which to file suit.<sup>35</sup> At that point, the legal assistance attorney may not be represented by the government. This raised the question about whether legal assistance attorneys should have or could even qualify for malpractice insurance.<sup>36</sup> As the offices received no additional attorneys or administrative support for this expanded program, legal assistance attorneys feared filing dates could be missed and give rise to another area of liability.<sup>37</sup> Court-related expenses for transcripts and depositions, and witness fees were significant.<sup>38</sup> The attorneys found that in some cases, fees could be waived because of a client's indigence, but in others a professional job required depositions be obtained.<sup>39</sup> Finally, because of the nature of the cases taken on during the pilot project, some clients transitioned out of the Air Force before the case was complete. During the pilot program, attorneys decided representation would end at the conclusion of trial but they recognized this could be a significant problem.<sup>40</sup> Based on the foregoing, it is not surprising that none of services adopted an OEO-style legal assistance regime for their current ELAPs.

### C. Current ELAP in the Air Force, Army and Navy

The Services took different paths following their experience with the pilot programs. The Air Force does not have an on-going in-court ELAP at any of its

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<sup>33</sup> Bender & Ranciglio, *supra* note 12, at 181-183.

<sup>34</sup> *Id.* The Federal Tort Claims Act is codified at 28 U.S.C. § 1346(b).

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

bases.<sup>41</sup> On the other hand, both the Army<sup>42</sup> and Navy<sup>43</sup> retained the option of providing in-court legal assistance to eligible clients.

The Army's current guidance regarding in-court representation requires that legal assistance attorneys first obtain permission from their "supervising attorney."<sup>44</sup> The Army defers to State authorities with respect to licensing requirements.<sup>45</sup> In the Army, an approved legal assistance attorney can appear in a civilian court provided the attorney is either "qualified through bar membership or otherwise" or is practicing in accordance with an agreement "...with the State bar or pursuant to a motion granted by an appropriate court of the State concerned."<sup>46</sup> The Army reports their legal assistance offices provided in-court representation for 653 clients in Fiscal Year 2014.<sup>47</sup> Of these, the Army Legal office at Fort Lee VA accounted for 483.<sup>48</sup> Most were in the family law area but the office also provided representation in Guardian ad Litem cases for disabled soldiers and their family members.<sup>49</sup> Their work with merchants and landlords has had a positive impact in convincing them to treat their soldiers fairly.<sup>50</sup> The Fort Lee office reports positive short and long-term effects from their program.<sup>51</sup> The Fort Lee legal office has been providing in-court

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<sup>41</sup> Telephone Interview with Lt. Col. Thomas Collick, Chief, Legal Assistance Policy Division (Dec. 16, 2014). While there are no current Air Force ELAPs, there have been occasions when Air Force legal assistance attorneys have routinely appeared in court on behalf of their clients. For example, the Warner Robins Air Logistics Center Legal Office received permission to establish an ELAP on Nov. 30, 1989. Between that date and 2011, a legal assistance attorney licensed in Georgia provided in-court representation to 20 to 25 clients per year. Typical cases involved local merchants, landlord/tenant issues, and simple adoption cases. They report their ELAP encouraged local merchants to treat their clients fairly and did not substantially increase their workload. In 2011, office leadership decided to devote ELAP resources to other areas. (E-mail from Debra Stone, Chief, Civil Law Division, 78 ABW/JA, to author (Dec. 16, 2014 14:55 CST) (on file with the author)).

<sup>42</sup> U.S. DEP'T OF ARMY, REG. 27-3, ARMY LEGAL ASSISTANCE PROGRAM, para 3-7(g) (21Feb. 1996).

<sup>43</sup> U.S. Dep't of Navy, NAVY LEGAL ASSISTANCE PROGRAM, JAGINST 5800.7E, para 0711 (February 15, 2013).

<sup>44</sup> U.S. Dep't of Army, Reg. 27-3, ARMY LEGAL ASSISTANCE PROGRAM, 27-3, para 3-7(g)(1) (February 21, 1996).

<sup>45</sup> *Id.* at para 3-7(g)(1), 3-7(g)(4)(a), and 3-7(g)(4)(b). The supervising Army attorney is authorized to approve representation for an individual case or a category of cases.

<sup>46</sup> *Id.*

<sup>47</sup> E-mail from Mr. John T. Meixell, Chief, Legal Assistance Policy Division, Headquarters, Dep't of the Army, to author, (December 15, 2014. 9:48 AM) (on file with author).

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> E-mail from Ms. Rhonda Mitchell, Chief, Client Services, at Fort Lee, VA to author, (Dec. 16, 2014, 20:28 CST) (on file with the author).

<sup>51</sup> *Id.*

representation since 1989 and states it has strong support from the local judiciary.<sup>52</sup> Fort Lee's in-court legal assistance attorneys are all members of the Virginia bar.<sup>53</sup>

In the Navy, legal assistance attorneys can provide in-court representation in connection with an approved ELAP or for an individual case.<sup>54</sup> For the former, the Navy TJAG or his designee is the approval authority.<sup>55</sup> For the latter, the Deputy Assistant Judge Advocate General (Legal Assistance) must approve the case.<sup>56</sup> Like the Army, the Navy requires its legal assistance attorneys to accommodate State licensing requirements before authorizing them to appear in civilian courts where they are not licensed.<sup>57</sup> In the past year, the Navy's ELAP program was confined to the Navy Legal Service Office Southwest in San Diego, CA.<sup>58</sup> All of their ELAP cases involved the Serviceman's Civil Relief Act.<sup>59</sup> For those clients, Navy attorneys appeared in civilian courts seeking a stay in proceedings.<sup>60</sup>

By deferring to state licensing authorities, the Army and Navy limit the number of attorneys able to participate in an ELAP to those licensed or otherwise permitted access to local state courts.<sup>61</sup> For Army and Navy legal assistance attorneys in states without authorizing legislation or permissive court rules, the pool of eligible ELAP attorneys is reduced to those who happen to be stationed in a state in which they are licensed. In contrast, the proposed Air Force Legal Assistance Instruction does not defer to state authorities regarding attorney licensure. As explained in the next section, this new approach is appropriate because of the preemptive language in 10 U.S.C. § 1044(d) eliminates the necessity to comply with state licensing requirements.

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<sup>52</sup> *Id.*

<sup>53</sup> *Id.* Ms. Mitchell also reports uniformed out-of-state Army Judge Advocates also appear on behalf of legal assistance clients under the supervision of licensed Virginia attorneys. See *supra* e-mail referenced in note 50.

<sup>54</sup> U.S. Dep't of Navy, NAVY LEGAL ASSISTANCE PROGRAM, JAGINST 5801.2B, para 13-1 (February 15, 2013).

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> *Id.* at para 13-4.

<sup>58</sup> E-mail from Lt. Caleb T. Christen, Code 16, Legal Assistance, Washington Navy Yard, DC., to author, (December 30, 2014, 11:42 CST) (on file with the author).

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> U.S. Dep't of Navy, NAVY LEGAL ASSISTANCE PROGRAM, JAGINST 5800.7E, para 0711 (February 15, 2013) and AR 27- 3, para 3-7(g) (February 21, 1996).

### III. PREEMPTION OF STATE ATTORNEY LICENSING REQUIREMENTS BY 10 U.S.C. § 1044

#### A. The Development of 10 U.S.C. § 1044

The analysis must begin with a review of 10 U.S.C. § 1044. Congress enacted the statute on October 19, 1984. The statute authorizes the Services to provide legal assistance to eligible clients in connection with their “personal civil legal affairs.”<sup>62</sup> With respect to representation in a “legal proceeding,” this statute permits “legal counsel” to represent clients who cannot afford to pay legal fees without “undue hardship.”<sup>63</sup> Specifically:

*This section does not authorize legal counsel to be provided to represent a member or former member of the uniformed services described in subsection (a), or the dependent of such a member or former member, in a legal proceeding if the member or former member can afford legal fees for such representation without undue hardship.*<sup>64</sup>

Over the years, the principal changes Congress made to the statute resulted in the expansion of legal assistance to additional groups. Originally, military legal assistance was limited to active duty members, retired personnel, and their dependents. In a succession of amendments, Congress expanded the availability of this service to officers in the Public Health Service, certain reserve component members, survivors of deceased or former military members, and most recently to victims of sexual abuse.<sup>65</sup> These additions account for four of the statute’s seven amendments. Two amendments were strictly administrative.<sup>66</sup> On January 6, 2006, Congress enacted the only amendment specifically addressing whether states could regulate military legal assistance attorneys with regard to their ability to practice in states where they were not licensed. The title of the enactment reveals the intent behind the Congressional action. Section 555 of PL 109-163 was entitled:

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<sup>62</sup> 10 U.S.C. § 1044(a).

<sup>63</sup> 10 U.S.C. § 1044 (c).

<sup>64</sup> *Id.*

<sup>65</sup> Officers in the Public Health Service were added on 23 Sept. 96, (Pub. L. No. 104-201 § 583, 110 Stat. 2538 (1997)). Certain reserve component members became eligible on October 30, 2000 (Pub. L. No. 106-398 § 524, 114 Stat. 1654A-108 (2000)). Survivors of deceased members or former members became eligible on January 28, 2008 (Pub. L. No. 110-181 § 541, 122 Stat. 114 (2008)). Most recently, victims of sexual assault became eligible on Dec. 26, 2013 (Pub. L. No. 113-66 § 1716, 127 Stat. 966 (2013)).

<sup>66</sup> There have been two administrative amendments (Pub. L. No. 111-84 § 513, 123 Stat. 2282 (2009) and Pub. L. No. 112-239 § 531(d)(2), 126 Stat. 1725, 1726 (2013)). On 28 Oct 09, Congress changed the reference to “Secretary of Defense” in 10 U.S.C. § 1044(a)(4) to “Secretary.” Congress’ second technical amendment was enacted on January 2, 2013. This change made clear that within the Marine Corps, the Staff Judge Advocate to the Commandant (like the other Services) is responsible for establishing and supervising legal assistance programs under this section.

*CLARIFICATION OF AUTHORITY OF MILITARY LEGAL ASSISTANCE COUNSEL TO PROVIDE MILITARY LEGAL ASSISTANCE WITHOUT REGARD TO LICENSING REQUIREMENTS (capitalization in original)*

The amendment was codified as Section (d)(1), (d)(2), and (d)(3) of 10 U.S.C. § 1044 as follows:

*(d)(1) Notwithstanding any law regarding the licensure of attorneys, a judge advocate or civilian attorney who is authorized to provide military legal assistance is authorized to provide that assistance in any jurisdiction, subject to such regulations as may be prescribed by the Secretary concerned. (Emphasis added)*

*(2) Military legal assistance may be provided only by a judge advocate or a civilian attorney who is a member of the bar of a Federal court or of the highest court of a State.*

*(3) In this subsection, the term “military legal assistance” includes—*

*(A) legal assistance provided under this section; and*

*(B) legal assistance contemplated by sections 1044a, 1044b, 1044c, and 1044d of this title.<sup>67</sup>*

Section (d)(3) makes clear the “legal assistance” described in this subsection includes two specific types of legal services. These are set out in sub-sections (d)(3)(A) and Section (d)(3)(B).

1. Legal Assistance Authorized by 10 U.S.C. § 1044(d)(3)(A)

The provision states “military legal assistance” includes “legal assistance provided under “this section,” that is Section 1044. As discussed earlier, this section enables military legal assistance attorneys to provide representation to eligible clients

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<sup>67</sup> 10 U.S.C. § 1044. This is how this subsection first appeared after its 6 Jan 2006 enactment. As noted *supra* note 65, the most recent amendment added victims of sexual abuse to the definition of “military legal assistance” by referencing 10 U.S.C. 1044(e) and 10 U.S.C. § 1565(b)(a)(1)(A). The amendment required the newly created “Special Victims’ Counsel” be certified and designated by the Judge Advocate General of the armed force of which the judge advocate is a member. 10 U.S.C. § 1044 also permits Special Victims’ Counsel to provide sexual assault victims legal assistance with “personal civil legal matters” in accordance with 10 U.S.C. § 1044. See 10 U.S.C. § 1044(e)(b)(8) (A).



for their “personal civil legal affairs”<sup>68</sup> and in-court representation to that portion of eligible clients who cannot afford to pay legal fees without undue hardship.<sup>69</sup>

## 2. Legal Assistance Authorized by 10 U.S.C. § 1044(d)(3)(B)

This provision makes clear military legal assistance attorneys can provide legal services involving notaries (10 U.S.C. § 1044a), powers of attorney (10 U.S.C. § 1044b), advance medical directives (10 U.S.C. § 1044c), and military testamentary instruments (10 U.S.C. § 1044d). Based on the most recent expansion of legal assistance eligibility, military legal assistance attorneys can now provide representation to victims of sexual assault (10 U.S.C. § 1044e and 10 U.S.C. § 1565(b)).

## 3. Breadth of Authorized Legal Assistance

The statute authorizes military legal assistance attorneys to provide a range of advice to eligible clients regarding their “personal civil legal affairs.” This is a broad term which can include general legal advice on contracts, landlord/tenant issues, wills, powers of attorney and other transactional matters. With respect to representation in litigated matters (i.e., representation in a “legal proceeding”), however, only a select portion of the otherwise eligible pool of legal assistance clients can be accommodated. Only those legal assistance clients for whom payment of legal fees would be an “undue hardship” are eligible for in-court representation. Congress also set out the professional qualifications necessary for legal assistance attorneys. In order to provide legal assistance—including representation of indigent clients in a civilian court—the attorneys must be either a judge advocate or civilian attorney who is a member of either a Federal court of the highest court of a State. In short, this statute establishes federal (vice state) criteria for military legal assistance attorneys to access civilian state courts.

Because this federal statute intrudes in an area which has historically been a state responsibility, to be effective it must displace all conflicting state bar admission requirements.<sup>70</sup> The mechanism for accomplishing federal preemption is the Constitution’s Supremacy Clause.<sup>71</sup> Assessing whether this statute qualifies for federal preemption will be considered next.

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<sup>68</sup> 10 U.S.C. § 1044(a).

<sup>69</sup> 10 U.S.C. § 1044(c). The Army and Navy have used this provision to authorize their own in-court representation programs. Both defer to state authorities rather than rely on the access permitted by 10 U.S.C. § 1044(d). See AR 27- 3, para 3-6(g) (21 Feb 1996) and JAGINST 5801.2B, para 13.1 (15 Feb 13).

<sup>70</sup> *Leis v. Flynt*, 439 U.S. 438, 442 (1979).

<sup>71</sup> U.S. Const. art. VI, cl. 2, states: “This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme law of the land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or laws of any State to the Contrary notwithstanding.”

## B. Congressional Intent to Preempt State Licensing Requirements

The Constitution’s Supremacy Clause mandates that behind treaties, federal statutes “shall be the supreme law of the land.”<sup>72</sup> Courts recognize three ways in which federal statutes may preempt state laws: (1) express language in a congressional enactment; (2) by implication from the depth and breadth of a congressional scheme that occupies the legislative field; and (3) by implication because of a conflict with a congressional enactment.<sup>73</sup> Where, as here, Congress is taking action in area where the police powers of the state (state regulation of admission to practice before its courts), there is an additional hurdle. In such cases, the Supreme Court imposes a “presumption against preemption.”<sup>74</sup> The presumption can be overcome where there is either a clear Congressional purpose to preempt or the existence of a conflict is ‘clear and manifest.’<sup>75</sup> In all preemption cases, the purpose of Congress is the ultimate touchstone.<sup>76</sup>

Despite the hurdles, this statute qualifies for preemption based upon the first criterion—express language in a Congressional enactment—and it overcomes the presumption against preemption by demonstrating an unmistakable Congressional intention to preempt state law. As noted above, both the title of the amending statute as well as its language make clear Congress intended to trump state attorney licensing requirements to enable military legal assistance attorneys to provide service to their eligible clients. The statute’s title states the law’s goal was to provide “clarification” to state licensing authorities that military legal assistance attorneys could provide legal assistance “without regard to licensing requirements.”<sup>77</sup> The language of the statute implements the Congressional intent by specifically permitting legal assistance attorneys to practice in “any jurisdiction” irrespective of “any law regarding the licensure of attorneys.”<sup>78</sup>

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<sup>72</sup> *Id.* The U.S. Supreme Court has long recognized Congress’ power to preempt state law in accordance with the Supremacy Clause, U.S. Const. art. VI, cl. 2; *See Gibbons v. Ogden*, 22 U.S. 1 (1824).

<sup>73</sup> *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 541, (2001).

<sup>74</sup> *Wyeth v. Levine*, 555 U.S. 555, 565 (2009). “In all preemption cases, and particularly in those in which [28] Congress has legislated... in a field which the States have traditionally occupied,... [courts] start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.”

<sup>75</sup> *Fellner v. Tri-Union Seafoods, L.L.C.* 539 F.3d 237, 249 (3d Cir. 2008), (quoting *Hillsborough Cnty. v. Automated Med. Labs, Inc.*, 471 U.S. 707, 715 (1985)).

<sup>76</sup> *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996).

<sup>77</sup> National Defense Authorization Act for Fiscal Year 2006, Pub. L. No. 109-163 § 555, 119 Stat. 3265 (2006).

<sup>78</sup> 10 U.S.C. § 1044(d).

### C. *Leis v. Flint* and Access to Courts by Out-of-State Attorneys

The leading case discussing an out-of-state attorney's access to courts where he/she is not licensed indicates there must be "an independent source of law" authorizing access before an attorney can practice in a court where he/she is not licensed. In that case, *Leis v. Flynt*,<sup>79</sup> the defendant's attorneys were out-of-state lawyers seeking permission to represent their client in an Ohio court pursuant to that state's *pro hac vice* procedure. In Ohio, the trial court judge has the discretion to approve or disapprove *pro hac vice* requests. The *Leis* trial court judge summarily rejected the attorneys' *pro hac vice* applications. Believing they had a constitutional right to represent their client which was protected by the Due Process Clause of the Fourteenth Amendment, the attorneys sought relief through the State and Federal courts.<sup>80</sup> In making its decision, the Supreme Court noted the practice of law does not create a property right capable of protection by the Due Process Clause of the Fourteenth Amendment. To have such a claim, the court held there must be some independent source such as a state law.<sup>81</sup> The court next examined whether there was either a state or federal statute which could support the admission of these out-of-state lawyers to the Ohio courts. The existence, or, in this case, the non-existence of an independent source of law was the determining factor in the Court's opinion. The Court found no basis in either state or federal law to support the out-of-state attorneys' claim they had a right to practice law in Ohio.<sup>82</sup> For that reason, the court denied the attorneys' claim and upheld the Ohio court's right to summarily deny their *pro hac vice* applications. This is in accordance with the Court's recognition of the State's historic role in establishing the requirements, discipline and regulation of attorneys appearing in their courts. In contrast to the situation in *Leis v. Flint*, military legal assistance attorneys *do have an independent source* authorizing their admission into state courts where they are not licensed. Section 1044(d) explicitly gives them the right to provide legal assistance to eligible clients notwithstanding "any law regarding licensure of attorneys..." and they can provide this service in "any jurisdiction."

### D. Preemption is Another Example of Congressional Efforts to Protect Service Members

Where its service members are involved, Congress decisively intrudes into areas typically under the exclusive control of the States. Congress' decision to enable indigent service members to have the assistance of counsel is consistent with similar protective action it has taken with respect to military personnel and their families.

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<sup>79</sup> 439 U.S. 438, 99 S. Ct. 698, 58 L. Ed. 2d 717, (1979).

<sup>80</sup> *Leis*, 439 U.S. at 443. The attorneys objected to the summary dismissal of their *pro hac vice* application. They believed they had a due process right to a hearing before the Ohio judge where he would be required to provide them an explanation for his decision denying them access to the Ohio court.

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

As noted earlier, Congress has explicitly mandated states accept military powers of attorney,<sup>83</sup> advanced medical directives,<sup>84</sup> and military testamentary instruments.<sup>85</sup> Federal intrusion into State matters on behalf of its service members is not confined to legal assistance. The Servicemember's Civil Relief Act (SCRA) imposes mandates in other areas of traditional State concern such as requiring state courts to delay judicial proceedings,<sup>86</sup> toll state statutes of limitation,<sup>87</sup> terminate lease agreements,<sup>88</sup> prevent evictions,<sup>89</sup> adjust interest rates,<sup>90</sup> and stop mortgage foreclosures.<sup>91</sup> Another federal statute directly impinging on the State's authority on behalf of service members is the Uniformed Services Employment and Reemployment Rights Act (USERRA). USERRA interposes a federal requirement on civilian employers to re-hire qualifying service members returning to civilian life from active duty. For the ex-service member to which it applies, USERRA ensures these former members can resume their civilian occupations with seniority rights.<sup>92</sup> Finally, Congress even provided for the possibility of legal malpractice by making the FTCA the exclusive remedy for any negligent or wrongful act or omissions by a member of the "legal staff" of a Department of Defense Agency.<sup>93</sup> Given this context, Congress' decision to provide indigent service members with a legal assistance attorney to represent them in a state court is neither unique nor a more significant federal intrusion into state affairs than those just listed.

Review of the laws in the eleven states where one of the Air Force's MAJ-COMs, Air Mobility Command (AMC), has active duty installations provides an illustrative example of why federal preemption is needed. In the absence of a superseding federal law, AMC's legal assistance attorneys would confront a bewildering morass of state laws. Two states, Illinois and North Carolina, specifically authorize military legal assistance attorneys licensed in other states access

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<sup>83</sup> 10 U.S.C. § 1044(b)(a).

<sup>84</sup> *Id.* § 1044(c)(a).

<sup>85</sup> *Id.* § 1044(d)(a). State control of probate issues — especially as regards the legal sufficiency of testamentary instruments and devising of property within its borders — is an inherent sovereign power which has a long history of recognition by both state and federal courts. *See Mager v. Grima*, 49 U.S. 490 (1850) and *Hall v. Vallandingham*, 540 A.2d 1162 (Md. Ct. Spec. App. 1988). A federal mandate requiring States to accept Federal guidance with respect to these issues shows the reach of federal power is indeed broad when employed to protect its service members. *See* Nowell D. Bamberger, *Are Military Testamentary Instruments Unconstitutional? Why Compliance with State Testamentary Formality Requirements Remain Essential*, 196 MIL. LAW REV. 91 (2008).

<sup>86</sup> 50 U.S.C. app. § 521. In addition to delaying the proceeding when a military member fails to appear, this section also requires the appointment of an attorney to represent the military defendant.

<sup>87</sup> *Id.* app. § 526.

<sup>88</sup> *Id.* app. §§ 534-535.

<sup>89</sup> *Id.* § 531.

<sup>90</sup> *Id.* § 527.

<sup>91</sup> *Id.* § 533.

<sup>92</sup> 38 U.S.C. §§ 4301-4333.

<sup>93</sup> 10 U.S.C. § 1054 and 28 U.S.C. § 1346(b); 2671-2680.

to their courts to represent indigent clients. Illinois permits access based on an order from their Supreme Court.<sup>94</sup> North Carolina recognizes 10 U.S.C. § 1044(d) preempts their state's law regarding attorney admission.<sup>95</sup> Neither state requires additional training or payment of a fee by military legal assistance attorneys before enabling them to practice in their courts. Three states, Washington,<sup>96</sup> Florida,<sup>97</sup> and California<sup>98</sup> also authorize legal assistance attorneys to practice in their courts but impose pre-admission requirements. Washington and Florida require military legal assistance attorneys take state-approved continuing legal education courses. Once admitted, these two states permit the attorneys to represent low ranking enlisted clients on a wide spectrum of civil law matters. California restricts the practice of military legal assistance attorneys to issues arising out of the SCRA. The remaining

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<sup>94</sup> M.R. 2799, Supreme Court of Illinois (1 Jul 1998). The Illinois Supreme Court specifically authorizes military legal assistance attorneys to represent indigent legal assistance clients. The senior legal officer for each Service stationed in Illinois identifies the attorneys who will be appearing on behalf of their clients. When entering an appearance, the legal assistance attorney files a copy of this authorization with the court clerk.

<sup>95</sup> Letter from Irwin W. Haskins III, Past President of the North Carolina State Bar, to William H. Neukom, Immediate Past President and General Earl E. Anderson, Chair-Standing Committee on Legal Assistance for Military Personnel, American Bar Association, (Nov. 12, 2008). Mr. Haskins acknowledges 10 U.S.C. § 1044 "...pre-empts any state law that would otherwise prohibit appearances by military attorneys in state courts." Without preemption, legal assistant attorneys would have to comply with N.C. R. St. Bar Subchap. 1D, § D.0905. This statute permits out-of-state attorneys to provide pro bono legal services to indigent clients in North Carolina. The out-of-state attorney must apply for admission at least thirty days prior to the quarterly meeting of the State Bar Council's Administrative Committee. In addition, the out-of-state attorney must associate with a North Carolina lawyer at a supporting nonprofit legal services corporation who will supervise the out-of-state attorney's work.

<sup>96</sup> Wash. Rules of Court § (g). Washington permits Judge Advocates (vice civilian military legal assistance attorneys) to represent indigent legal assistance clients but requires them to take 15 credit hours of approved continuing legal education.

<sup>97</sup> Fla. Bar Reg. R. 18-1.2. While Florida does authorize military legal assistance officers to practice in its courts, it requires they report to a supervising attorney who is a Florida bar member. The state also requires military legal assistance officers complete a training course.

<sup>98</sup> Cal. Rules of Court, Rule 9.41.

states, Delaware,<sup>99</sup> Arkansas,<sup>100</sup> Kansas,<sup>101</sup> New Jersey,<sup>102</sup> North Dakota,<sup>103</sup> and South Carolina<sup>104</sup> make no provision for military legal assistance attorneys. To represent clients in court, legal assistance attorneys in those jurisdictions have to comply with state-specific requirements applicable to representation of indigent clients, admission by *pro hac vice*, or both. As compliance varies by state and degree of difficulty, it is not surprising that none of AMC's bases currently represent any indigent clients in civil proceedings.<sup>105</sup>

In sum, 10 U.S.C. § 1044 authorizes legal assistance attorneys to provide in-court representation for indigent clients in connection with their "personal civil legal affairs." Congress' 2006 amendment to this statute removed any doubt about a legal assistance attorney's ability to appear in courts in which they were not licensed. The title to this amendment announced it was a "clarification" of a military legal

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<sup>99</sup> Del. Sup. Ct. R. 55. Military legal assistance attorneys not licensed in Delaware are required to comply with Delaware's "limited practice" rule. It requires out-of-state lawyers to affiliate with a state-recognized legal assistance program. The military's legal assistance program is not recognized by this state.

<sup>100</sup> Ark. Sup. Ct. Adm. Order No. 15.2. Military legal assistance attorneys not licensed in Arkansas are required to comply with the state rule on pro bono attorneys. Arkansas requires non-admitted lawyers to be part of state-recognized legal aid service provider. The local court may also require the military legal assistance attorney to associate with an Arkansas lawyer before being permitted to practice in the state. The military's legal assistance program is not recognized by this state.

<sup>101</sup> Kan. Sup. Ct. Rule 208. This rule provides only attorneys "registered" with the state may practice law in Kansas. Military legal assistance attorneys not licensed in Kansas would have to apply for admission *pro hac vice* in accordance with Kan. Sup. Ct. Rule 116. This would have to be accomplished on a case-by-case basis and there is a \$100 fee for each application. In addition, a Kansas attorney would have to be associated with the case.

<sup>102</sup> N.J. Court Rules, R. 1:21-1. New Jersey requires all attorneys practicing in its courts to "... hold a plenary license to practice in this State..." New Jersey does permit out-of-state attorneys to represent the poor through incorporated legal assistance organizations. The state requires the out-of-state attorney to work through a member of the New Jersey bar.

<sup>103</sup> N.D. Admission to Practice Rule 3.1. North Dakota permits out-of-state attorneys to provide legal assistance "...to individuals who are unable to pay for such services..." Out-of-state lawyers providing this service have to have engaged in the practice of law for at least five of the last ten preceding years. This provision would restrict appearances to the more senior judge advocates assigned to Grand Forks AFB.

<sup>104</sup> Rule 402, SCACR and Rule 410, SCACR. The former sets out the requirements for admission to the South Carolina bar. The latter precludes anyone not admitted to practice law in South Carolina. There are exceptions for certain law school professors (Rule 402(m), SCACR), but none for military attorneys. JAG attorneys who have served more than six months on active duty, are licensed in South Carolina, and elect to become "military members" of the South Carolina bar cannot practice law in South Carolina "...outside their duties in the Armed Forces of the United States." Presumably, if the South Carolina JAG's duties involved providing military legal assistance, the attorney could appear in South Carolina courts on the client's behalf. Aside from that possibility, out-of-state judge advocates serving in South Carolina would have to comply with Rule 404, SCACR, South Carolina's *pro hac vice* rule. In addition to a \$250 fee (Rule 404(e), SCACR), South Carolina requires a South Carolina attorney be associated with the case (Rule 404(a), SCACR).

<sup>105</sup> See *supra* note 41.

assistance attorney's authority to provide legal assistance irrespective of their state of licensure. The terms of the amendment put their intention into effect. Codified as subsection (d), this statute states "...a judge advocate or civilian attorney" authorized to provide legal assistance can do so "in any jurisdiction" notwithstanding "any law regarding the licensure of attorneys." This statute provides the "independent source of law" the Supreme Court found essential to authorize an out-of-state attorney's access to state courts where he/she is not specifically licensed.<sup>106</sup> This statute is consistent with other Congressional enactments designed to protect the rights of military members and their dependents. Finally, the hodgepodge of state laws on this subject makes federal intervention as appropriate as it is necessary.

The fact of preemption leads to a consideration of what, if anything, the Air Force can or should do with the opportunity to represent indigent clients in civilian courts. The next section describes the types of cases amenable to in-court representation and the results of a 2011-2012 pilot study, advantages that would accrue to the Air Force by adopting this policy, and it concludes with a discussion of likely areas of concern.

#### IV. MAKING IN-COURT REPRESENTATION PART OF LEGAL ASSISTANCE

##### A. Recent Air Force Experience with ELAP Shows A Way Forward

Congress has made it plain the Services are required to provide legal assistance with existing resources on a "space available" basis.<sup>107</sup> As no additional resources can be anticipated, the Air Force must be circumspect on how it utilizes its already scarce legal resources to accommodate its clients' expectations and needs regarding this benefit. The Air Force's earlier experience with an OEO-style ELAP provides useful practical experience on the types of cases to take and which to avoid. An ELAP will be in addition to rather than taking the place of traditional legal assistance. For that reason, cases involving protracted litigation or which require multiple appearances are not be good ELAP candidates. As in-court representation is statutorily limited to indigent clients and no additional resources can be expected, cases with the potential to incur substantial fees for transcripts or depositions are similarly inappropriate. On the other hand, legal offices should consider cases which leverage already existing capabilities, can be completed by a single court appearance, and do not involve excessive court fees or expenses. The 375 AW/JA office at Scott Air Force Base is an example of a legal office that achieved the proper balance.

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<sup>106</sup> 10 U.S.C. § 1044 (2015).

<sup>107</sup> H.R. REP. NO. 98-1080. This report accompanied the 1984 statute authorizing the Services to provide legal assistance. The report made it plain the statute's purpose was to "clarify the existing status of the benefit" and included the comment: "The conferees further intend that the adoption of this provision should not be interpreted to support requests for additional facilities or personnel beyond that required to accomplish the direct military mission."

Their work provides an example of how to set up an ELAP and the benefits that accrue to both the client and the legal office.<sup>108</sup>

In anticipation of establishing this ELAP, AMC/JA leaders arranged to meet the local Family Court judges to brief them on the new program.<sup>109</sup> The judges learned that the Air Force attorneys and paralegals would receive training on local court practice by a reserve judge advocate licensed in Illinois and that the cases would be limited to uncontested divorce actions where there was no property or child custody issues.<sup>110</sup> The judges were enthusiastic supporters and suggested ways to enable Scott Air Force Base's legal assistance attorneys, who were not licensed in Illinois, to submit documents in their courts.<sup>111</sup> AMC/JA shared this information with TJAG who approved the pilot program on 3 Aug 11.<sup>112</sup>

After receiving TJAG's approval for their pilot program, the Scott Legal office tailored their legal assistance operation to the requirements of the Illinois Supreme Court order authorizing military legal assistance attorneys to practice in their courts.<sup>113</sup> This order, MR 2799, expressly authorizes military legal assistance attorneys to represent "...active duty personnel, their family members and retirees"...in civil matters "...who might not otherwise be able to afford proper legal assistance."<sup>114</sup> In addition to MR 2799's authorization to practice in Illinois courts, the attorneys also sought court access through Illinois' *pro hac vice* procedure that is set out in Illinois Supreme Court Rule 707.<sup>115</sup> The version of Rule 707 in effect

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<sup>108</sup> Capt. Bob Brady, *Uncontested Divorces: What We Can Do For Our Clients*, THE REPORTER, Vol. 40, No. 1., page 33 (2013), <http://www.afjag.af.mil/library/index.asp>.

<sup>109</sup> E-mail from Col. Felix A. Losco, AMC/JA, to Col. Marlesa K. Scott, AFLOA, (29 Aug 2011, 2:53 PM) (on file with the author).

<sup>110</sup> Deployment and mobilization related legal assistance has the highest priority and is not limited to will preparation. The impact of the client's legal problem on his/her command's ability to mobilize or deploy the service member is the most important criteria in determining the priority given to the service member's problem. U.S. DEP'T OF AIR FORCE, INSTR. 51-504, LEGAL ASSISTANCE, NOTARY, PREVENTIVE LAW, AND TAX PROGRAM, para 1.1 (October 27, 2003). On that basis, resolution of a dysfunctional marital situation is an area which should be a priority for legal assistance practitioners. After wills and estates, domestic relations is consistently the second most cited reason clients seek assistance from our legal offices. Lt. Col. Tom Collick and Maj. Karin Peeling, *2015 Legal Assistance Annual Refresher* (29 Jan 15), <https://flite.jag.af.mil/?id=28872&length=0&gradeitemid=5585>.

<sup>111</sup> *Id.*

<sup>112</sup> Letter from Lt. Gen. Richard Harding, AF/JA, to AMC/JA (Aug 3, 2011) (on file with the author).

<sup>113</sup> Ill. Sup. Ct, Order M.R. 2799 (1 Jul 1998). State permission for legal assistance attorneys to represent clients in local courts is not required. At the time, the program participants did not appreciate the federal preemption of state licensing requirements by 10 U.S.C. § 1044(d) provided an additional basis authorizing their appearance in the civilian court.

<sup>114</sup> *Id.* The Ill. Sup. Ct. Order is consistent with 10 U.S.C. § 1044(c), which limits representation in a legal proceeding to clients who "...could not afford legal fees without undue hardship."

<sup>115</sup> Ill. Sup. Ct., Rule 707, Pro Hac Vice (effective Jul 1, 2007) and amended by M.R. 3140 on June 18, 2013 and effective on Jul 1, 2013.



at the time gave the trial court judge discretion to approve out-of-state attorneys to appear and participate in Illinois courts.<sup>116</sup> There was no requirement to associate local counsel or pay any fees. The attorneys reported the judges approved their participation in a ruling from the bench.<sup>117</sup>

Recognizing representation was confined to indigent clients and noting the local bar's resistance to providing for free a service for which they would typically charge \$1500, the Scott Legal office elected to provide in-court representation to eligible clients or their dependents serving in the ranks between E-1 (Airman Basic) and E-5 (Staff Sergeant).<sup>118</sup> To ensure their attorneys would not become embroiled in complicated cases involving repeated appearances and document preparation, the Scott Legal office further limited in-court representation to clients without minor dependents where both parties agreed on a property settlement.<sup>119</sup> These restrictions enabled them to bundle their cases together and bring them to a conclusion during a single court appearance.<sup>120</sup>

The paralegal's role was critical.<sup>121</sup> After appropriate training, the paralegals interviewed clients and identified potential candidates for the in-court representation program.<sup>122</sup> After confirming there was no conflict, clients meeting the income and other criteria discussed above were accepted.<sup>123</sup> The paralegals explained the limited scope of the office's representation,<sup>124</sup> reviewed documents submitted by clients, prepared forms for court, and assured the client and his or her spouse signed all documents.<sup>125</sup> The paralegals kept in touch with the client and conducted follow-up interviews as necessary.<sup>126</sup> To streamline the operation, the office created checklists that ensured all necessary documents were prepared prior to court.<sup>127</sup> Because of the paralegal's preparatory work, any legal assistance attorney in the office could quickly review the documents and be ready for court.<sup>128</sup> Aside from the personal

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<sup>116</sup> *Id.*

<sup>117</sup> E-mail from Capt. Michael J. Garcia, 375 AMW/JA, to Col. Felix A. Losco, AMC/JA, (16 Dec 13, 11:46 AM)(on file with the author).

<sup>118</sup> *See supra* note 106.

<sup>119</sup> *Id.*

<sup>120</sup> *Id.* at 35.

<sup>121</sup> *Id.* at 34.

<sup>122</sup> *Id.*

<sup>123</sup> *Id.*

<sup>124</sup> The representation agreement signed by the client advised they would be responsible for all fees. E-mail from the author to Col Marlesa K. Scott, AFLOA, (29 Aug 2011, 2:53 PM)(on file with the author).

<sup>125</sup> *See supra* note 106.

<sup>126</sup> *Id.*

<sup>127</sup> *Id.* at 35.

<sup>128</sup> *Id.* at 34.

appearance, which the paralegals could not do, the paralegals were responsible for accomplishing most of the work associated with the in-court representation program.

The Scott Air Force Base legal office reports they represented twenty-two clients in their program's one-year operation.<sup>129</sup> Of these, twelve clients completed the divorce process.<sup>130</sup> The attorney responsible for the program noted his clients' sincere gratitude and observed how this endeavor enhanced their legal assistance program.<sup>131</sup> He commented he could "...give much better information on Illinois law based on my experience in civil court.<sup>132</sup> Once you've gone through court proceedings, it's a lot easier to advise a client face-to-face."<sup>133</sup>

Scott Air Force Base's ELAP was active until Illinois amended their *pro hac vice* rules regarding permission of out-of-state attorneys to provide legal services in Illinois.<sup>134</sup> Although MR 2799, the Illinois Supreme Court order, explicitly authorizes military legal assistance attorneys licensed in other states to appear in their courts, the local court believed Scott Air Force Base's legal assistance attorneys had to comply with the new version of Illinois Supreme Court Rule 707. The amended Rule 707 transferred the admission decision for out-of-state attorneys from the trial judge to Illinois' Attorney Registration and Disciplinary Commission. In addition, the new rule required out-of-state attorneys to provide personal background information and proof of admission to the bar, and required them to associate with a licensed Illinois attorney. The new rule also imposes a \$250 fee but the fee could be waived for indigent clients.<sup>135</sup> Faced with these new requirements and unaware of pre-emptive nature of 10 U.S.C. § 1044, the Scott Air Force Base legal office terminated their ELAP.<sup>136</sup>

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<sup>129</sup> *Id.* at 33.

<sup>130</sup> *Id.*

<sup>131</sup> *Id.* at 35.

<sup>132</sup> *Id.*

<sup>133</sup> *Id.* He also noted the legal office spent between six and eight hours (including court time) for each client.

<sup>134</sup> E-mail from Capt. Michael J. Garcia, 375 AMW/JA, to Col. Felix A. Losco, AMC/JA, (16 Dec 13, 11:46 AM) (on file with the author).

<sup>135</sup> *See supra* note 113.

<sup>136</sup> While understandable, their concern about the impact of the amended version of Ill. Sup. Ct. Rule 707 on their ability to appear in Illinois courts was misplaced. As confirmed by Ms. Mary Grochocinski, Deputy Director of Illinois' Attorney Registration and Disciplinary Commission, military attorneys seeking to represent indigent military personnel or their families in civil matters need not comply with this rule. E-mail from Mary Grochocinski, Deputy Registrar, Illinois Attorney Registration and Disciplinary Commission, to Col. Felix A. Losco, AMC/JA (27 Mar 2015, 8:06 AM) (on file with the author).

## B. Advantages of Including In-Court Representation in Legal Assistance

While the clients obviously benefited, both paralegals and attorneys reaped substantial experience and knowledge from participating in this ELAP. Paralegals demonstrated how a legal office could leverage scarce resources to accomplish important results. The paralegals did more than perfunctory administrative duties. While under the general supervision of an attorney, the paralegals accomplished significant legal work. They performed the initial interviews, made an eligibility determination, prepared representation agreements and court documents, and followed up with the client as necessary. To make the process more efficient, they developed and used checklists which ensured their attorneys would have all the documents they needed when the attorney and client entered the courtroom. The hallmark of their significant contribution was that any legal assistance attorney in the office could pick up the case on short notice and confidently take it to court.<sup>137</sup> The participating attorneys reaped considerable rewards as well. The attorneys were exposed to civilian judges, their court personnel, and gained valuable insight into process that only actual courtroom experience can provide. The knowledge gained translated to better advice to future clients. Just as important, if not more so, is the opportunity the attorneys had to genuinely partner with a paralegal. With the support of the local bench, the office reported they were exploring other areas such as name changes and domestic adoptions as possible candidates for an expansion of their ELAP.<sup>138</sup>

In addition to simple domestic relations cases, ELAPs are appropriate when a client's problem is representative of an issue affecting the military community. Where local merchants or landlords attempt to take advantage of military personnel, the ability of legal assistance attorney to appear in court is often all that is required to affect a favorable resolution.<sup>139</sup> The Army's experience at Fort Lee shows the mere possibility of in-court representation of legal assistance clients encouraged local merchants and landlords to treat their personnel fairly.<sup>140</sup> Resource and personnel limitation will, of course, require base staff judge advocates to select cases wisely. The positive experience and resulting protection of military personnel from predatory merchants where ELAPs have been in place make this option one all Staff Judge Advocates need to have.<sup>141</sup>

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<sup>137</sup> The document preparation, client screening, and case management skills the paralegals demonstrated are transferable to other areas of Air Force practice and would be of interest to a future civilian employer.

<sup>138</sup> See *supra* note 113. Despite the favorable report, ELAP at Scott Air Force Base was not continued.

<sup>139</sup> See discussion *supra* note 50. The Air Force ELAP at Warner Robins Air Force Base reported similar results. See *supra* note 41.

<sup>140</sup> *Id.*

<sup>141</sup> The Services' Judge Advocate Generals recognized the importance of in-court representation of legal assistance clients. In support of the American Bar Association's initiative to expand ELAP, the Services' TJAGs issued a joint letter which included the following:

### C. Issues with ELAP—Malpractice, Lack of Resources, and Upsetting State Authorities

One concern about permitting legal assistance attorneys to practice in civilian courts where they are not licensed is that their unfamiliarity with these courts might result in mistakes which lead to malpractice claims.<sup>142</sup> Such an event is not likely so long as the ELAP is restricted to cases similar to those undertaken by the Scott Air Force Base legal office—uncomplicated, capable of being resolved on a single appearance and not requiring the expenditure of additional resources.<sup>143</sup> To the extent unfamiliarity is an issue, it is one that can be remedied by training and experience. The Scott Air Force Base office utilized a Reserve judge advocate to guide them through the local courts. Air Force judge advocates and civilian attorneys are highly qualified professionals. They are competitively selected, undergo regular training, and commanders at all levels routinely seek them out for advice on the full spectrum of Air Force practice. There is every reason to believe they can master the law necessary to perform well in an ELAP. If a base office and MAJCOM decide to undertake an ELAP, fear of potential lawsuits should not dissuade them.

While resources and personnel will continue to be an issue, the Scott Air Force Base’s ELAP experience shows establishing an ELAP does not necessarily mean a legal office has to increase the resources devoted to that portion of its practice. Even so, the recent personnel losses due to Force Shaping coupled with the recognition legal offices must prioritize other areas—especially military justice—over legal assistance means the Air Force should take every opportunity to maximize the impact of its remaining resources. An ELAP provides just such an opportunity because it leverages the talent of our paralegals and multiplies the

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*The most powerful option available to an attorney is the ability to defend or enforce a right in court. In jurisdictions where the local community knows a judge advocate’s practice cannot extend beyond simply writing letters and requesting negotiations, servicemembers often find themselves unable to achieve a fair resolution of even the most frivolous legal issues. On the other hand, when servicemembers have access to local courts it levels the playing field and helps ensure just outcomes.*

Letter from Maj. Gen. Jack L. Rives, Air Force TJAG, Maj. Gen. Scott C. Black, Army Judge Advocate General, Rear Admiral Bruce MacDonald, Navy Judge Advocate General, and Brig. Gen. James C. Walker, Marine Corps Staff Judge Advocate to the Commandant of the Marine Corps, to the State Bar Presidents and Executives, (May 2, 2008) (on file with the author).

<sup>142</sup> As noted in discussion at *supra* note 33, this was a concern of an earlier generation of legal assistance attorneys. Their concerns state negligence law might require them to purchase malpractice insurance were addressed when Congress enacted 10 U.S.C. § 1054(a). This statute makes the Federal Tort Claims Act the exclusive remedy for “...damages for injury or loss of property caused by the negligent or wrongful act of any person who is an attorney, paralegal, or other member of a legal staff within the Department of Defense....” 10 U.S.C. § 1054(a) (2015).

<sup>143</sup> Not being in court does not mean the Air Force cannot be sued for legal malpractice. Clients have brought legal malpractice suits against legal assistance attorneys for advice given in their office. See *Mossow v. United States*, 987 F.2d 1365, 1993 U.S. App. LEXIS 4556 (8th Cir. Minn. 1993).

effectiveness of the legal assistance attorneys. It is worth reiterating the paralegal's role in the ELAP is critical. While the legal assistance attorney will supervise their work, the paralegals will effectively run the ELAP. After interviewing the client, they will determine if the client meets the ELAP's statutory financial and legal criteria and ensures there are no representational conflicts. In addition to preparing all court-related documents for attorney review, the paralegals will be responsible for communicating with the court clerk and making all necessary arrangements with the clients and the attorney. As at Scott Air Force Base, once the ELAP is running, any attorney in the office can use the approved documents prepared by the paralegals and make any required court appearances. While an ELAP may be new to most offices, the experience at Scott Air Force Base shows an ELAP is not likely to overburden the office. To the contrary, the attorneys and paralegals reported favorable results and were looking for additional ways to assist their clients when they disbanded the program. If, however, an office believes an ELAP is too burdensome, they are under no obligation to continue to provide the service. Legal assistance, as noted earlier, is on a space available basis. The alternative to ELAP is to maintain our current practice of referring our most destitute and vulnerable clients to the civilian bar—hoping they are able to find either sympathetic civilian counsel or struggle through their legal issues on their own.<sup>144</sup>

Though Section 1044(d) permits legal assistance attorneys to practice in the civilian courts on behalf of indigent clients, the possibility exists a local bar would object to uniformed officers representing clients in civilian courts. Such a concern, if it exists, is misplaced. Clients eligible for in-court representation are not paying clients. By statute, only those clients for whom paying legal fees would constitute an “undue hardship” are eligible for this service. The best remedy for what may appear to be government interference with their livelihood is an out-reach program like the one employed by Scott Air Force Base. After encountering opposition from the local bar, Scott Air Force Base attorneys explained how their service extended only to those who could not otherwise afford professional legal help. Once that became clear, they report receiving more support from the local bar. It is conceivable there will be a segment of the local bar that objects to ELAP despite even the most compelling out-reach program. A base's decision on whether to initiate an ELAP should be driven by a reasoned assessment of the needs and resources of the office and not on the obstinate refusal of the few who will only be satisfied by a total ban on the effort. Finally, the existence of other resources designed to help the poor such as Legal Aid Societies and the American Bar Association's referral service are helpful but not a complete answer to the lack of effective legal representation for indigent clients. Even with a robust ELAP, the need for these services will far outstrip the demand.<sup>145</sup>

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<sup>144</sup> See *supra* note 1.

<sup>145</sup> Deference to state authorities has not resulted in an increased willingness of civilian attorneys to represent indigent military clients. Despite the commendable efforts of groups like the American Bar Association (ABA), civilian attorneys have not accepted cases from indigent military clients in great numbers. In 2014, Air Force attorneys referred a total of 109 cases to the ABA's Military Pro

## V. CONCLUSION

Once approved, the new Air Force Instruction on legal assistance will provide Air Force practitioners with an opportunity for a new direction in how legal assistance professionals provide this important service. Unlike the Army and Navy, the new instruction will permit Air Force legal assistance attorneys to take advantage of the preemptive language of Section 1044(d) and relieves them of the burden of complying with state licensing requirements. Effective teaming with paralegals will increase the efficiency, effectiveness, and ability of legal assistance attorneys to provide quality legal service. Significantly, in-court representation will enable legal assistance attorneys to protect service members from unscrupulous merchants and do more than write letters and request negotiations. Outreach to the local judiciary will be important and should emphasize ELAP is limited to indigent clients who would otherwise not be represented. While resources and manning will continue to be issues, an effectively run ELAP leverages already existing resources and should not overburden an office. Offices able to provide this enhanced service should be empowered to do so. Legal offices can build upon the experience of successful ELAPs at Fort Lee and Scott Air Force Base. While the attorneys and paralegals will benefit from the experience and training only a courtroom can provide, the best reason for initiating an ELAP is that it will benefit an underserved and largely unrepresented portion of our military community.

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Bono Project. Of these, 47 were placed with civilian lawyers. This number is a small fraction of the number of clients seen by legal assistance attorneys. In 2014, legal assistance officers met with 16,164 domestic relations clients. *See* Lt. Col. Tom Collick and Maj Karin Peeling, *2015 Legal Assistance Annual Refresher* (29 Jan 15) at <https://flite.jag.af.mil/?id=28872&length=0&gradeitmid=5582015>. An ELAP of the type described will not significantly change these numbers but it will afford those clients who are eligible for this service representation they would not otherwise receive.

COMPLIANCE WITHOUT CREDIT: THE NATIONAL SECURITY  
AGENCY AND THE INTERNATIONAL RIGHT TO PRIVACY

MAJOR PETER BEAUDETTE JR.\*

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\* Major Peter Beaudette, Jr. is currently the Staff Judge Advocate for the Office of Military Cooperation-Kuwait, U.S. Embassy, Kuwait. He received a direct commission as an Air Force judge advocate in May 2004. Major Beaudette is admitted to practice law in California and the United States Court of Appeals for the Armed Forces. He received a B.A. in English from Rollins College, a Juris Doctor from the University of San Francisco, and a LL.M. from Columbia University in International Law.

## I. INTRODUCTION

Recent disclosures regarding the National Security Agency's (NSA) intelligence operations have produced an intense backlash to what many characterize as gross overreaching by the United States. Previously, critics focused their ire domestically, arguing that the Section 215<sup>1</sup> telephony metadata collection and the Section 702<sup>2</sup> Prism programs violated U.S. law, such as the right to privacy under the Fourth Amendment to the U.S. Constitution. Now, however, critics from foreign governments and human rights groups have widened the aperture and charged the United States with violations of international law as well.<sup>3</sup> This new line of attack cites human rights in general, and the international right to privacy in particular. At first glance, it seems elementary that any NSA espionage program would violate any articulable right to privacy, but upon closer analysis, the programs not only comply with the right to privacy, they actually exceed the protections in many other countries (including those who have protested the loudest).

In March 2014 the Privacy and Civil Liberties Oversight Board (PCLOB)<sup>4</sup> invited comment regarding NSA surveillance compliance with international law and human rights instruments, the most predominant being the International Covenant on Civil and Political Rights (ICCPR). The debate instantly veered toward a well-worn topic of debate: the United States' policy decision not to apply the ICCPR extraterritorially. Most commentators characterize this debate as the defining and controlling contention. If the ICCPR applies extraterritorially, the United States has therefore violated human rights.<sup>5</sup> Conversely, others support the U.S. policy

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<sup>1</sup> See discussion *infra* Part I.A.

<sup>2</sup> See discussion *infra* Part I.B.

<sup>3</sup> See Nick Hopkins & Ian Traynor, *NSA And GCHQ Activities Appear Illegal, Says EU Parliamentary Inquiry*, THE GUARDIAN, Jan. 9, 2014, <http://www.theguardian.com/world/2014/jan/09/nsa-gchq-illegal-european-parliamentary-inquiry>; AMNESTY INT'L USA & THE AM. CIVIL LIBERTIES UNION, PRIVACY AND CIVIL LIBERTIES OVERSIGHT BOARD PUBLIC HEARING ON SECTION 702 OF THE FISA AMENDMENTS ACT MARCH 19, 2014: SUBMISSION OF AMNESTY INTERNATIONAL USA AND THE AMERICAN CIVIL LIBERTIES UNION 4-7 (Mar. 19, 2014), *available at* <https://www.aclu.org/sites/default/files/assets/aiusaclusubmissiontopclob.pdf>.

<sup>4</sup> The PCLOB's website describes its mission as "an independent, bipartisan agency within the executive branch... vested with two fundamental authorities: (1) To review and analyze actions the executive branch takes to protect the Nation from terrorism, ensuring the need for such actions is balanced with the need to protect privacy and civil liberties and (2) To ensure that liberty concerns are appropriately considered in the development and implementation of laws, regulations, and policies related to efforts to protect the Nation against terrorism." PRIVACY AND CIVIL LIBERTIES OVERSIGHT BOARD, <http://www.pclob.gov/> (last visited July 16, 2014).

<sup>5</sup> See LAURA PITTER, HUMAN RIGHTS WATCH, COMMENTS OF HUMAN RIGHTS WATCH: PRIVACY AND CIVIL LIBERTIES OVERSIGHT BOARD HEARING – MARCH 19, 2014, "THE SURVEILLANCE PROGRAM OPERATED PURSUANT TO SECTION 702 OF THE FOREIGN INTELLIGENCE SURVEILLANCE ACT," 1-9 (MAR. 19, 2014), *available at* [http://www.hrw.org/sites/default/files/related\\_material/PCLOB%203-19-14%20Hearing%20Submission\\_1.pdf](http://www.hrw.org/sites/default/files/related_material/PCLOB%203-19-14%20Hearing%20Submission_1.pdf) (arguing that the current U.S. position denying extraterritorial application of the ICCPR is inconsistent with international practice and the meaning of the ICCPR).



decision refusing extraterritorial application and therefore conclude the U.S. has violated no obligation whatsoever.<sup>6</sup>

This article argues that these discussions fail to address the deeper and more critical issues, and they ultimately evade evaluation of the Section 215 and Section 702 programs on their international legal merits.<sup>7</sup>

For purposes of a more thorough evaluation under international human rights law, this paper assumes that the ICCPR applies extraterritorially to the United States. It does not, however, necessarily follow that the United States has violated its human rights obligations. On the contrary, after critically evaluating the programs under the requirements of the international right to privacy, this paper argues that the Section 215 and Section 702 programs legally comply with the international right to privacy. The programs do raise legitimate privacy concerns, and some proposed changes would strengthen compliance, but, on the whole, the programs as constituted demonstrate a tolerable legal balance between privacy and national security.

This article begins by describing the Section 215 and Section 702 programs in light of recent NSA disclosures regarding the policies and procedures it must follow. Next, the evolution of the right to privacy is detailed, from the Universal Declaration of Human Rights, the ICCPR, United Nations Resolutions, Human Rights Council comments, and Special Rapporteur reports. This paper then reviews two cases from the European Court of Human Rights and one from the European Court of Justice offering examples of how some courts have applied international human rights principles to mass interception of communications and to the collection of bulk metadata. The final section evaluates recent proposed U.S. policy changes to determine if they would strengthen the United States' current compliance with the international human right to privacy. Here, this article argues that other human rights provisions may provide a superior framework for analyzing NSA's surveillance programs and their relationship to the right of privacy.

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<sup>6</sup> See JOHN B. BELLINGER III, TESTIMONY OF JOHN B. BELLINGER III: PRIVACY AND CIVIL LIBERTIES OVERSIGHT BOARD MARCH 19, 2014 1-4 (Mar. 19, 2014), available at <https://www.pclob.gov/Library/20140319-Testimony-Bellinger.pdf> (arguing that the ICCPR does not apply outside the United States or obligate the United States as a legal matter to respect privacy rights overseas).

<sup>7</sup> For an exception to this trend, see Peter Margulies, *The NSA in Global Perspective: Surveillance, Human Rights, and International Counterterrorism*, 82 *FORDHAM L. REV.* 2137 (2014). Unlike Margulies, who finds that the NSA programs at issue comply with international law by applying the principle of complementarity, this article argues that the NSA programs meet the requirements of international human rights law more directly, and that therefore an application of the principle of complementarity is unnecessary.

## II. DESCRIPTIONS OF THE SECTION 215 AND SECTION 702 PROGRAMS

### A. Section 215

“Section 215” as it is commonly called, is part of the Patriot Act<sup>8</sup> and codified at 50 U.S.C. §§ 1861-62.<sup>9</sup> Section 215 expanded the ability of the government to collect business records for the purpose of investigating known or suspected terrorist activity. It therefore differs from the majority of the Foreign Intelligence Surveillance Act<sup>10</sup> (FISA) provisions regulating foreign intelligence collection in general, where the goal is simply to gather foreign intelligence in all of its forms. The program is designed to determine whether “known or suspected terrorist operatives have been in contact with other persons who may be engaged in terrorist activities, including persons and activities in the United States.”<sup>11</sup> Although the information can come from a variety of locations, Section 215 attempts to identify national security threats within the United States rather than throughout the globe.

Section 215 achieves this end by analyzing records of past telephone calls. 50 U.S.C. § 1861(a)(1) authorizes the Federal Bureau of Investigation (FBI) to apply to the Foreign Intelligence Surveillance Court (FISC) for an order to obtain “any tangible things (including books, records, papers, documents, and other items) for an investigation to obtain foreign intelligence information not concerning a United States person or to protect against international terrorism or clandestine intelligence activities....”<sup>12</sup>

The FISC will direct a business to produce bulk telephony metadata when “there are reasonable grounds to believe that the information sought is relevant to an authorized investigation of international terrorism.”<sup>13</sup> Pursuant to this authority the FBI issues a subpoena to a telephone service provider in order to obtain the call records for its customers.<sup>14</sup> The information obtained is limited and only includes data

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<sup>8</sup> Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001, Pub. L. No. 107-56, § 215, 115 Stat. 272, 287-88 (codified as amended in scattered sections of 8, 12, 15, 18, 20, 21, 31, 42, 49, and 50 U.S.C.).

<sup>9</sup> 50 U.S.C. §§ 1861-62 (2012).

<sup>10</sup> Foreign Intelligence Surveillance Act of 1978, Pub. L. No. 95-511, 92 Stat. 1783 (codified as amended in scattered sections of 8, 18, and 50 U.S.C.).

<sup>11</sup> ADMINISTRATION WHITE PAPER, BULK COLLECTION OF TELEPHONY METADATA UNDER SECTION 215 OF THE USA PATRIOT ACT, 1(Aug. 9, 2013) *available at* <http://big.assets.huffingtonpost.com/Section215.pdf> [hereinafter Section 215 White Paper].

<sup>12</sup> 50 U.S.C. § 1861(a)(1).

<sup>13</sup> Section 215 White Paper, *supra* note 11, at 1.

<sup>14</sup> While the precise amount of call data obtained remains unclear, some media outlets reports that the NSA obtains data on less than 20% of all telephone calls in the United States since the agency does not collect complete records on cellular calls. *See* Siobhan Gorman, *NSA Collects 20% or Less of U.S. Call Data*, WALL ST. J, Feb. 7, 2014, <http://online.wsj.com/news/articles/SB10001424052702304680904579368831632834004>.

about the call: the calls' origins, when the calls occurred, and the calls' durations.<sup>15</sup> This information, or metadata, does not include the contents of any telephone call.

Once received from a telephone company, the metadata rests in a database at NSA, and at this point no one has reviewed the information, and no one has analyzed anything. NSA technicians then query that database with an "identifier" to determine if the records respond to that identifier.<sup>16</sup> An identifier is information, such as the phone number of a suspected terrorist. The FISC-approved procedures require a "reasonable, articulable suspicion" that the identifier is associated with a foreign terrorist organization.<sup>17</sup> Operators cannot base their suspicion on freedom of expression activities protected by the First Amendment.<sup>18</sup> Only those records that respond to the query are subject to further analysis.<sup>19</sup> Metadata unresponsive to a query remains unseen due to technical controls in place at NSA.<sup>20</sup> The NSA then passes along responsive information to the relevant department or agency for action. For example, the FBI could use the information to initiate an investigation and to build a counter-terrorism case and to possibly petition the FISC for authorization to intercept the contents of communications to and from that number.<sup>21</sup> Thus, investigators must navigate two levels of judicial review prior to obtaining the contents of any communication via surveillance.

Under the FISC order, the NSA then takes those responsive records and expands to what they refer to as the next "hop."<sup>22</sup> A hop is simply the records associated with the first responsive results. For example if, by querying a terrorist phone number against the database, the phone number for "John Doe" appears, the NSA will then run another query to see with whom "John Doe" has communicated. Analyzing John Doe's number is the first hop. All of John Doe's responsive queries are then analyzed in the same manner. So, if John Doe communicated with Jane Doe and James Doe, both of their numbers will respond to the query using John Doe's phone number as an identifier. Jane Doe and James Doe are then the second hop. NSA will then query Jane Doe and James Doe, as the second hops, ultimately up to three hops.<sup>23</sup> What began with one response to a query (John Doe) can therefore expand exponentially to potentially thousands of people. This would still only amount to a miniscule fraction of the 3 billion phone calls made every day in the United States alone.<sup>24</sup>

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<sup>15</sup> Section 215 White Paper, *supra* note 11, at 1.

<sup>16</sup> *Id.* at 3.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Id.* at 4.

<sup>20</sup> *Id.* at 3.

<sup>21</sup> *Id.* at 4.

<sup>22</sup> *Id.* at 3.

<sup>23</sup> *Id.* at 3-4.

<sup>24</sup> See Tim Cavanaugh, *What Do They Know About You? An Interview with NSA Analyst William*

Responses to queries only contain telephone metadata.<sup>25</sup> There is no content of the communication, so the NSA at this stage only knows that a terrorist overseas called a number in the United States on a certain date, at a certain time, and for a certain duration.<sup>26</sup> Granted, that is a significant amount of information, but the NSA does not know the subject or content of the communication. This is an important clarification. The NSA may be potentially tracking the calls someone makes, but it is not monitoring or listening into the call. This important distinction is often overlooked in discussions regarding the Section 215 metadata program.<sup>27</sup> It is important to keep the proper context. Section 215 is a monumental records review, not a tap on the phones of Americans. Just as importantly, Section 215 is not a dragnet on the communications of foreigners. Only identifiers that correspond to known or suspected terrorists are run against the database. Section 215 does not track or log the phone calls for all foreigners, and NSA analysts cannot simply input any phone number as an identifier. Section 215 obviously possesses the capability to churn through a tremendous amount of information, but the limitations of acceptable identifiers throttles attempts to expand its reach. For a sense of scope, less than 300 numbers were approved for bulk data retention queries in 2012.<sup>28</sup>

## B. Section 702

Section 702 of the Foreign Intelligence Surveillance Act<sup>29</sup> (FISA), as amended, regulates collection for much broader categories of information. Section 702 targets internet communications rather than phone information. Instead of merely obtaining metadata, Section 702 permits the U.S. Government to obtain contents of entire communications, this time via “electronic communication service” providers

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Binney, THE DAILY CALLER, June 10, 2013, <http://dailycaller.com/2013/06/10/what-do-they-know-about-you-an-interview-with-nsa-analyst-william-binney/#ixzz37GXHZ6MJ>

<sup>25</sup> Section 215 White Paper, *supra* note 11, at 2.

<sup>26</sup> *Id.*

<sup>27</sup> See Editorial, *This Week, Mass Surveillance Wins*, N.Y. TIMES, Dec. 27, 2013, <http://www.nytimes.com/2013/12/28/opinion/this-week-mass-surveillance-wins.html> (referring to Section 215 as “mass surveillance”); Editorial, *Bad Times for Big Brother*, N.Y. TIMES, Dec. 21, 2013, [http://www.nytimes.com/2013/12/22/opinion/sunday/bad-times-for-big-brother.html?\\_r=0](http://www.nytimes.com/2013/12/22/opinion/sunday/bad-times-for-big-brother.html?_r=0) (arguing that a free society must have security from “the fear that their conversations and activities are being watched, monitored, questioned, interrogated, or scrutinized”).

<sup>28</sup> See Mattathias Schwartz, “*We’re At Greater Risk*”: Q. & A. with General Keith Alexander, THE NEW YORKER, May 15, 2014, [http://www.newyorker.com/online/blogs/newsdesk/2014/05/were-at-greater-risk-q-a-with-general-keith-alexander.html?utm\\_source=www&utm\\_medium=tw&utm\\_campaign=20140515](http://www.newyorker.com/online/blogs/newsdesk/2014/05/were-at-greater-risk-q-a-with-general-keith-alexander.html?utm_source=www&utm_medium=tw&utm_campaign=20140515).

<sup>29</sup> Foreign Intelligence Surveillance Act of 1978 Amendments Act of 2008, Pub. L. No. 110-261, 122 Stat. 2436 (codified in scattered sections of 8, 18, and 50 U.S.C.). Although the controversy is relatively new, the statute was passed in 2008 and was subject to much debate at the time. See NAT’L SEC. AGENCY, NSA DIRECTOR OF CIVIL LIBERTIES AND PRIVACY OFFICE REPORT: NSA’S IMPLEMENTATION OF FOREIGN INTELLIGENCE SURVEILLANCE ACT SECTION 702 (Apr. 16, 2014), 2, available at <http://www.dni.gov/files/documents/0421/702%20Unclassified%20Document.pdf> [hereinafter NSA PCLOB Submission].

located in the United States.<sup>30</sup> The statute establishes specific limitations, but they predominantly apply to U.S. citizens. Acquisitions cannot intentionally target “any person” known to be located in the United States,<sup>31</sup> so even a foreigner on U.S. soil cannot be targeted under this provision. Government operatives cannot circumvent this limitation by targeting an individual outside of the United States if the purpose of the acquisition is to target a “known person” in the United States.<sup>32</sup> The statute prohibits targeting a U.S. person outside of the United States<sup>33</sup> as well as any communication where the sender and the intended recipients are known to be located in the United States.<sup>34</sup> Finally, all acquisitions must be consistent with the Fourth Amendment to the U.S. Constitution.<sup>35</sup>

But even if the majority of limitations apply to U.S. citizens (or at least to U.S. borders), not all foreigners’ emails are fair game. The NSA is only allowed to target someone outside of the United States in order to obtain “foreign intelligence information.”<sup>36</sup> Foreign intelligence information is information needed to protect against “actual or potential attacks” from: foreigners, sabotage, international terrorism, or weapons of mass destruction proliferation by a foreigner, and clandestine intelligence activities by foreign powers.<sup>37</sup> Foreign intelligence also includes information relating to a foreign power that is necessary for the national defense and security of the United States or the conduct of foreign affairs of the United States.<sup>38</sup>

As with all foreign intelligence collection under FISA, Section 702 operations must obtain prior approval from the FISC. Instead of requiring the government to prove probable cause that an individual suspected target is a foreign power or an agent of a foreign power, the FISC reviews annual certifications from the Attorney General (AG) and the Director of National Intelligence (DNI) to ensure statutory compliance.<sup>39</sup> The FISC reviews the certification, and if it determines the certification is complete, the FISC “shall enter an order approving the certification and the use...of the procedures for the acquisition.”<sup>40</sup> When the FISC determines that the certification does not meet the requirements, the NSA has a chance to correct any deficiency or it must stop collection already underway.<sup>41</sup>

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<sup>30</sup> 50 U.S.C. § 1881a(h) (2012).

<sup>31</sup> *Id.* § 1881a(b)(1).

<sup>32</sup> *Id.* § 1881a(b)(2).

<sup>33</sup> *Id.* § 1881a(b)(3).

<sup>34</sup> *Id.* § 1881a(b)(4).

<sup>35</sup> *Id.* § 1881a(b)(5).

<sup>36</sup> *Id.* § 1881a(a).

<sup>37</sup> *Id.* §§ 1801(e)(1)(A)-(C).

<sup>38</sup> *Id.* §§ 1801(e)(2)(A)-(B).

<sup>39</sup> See NSA PCLOB Submission, *supra* note 29, at 2.

<sup>40</sup> 50 U.S.C. § 1881a(i)(3)(A).

<sup>41</sup> *Id.* §§ 1881a(i)(3)(B)(i)-(ii)

The FISC has received a good deal of criticism for supposedly acting as a “rubber stamp” for NSA operators,<sup>42</sup> but upon closer analysis the claim is not warranted. The FISC actually rejects a greater percentage of FISA applications than Title III courts when presented with a surveillance warrant.<sup>43</sup> The FISC demands modifications to FISA applications as a matter of standard practice, and then approves the amended FISA submission.<sup>44</sup> This has produced the misconception that the FISC blindly approves 99% of FISA applications.<sup>45</sup> While this process may not yield the formal “rejection” craved by critics, it certainly demonstrates that the FISC actively scrutinizes government FISA application and does not merely “rubber stamp” government operations.

Before any intelligence operation can begin, the FISC must approve targeting and minimization procedures under Section 702.<sup>46</sup> Review of the targeting procedures, rather than targets themselves, ensures that the operation does not intentionally capture U.S. persons or communications entirely within the United States.<sup>47</sup> Non-U.S. persons are only targeted if they possess, receive, or are likely to communicate foreign intelligence information relating to a topic that was certified by the AG and DNI as discussed above.<sup>48</sup> The NSA only obtains communications meeting statutory requirements; it cannot, for example, acquire every email from a given country.

When an NSA analyst identifies an individual meeting all of the FISC-approved Section 702 criteria, that person is considered a target.<sup>49</sup> The next step is to determine communications patterns of that target, until an analyst identifies a specific

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<sup>42</sup> See JAMEEL JAFFER AND LAURA W. MURPHY, AM. CIVIL LIBERTIES UNION, STRENGTHENING PRIVACY RIGHTS AND NATIONAL SECURITY: OVERSIGHT OF FISA SURVEILLANCE PROGRAMS, July 31, 2013 (testimony before the Senate Judiciary Committee) available at [https://www.aclu.org/files/assets/testimony.sjc\\_073113.final\\_.pdf](https://www.aclu.org/files/assets/testimony.sjc_073113.final_.pdf) (arguing that “[s]tructural features of the Foreign Intelligence Surveillance Court (FISC) have prevented the court from serving as an effective guardian of individual rights”); Eric Lichtblau, *In Secret, Court Vastly Broadens Powers of N.S.A.*, N.Y. TIMES, July 6, 2013, [http://www.nytimes.com/2013/07/07/us/in-secret-court-vastly-broadens-powers-of-nsa.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2013/07/07/us/in-secret-court-vastly-broadens-powers-of-nsa.html?pagewanted=all&_r=0); Jennifer Granick & Christopher Sprigman, *The Secret FISA Court Must Go*, THE DAILY BEAST, July 24, 2013, <http://www.thedailybeast.com/articles/2013/07/24/the-secret-fisa-court-must-go.html> (asserting that “the FISC has denied not a single surveillance request in the past three years. By any measure, the court is simply a rubber stamp for the executive branch”).

<sup>43</sup> Letter from the Honorable Reggie B. Walton, Presiding Judge for the Foreign Intelligence Surveillance Court, to the Honorable Patrick J. Leahy, Chairman, Comm. on the Judiciary, U.S. Senate, July 29, 2013, at n.6., available at <http://www.fisc.uscourts.gov/sites/default/files/Correspondence%20Leahy-1.pdf> [hereinafter Leahy Letter].

<sup>44</sup> *Id.* at 2-4. See also Joel Brenner, *The Data on FISA Warrants*, LAWFARE, Oct. 17, 2013, <http://www.lawfareblog.com/2013/10/the-data-on-fisa-warrants/>

<sup>45</sup> See Brenner, *supra* note 44.

<sup>46</sup> NSA PCLOB Submission, *supra* note 29, at 3.

<sup>47</sup> *Id.* at 2.

<sup>48</sup> *Id.*

<sup>49</sup> *Id.* at 4.

means of communication (phone, internet, etc.) preferred by that target.<sup>50</sup> This information in turn allows the NSA to obtain a unique identifier for the target, just as with the Section 215 query.<sup>51</sup> Under Section 702, an identifier can be a telephone number or email address.<sup>52</sup> The NSA calls this unique identifier a “selector.”<sup>53</sup> Note that a selector is not a keyword; it is a specific phone number or email address.<sup>54</sup> Therefore, NSA analysts cannot probe the database with search terms such as “terrorism” or even “al Qaeda.” The selector cannot be used to search political points of view or other areas of protected expression.

Each selector requires documentation that it meets the requirements under an authorized certification.<sup>55</sup> The documentation is verified by two “senior NSA analysts” who may request more information or clarification prior to approval.<sup>56</sup> The senior analysts’ review undergoes further scrutiny by NSA’s compliance division, as well as oversight from the Department of Justice (DOJ) and the DNI.<sup>57</sup> When that approval is obtained, the NSA uses the selector as the basis to compel a U.S. based communications service provider to forward communications associated with that selector.<sup>58</sup>

The NSA receives information under Section 702 via two methods. The government can supply Internet Service Providers (ISPs) with the selectors, and they then furnish the NSA with the communications to or from these selectors (this has been referred to as the PRISM program).<sup>59</sup> In the second method, the communication providers assist NSA in the lawful intercept of electronic communications “to, from, or about tasked selectors.”<sup>60</sup> This is referred to as “upstream collection.”<sup>61</sup> Unevaluated communications content and metadata obtained from service providers (i.e., the PRISM program) can be kept for up to five years.<sup>62</sup> Upstream collection of intercepted communications can only be kept for up to two years.<sup>63</sup> NSA implements an automated process to comply with these retention limits.<sup>64</sup>

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<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> *Id.* at 4-5.

<sup>56</sup> *Id.* at 5.

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> *Id.* at 8.

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

Section 702 is subject to constant review processes to ensure its effectiveness. Every six months the AG and DNI must certify statutory compliance of Section 702 operations to the FISC, congressional intelligence committees, and the Judiciary Committees of both the Senate and the House of Representatives.<sup>65</sup> Each intelligence agency that acquires any information under Section 702 must also annually review whether or not foreign intelligence collection will still be obtained. The review must be provided to the FISC, the AG, the DNI, congressional intelligence committees, and the Judiciary committees from the House and Senate.<sup>66</sup>

The statute provides a remedy for those under Section 702 surveillance. If the government intends to use the results from a Section 702 surveillance in a criminal or administrative proceeding, the government must notify the subject of the surveillance of its intentions.<sup>67</sup> The subject then can challenge whether acquisition of the communication was lawfully executed.<sup>68</sup>

### III. THE RIGHT TO PRIVACY IN INTERNATIONAL LAW

#### A. Universal Declaration of Human Rights (UDHR)<sup>69</sup>

As one of the foundational human rights documents, the UDHR ushered in the era of international human rights concepts following World War II.<sup>70</sup> Adopted by the General Assembly on December 10, 1948, the UDHR established international acceptance of basic human rights tenets.<sup>71</sup> Included among these concepts was the right to privacy, which is stated as follows: “No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.”<sup>72</sup>

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<sup>65</sup> 50 U.S.C. § 1881a(l)(1).

<sup>66</sup> *Id.* § 1881a(l)(3)

<sup>67</sup> *Id.* § 1806(d).

<sup>68</sup> *Id.* § 1806(g). *See also* Ellen Nakashima, *Terrorism Suspect Challenges Warrantless Surveillance*, WASH. POST, Jan. 29, 2014, [http://www.washingtonpost.com/world/national-security/terrorism-suspect-challenges-warrantless-surveillance/2014/01/29/fb9cc2ae-88f1-11e3-a5bd-84462943ba3\\_story.html](http://www.washingtonpost.com/world/national-security/terrorism-suspect-challenges-warrantless-surveillance/2014/01/29/fb9cc2ae-88f1-11e3-a5bd-84462943ba3_story.html)

<sup>69</sup> Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948), *available at* <http://www.un-documents.net/a3r217a.htm> [hereinafter UDHR].

<sup>70</sup> The United Nations characterizes the UDHR as “a milestone document in the history of human rights... as a common standard of achievements for all peoples and all nations. It sets out, for the first time, fundamental human rights to be universally protected.” OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS, UNIVERSAL DECLARATION OF HUMAN RIGHTS, <http://www.ohchr.org/en/udhr/pages/introduction.aspx> (last visited August 4, 2015).

<sup>71</sup> *Id.*

<sup>72</sup> UDHR, *supra* note 69, at art. 12.



As an aspirational and visionary document, the UDHR did not go into great detail regarding the components of this right. It neither articulates the right nor explains what actions constitute arbitrary interference. Still, it does introduce the notion that privacy as a right exists (in whatever form), and that any interference requires proper justification, not any government whim. It also provides that governments are required to protect the right in law.<sup>73</sup>

## B. International Covenant on Civil and Political Rights (ICCPR)<sup>74</sup>

A watershed moment in human rights, the ICCPR was the first major international human rights treaty devoted to civil and political rights. The ICCPR cites UN member state obligations to “promote universal respect for, and observance of human rights.”<sup>75</sup> The ICCPR aims to create conditions “whereby everyone may enjoy his civil and political rights, as well as his economic, social, and cultural rights.”<sup>76</sup> One such right is the right to privacy. Article 17 of the ICCPR incorporates essentially the same definition of the right to privacy from the UDHR, which is: “1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation. 2. Everyone has the right to the protection of the law against such interference or attacks.”<sup>77</sup>

Again, this is as far as it goes. Just as in the UDHR, the ICCPR does not define the right to privacy or expand upon what actions constitute “arbitrary interference” with such a right. Notably, the ICCPR does not distinguish between citizens and non-citizens of a signatory, a crucial legal distinction under U.S. intelligence law. Article 2.1 requires all signatories “to respect and to ensure” the rights of the covenant irrespective of “national or social origin.”<sup>78</sup>

## C. United Nations Resolutions

### 1. General Assembly Resolution 68/167<sup>79</sup>

The international backlash to the NSA programs has now been elevated to the United Nations with recent debates and resolutions criticizing U.S. intelligence activities and the NSA in particular. In December of 2013 the United Nations General

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<sup>73</sup> *Id.* at preamble.

<sup>74</sup> International Covenant on Civil and Political Rights, G.A. Res. 2000 (XXI), U.N. Doc. A/RES/2000(XXI) (Dec. 16, 1966), *available at* <http://www.un-documents.net/iccpr.htm> [hereinafter ICCPR].

<sup>75</sup> *Id.* at preamble.

<sup>76</sup> *Id.*

<sup>77</sup> *Id.* at art. 17.

<sup>78</sup> *Id.* at art. 2.1. Again, this assumes extraterritorial application of the ICCPR.

<sup>79</sup> G.A. Res. 68/167, U.N. Doc. A/RES/68/167 (Jan. 21, 2014), *available at* [http://www.un.org/en/ga/search/view\\_doc.asp?symbol=A/RES/68/167](http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/68/167).

Assembly entered the NSA surveillance fray by debating a resolution affirming the international right to privacy. The resulting resolution sponsored by Brazil and Germany entitled “the Right to Privacy in the Digital Age” noted that technical developments improving “surveillance, interception and data collection” may violate or abuse certain human rights, specifically the right to privacy as embodied in Article 12 of the UDHR and Article 17 the ICCPR.<sup>80</sup>

The Resolution affirmed the “human right to privacy” and imported the refrain that no one shall be subject to arbitrary or unlawful interference with his or her privacy.<sup>81</sup> Exercising this right allows individuals to then realize other rights, such as the rights to “freedom of expression” and to “hold opinions without interference.”<sup>82</sup> While “concerns about public security” may permit some accumulation of “sensitive information,” states must still comply with their human rights obligations.<sup>83</sup> The resolution expressed deep concerns, particularly about the collection of “personal data” on a mass scale, and affirmed that people have the same rights online that they do offline.<sup>84</sup>

In describing the right itself, Resolution 68/167 illustrates very little. It makes it clear that no one shall be subject to “arbitrary or unlawful” interference with his or her right to privacy,<sup>85</sup> but it does not define the right to privacy or present a conceptual framework defining the right. It only lets one know when the right to privacy has been violated: “unlawful or arbitrary surveillance and/or interception of communications” as well as the “highly intrusive acts” of unlawful and arbitrary collection of “personal data.”<sup>86</sup> The resolution does not define “personal data” nor does it define “interference.”

In the discussions of the draft resolution, Brazil (a co-sponsor along with Germany), stressed the importance of having a “timely and crucial debate on human rights violations” potentially arising out of “mass surveillance and the interception and collection of data.”<sup>87</sup> North Korea supported the resolution as a means to force the United States to “rectify its human violations” resulting from its foreign intelligence activities.<sup>88</sup> Most countries that expressed support for the resolution did so on the basis that the resolution affirmed the application of the ICCPR to the digital age.<sup>89</sup>

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<sup>80</sup> *Id.* at 1.

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> *Id.* at 2.

<sup>84</sup> *Id.*

<sup>85</sup> *Id.* at 1.

<sup>86</sup> *Id.* at 2.

<sup>87</sup> U.N. GAOR, 68th Sess, 51st mtg. at 6, U.N. Doc. A/C.3/68/SR.51 (Jan. 16, 2014), available at <http://documents-dds-ny.un.org/doc/UNDOC/GEN/N13/582/57/pdf/N1358257.pdf?OpenElement>.

<sup>88</sup> *Id.* at 6-7.

<sup>89</sup> See *id.* at 6 (where Germany stated that the ICCPR’s articles 2 and 17 “formed a sound basis for

## D. United Nations Human Rights Committee Comments on the ICCPR's Right to Privacy

In its General Comment No.16 regarding Article 17 of the ICCPR, the UN Human Rights Committee<sup>90</sup> illustrated some of the principles behind the ICCPR's right to privacy. While still not actually defining the scope of the privacy right itself, the Committee did expound on the principles of the right. For instance, the Committee defined "unlawful" to mean "no interference can take place except in cases envisaged by the law."<sup>91</sup> Not any law, however, will justify interference. The law "must comply with the provisions, aims, and objectives of the Covenant."<sup>92</sup> The objectives of the ICCPR also apply to the determination of "arbitrary interference."<sup>93</sup> Arbitrariness affects any law justifying interference with the privacy right.<sup>94</sup> Even lawful interference with the right to privacy must be consistent with the aims and goals of the ICCPR, and such interference "should be, in any event, reasonable in the particular circumstances."<sup>95</sup> While providing some structure to the analysis, terms like "reasonable in the particular circumstances" are certainly subjective and will surely generate a wide range of reasonable conclusions.

Laws permitting interference with the right to privacy must specify "the precise circumstances in which such interferences may be permitted."<sup>96</sup> The accumulation of "personal information" (not defined) in databases requires legal regulation, and states must ensure that unauthorized persons do not obtain information of a person's "private life."<sup>97</sup> Such information must always be used in a manner consistent with the ICCPR. Individuals should have access to the identity of persons holding their information and the purposes behind the data retention.<sup>98</sup>

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the terms of the draft resolution"); *id.* at 7 (Canada asserted that states must ensure the rights to privacy and expression were "both respected online and offline"); *id.* (Australia supported the draft resolution in order to affirm that the ICCPR "remained applicable in the digital age").

<sup>90</sup> The United Nations High Commissioner for Human Rights describes the Human Rights Committee as "the body of independent experts that monitors implementation of the International Covenant on Civil and Political Rights by its State parties." OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS, HUMAN RIGHTS COMMITTEE, <http://www.ohchr.org/EN/HRBodies/CCPR/Pages/CCPRIntro.aspx> (last visited August 4, 2015).

<sup>91</sup> U.N. Human Rights Comm., Gen. Comment No. 16: Article 17 ( Right to Privacy), 32nd Sess., Apr. 8, 1988, para. 3, U.N. Doc. HRI/GEN/1/Rev.9 (Vol. I), at 191 (2008), available at <http://documents-dds-ny.un.org/doc/UNDOC/GEN/G08/422/35/pdf/G0842235.pdf?OpenElement> [hereinafter ICCPR Art. 17 General Comment].

<sup>92</sup> *Id.*

<sup>93</sup> *Id.* at para. 4.

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> *Id.* at para. 8.

<sup>97</sup> *Id.* at para. 10.

<sup>98</sup> *Id.*

## E. United Nations Human Rights Council Special Rapporteur Report

In 2013, the UN Human Rights Council<sup>99</sup> commissioned a report by Special Rapporteur Frank LaRue on the subject of “the promotion and protection of the right to freedom of opinion and expression.”<sup>100</sup> The report analyzed state surveillance of communications and its implications on the rights to privacy and freedom of opinion. It also assessed the risks to human rights from the “new means and modalities of communications.”<sup>101</sup> Recognizing that leaving the right to privacy undefined has caused problems in its application, Mr. LaRue defined the right of privacy as:

the presumption that individuals should have an area of autonomous development, interaction, and liberty, a “private sphere” with or without interaction with others, free from state intervention and from excessive unsolicited intervention by other uninvited individuals. The right to privacy is also the ability of individuals to determine who holds information about them and how that information is used.<sup>102</sup>

Mr. LaRue points out that Article 17, unlike other articles in the ICCPR, does not provide specific elements for limiting the right.<sup>103</sup> LaRue explicitly intertwines the right to privacy to the right to freedom of opinion and expression. The ICCPR’s freedom from interference with correspondence produces a state responsibility to ensure that emails and other online communications are delivered to the intended recipient without “interference or inspection by the state.”<sup>104</sup> He does not comment as to the state’s role if these communications were criminal activity, such as terrorist plans, child pornography, or hate speech of the kind prohibited in many nations.

As noted in LaRue’s report, one often-claimed justification for limiting a variety of rights has been national security,<sup>105</sup> and the United States is no exception.

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<sup>99</sup> The Human Rights Council “is an inter-governmental body within the United Nations system responsible for strengthening the promotion and protection of human rights around the globe and for addressing situations of human rights violations and make recommendations on them.” OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS, HUMAN RIGHTS COUNCIL, <http://www.ohchr.org/EN/HRBodies/HRC/Pages/AboutCouncil.aspx> (last visited August 4, 2015).

<sup>100</sup> U.N. Human Rights Council, Rep. of Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, U.N. Doc. A/HRC/23/40 (Apr. 17, 2013), available at <http://documents-dds-ny.un.org/doc/UNDOC/GEN/G13/133/03/pdf/G1313303.pdf?OpenElement> [hereinafter Special Rapporteur Report].

<sup>101</sup> *Id.* at para. 5.

<sup>102</sup> *Id.* at para. 22.

<sup>103</sup> *Id.* at para. 28. LaRue references Article 19, freedom of expression. Para. 3 of Article 19 provides that restrictions of the rights must be provided by law and necessary: 1) for respect of the rights or reputations of others; and 2) for the protection of national security or of public order (order public), or of public health or morals. ICCPR, *supra* note 74, at art. 19.

<sup>104</sup> Special Rapporteur Report, *supra* note 100, at para. 24.

<sup>105</sup> *Id.* at para. 58.

The danger, according to LaRue, is that such an “amorphous concept” will justify “invasive limitations on the enjoyment of human rights.”<sup>106</sup> LaRue dismisses the necessity and benefits from national security efforts, only looking at such measures as ways for the state to manipulate the law and target vulnerable communities such as human rights groups, journalists, and activists.<sup>107</sup> LaRue gives precious little credit to the benefits of national security, namely the protection and safety of a nation’s citizens.

LaRue offers the United States as Exhibit A for his concerns. In LaRue’s opinion, the United States grants intelligence agencies “blanket exceptions” to the requirement of judicial authorization.<sup>108</sup> Specifically, he claims that FISA “empowers the National Security Agency to intercept communications *without judicial authorization* where one party to the communication is located outside the United States, and one participant is reasonably believed to be a member of a State-designated terrorist organization.”<sup>109</sup> The accuracy of the last statement is subject to debate. As described above, Section 702<sup>110</sup> achieves judicial approval on a programmatic level, where approval of targeting procedures themselves ensures that the intelligence target will fall within the statutory requirement of being “non-U.S. persons reasonably believed to be located outside the U.S.”<sup>111</sup> The FISC may not approve each individual target, but that does not necessarily equate to an absence of judicial authorization.

If LaRue finds fault with no judicial authorization of interception, then it is strange to accuse the United States of such an infraction. Unlike other nations the United States devotes an entire specialized court to the issue of intelligence collection. Most other nations have no court involvement whatsoever in approving interceptions beforehand.<sup>112</sup> For example, the sponsors of UN Resolution 68/187, Germany and Brazil, each permit the interception of communications with no judicial oversight.<sup>113</sup>

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<sup>106</sup> *Id.* at para. 60.

<sup>107</sup> *Id.*

<sup>108</sup> *Id.* at para. 59.

<sup>109</sup> *Id.* (emphasis added).

<sup>110</sup> Section 215 is inapplicable to this accusation, as the program does not intercept communications.

<sup>111</sup> NSA PCLOB Submission, *supra* note 29, at 2.

<sup>112</sup> *See infra* Part II.F.

<sup>113</sup> *See* CHRISTOPHER WOLF, “A TRANSNATIONAL PERSPECTIVE ON SECTION 702 OF THE FOREIGN INTELLIGENCE SURVEILLANCE ACT (Mar. 19, 2014)” available at <http://www.lawfareblog.com/wp-content/uploads/2014/03/Christopher-Wolf.pdf> (demonstrating the lack of judicial oversight in other nations’ surveillance regimes). In Brazil, for example the Brazilian intelligence Agency (“ABIN”) coordinated the intelligence operations of various government agencies, such as the central bank, the Federal Police, the Revenue Service, and numerous government ministries. Recent legislation has expanded the ABIN’s ability to exchange information with other government departments and integrated its databases with that of the police. *Id.* at 9 (citing Bruno Magrani, *Systemic Government Access to Private-Sector Data in Brazil*, 4 INT’L DATA PRIVACY L. 30,35 (2014)). German intelligence agencies are authorized to conduct “strategic surveillance” to

## F. Case Law from European Courts

Since the principles of Article 17 are rather vague, judicial interpretations can provide principles and guidelines to augment the ICCPR and its commentary. Although it applies the European Convention on Human Rights<sup>114</sup> rather than the ICCPR directly, the European Court of Human Rights (ECHR)<sup>115</sup> has applied international privacy principles to surveillance programs, and its decisions provide additional context to what the right of privacy looks like under international law. Another European Court with similar experience is the Court of Justice of the European Union.<sup>116</sup> Even though the United States is not bound by these decisions, they illustrate the application of international human rights principles to operations such as bulk data collection and communications interception. It is interesting to see how the NSA operations conform to them. The government programs that came before the European Courts met with varying degrees of success.

### 1. *Weber and Saravia v. Germany*<sup>117</sup>

In *Weber v. Germany*, the ECtHR reviewed a German “strategic monitoring” program that functioned by “intercepting telecommunications in order to identify and avert serious dangers threatening the Federal Republic of Germany, such as an armed attack on its territory, the commission of terrorist attacks, and certain serious

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investigate specific threats or to even “proactively gather relevant information about other countries that are important to the foreign and national security policy of Germany. *Id.* at 11-12 (citing Paul M. Schwartz, *Systematic Government Access to Private Sector Data in Germany*, 2 INT’L DATA PRIVACY L. 289, 291 (2012)).

<sup>114</sup> Council of Europe, Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, available at [http://www.echr.coe.int/Documents/Convention\\_ENG.pdf](http://www.echr.coe.int/Documents/Convention_ENG.pdf) [hereinafter European Convention on Human Rights (ECHR)]. Article 8 of the convention, articulates the Right to Privacy in a slightly different way from the ICCPR. Section 1 states that “Everyone has the right to respect for his private and family life, his home and his correspondence.” *Id.* at art. 8, § 1. Section 2 then provides guidance regarding what constitutes permissible interference with that right:

There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others. *Id.* at art. 8, § 2.

<sup>115</sup> The European Court of Human Rights is an international court established in 1959 to rule on individual or State applications alleging violations of the civil and political rights set out in the European Convention on Human Rights. EUROPEAN COURT OF HUMAN RIGHTS, [http://www.echr.coe.int/Documents/Court\\_in\\_brief\\_ENG.pdf](http://www.echr.coe.int/Documents/Court_in_brief_ENG.pdf) (last visited August 4, 2015).

<sup>116</sup> The Court of Justice of the European Union has three roles: (1) it “reviews the legality of the acts of the institutions of the European Union;” (2) it “ensures that the Member States comply with obligations under the Treaties;” and (3) it “interprets European Union law at the request of the national courts and tribunals.” By cooperating “with the courts and tribunals of the Member States, it ensures the uniform application and interpretation of European Union law.” COURT OF JUSTICE OF THE EUROPEAN UNION, [http://curia.europa.eu/jcms/jcms/Jo2\\_6999/](http://curia.europa.eu/jcms/jcms/Jo2_6999/) (last visited August 4, 2015).

<sup>117</sup> *Weber and Saravia v. Germany*, 2006-XI Eur. Ct. H.R. 309.

offenses.”<sup>118</sup> This bulk communications collection program permitted collection of data from throughout the world, not just in Germany.<sup>119</sup> The case was brought by German and Uruguayan citizens, claiming that their rights to privacy had been violated due to the potential of surveillance.<sup>120</sup>

Both the applicant and the government of Germany conceded that the monitoring of communications and the subsequent use of any information obtained interfered with secrecy of telecommunications envisioned in Article 8 of the ECHR, and the court made a point to emphasize that telephone conversations are included in the notions of “private life” and “correspondence.”<sup>121</sup> The court then broadened the notion of interference to such a point that there need not be any actual interference at all. The applicants could not prove that the government surveillance interfered with their particular communications, but the “mere existence of legislation which allows for a system for the secret monitoring of communications entails a threat of surveillance....”<sup>122</sup> This “mere existence” of legislation authorizing collection posed a sufficient “threat” to communications that the court found an interference with the exercise of the right to privacy.<sup>123</sup>

Having established interference (without demanding proof of it), the court then turned to whether that interference was done “in accordance with the law,”<sup>124</sup> as required by the ECHR. For purposes of the right to privacy, “in accordance with the law” requires three determinations. First, the surveillance measure should have “some basis in domestic law.”<sup>125</sup> Second, the quality of the law demands that it be accessible to the person concerned,<sup>126</sup> and finally, the law’s consequences must be foreseeable.<sup>127</sup>

Meeting the basis-in-law test was relatively straightforward since the surveillance at issue was executed pursuant to a parliamentary-approved law. The court then looked at public international law, and determined there was no sovereignty violation because Germany was intercepting communications signals from within its own borders (just like the NSA which gets Section 702 information from ISPs

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<sup>118</sup> *Id.* at 315

<sup>119</sup> *Id.* at 315-16

<sup>120</sup> *Id.*

<sup>121</sup> *Id.* at 331.

<sup>122</sup> *Id.* at 331-32.

<sup>123</sup> *Id.* at 332.

<sup>124</sup> *Id.* The European Convention requirement that the interference be done “in accordance with the law” is analogous to the ICCPR requirement that the interference not be “unlawful.”

<sup>125</sup> *Weber*, 2006-XI Eur. Ct. H.R. at 333.

<sup>126</sup> *Id.* at 333.

<sup>127</sup> *Id.*

in the United States).<sup>128</sup> The accessibility of the law did not “raise any problems in this case” as the law was easily available and public.<sup>129</sup>

The foreseeability analysis was not so elementary. The court acknowledged operational necessities of intelligence programs when it said that foreseeability “cannot mean that an individual should be able to foresee when the authorities are likely to intercept his communications so that he can adapt his conduct accordingly.”<sup>130</sup> But the court then undermined this governmental privilege significantly by also requiring “clear, detailed rules on interception of telephone conversations,” particularly as improved technology enables interception.<sup>131</sup> To make this balancing act even more difficult, the court concluded by demanding that the “domestic law must be sufficiently clear in its terms to give citizens an adequate indication as to the circumstances in which...public authorities are empowered to resort to” surveillance.<sup>132</sup> So, the government must tread a careful path of providing “clear, detailed rules” of a surveillance program without disclosing the amount of information that would permit the public from evading the surveillance altogether.

According to the court, Germany successfully walked this tightrope. The court found that Germany had met six minimum safeguards in its surveillance: (1) the nature of the offenses giving rise to surveillance were included in the statute; (2) the statute included a definition of people liable for surveillance; (3) there was a limit on the duration of the tapping; (4) procedures for examining, using, and storing data were articulated; (5) the statute required precautions when communicating data to other parties; and (6) the circumstances where recording will be erased were included.<sup>133</sup>

The court then evaluated the program’s purpose and necessity.<sup>134</sup> Governments deserve a “wide margin of appreciation” in their efforts to achieve national security, but a surveillance system cannot be so encompassing as to threaten the democracy it purports to defend.<sup>135</sup> The court must therefore be satisfied that there are adequate safeguards against abuse.<sup>136</sup> Such adequacy is determined by circumstances such as the program’s nature, scope, and duration, as well as remedies under the

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<sup>128</sup> *Id.* at 333-34.

<sup>129</sup> *Id.* at 335.

<sup>130</sup> *Id.*

<sup>131</sup> *Id.*

<sup>132</sup> *Id.*

<sup>133</sup> *Id.* at 336-37.

<sup>134</sup> *Id.* at 337. Again, purpose and necessity are not required terms from the ICCPR but from the European Convention.

<sup>135</sup> *Weber*, 2006-XI Eur. Ct. H.R. at 338.

<sup>136</sup> *Id.*



domestic law. Ultimately the court found the surveillance measures necessary to meet the German government's goals of national security and crime prevention.<sup>137</sup>

## 2. *Liberty and Others v. the United Kingdom*<sup>138</sup>

While the *Weber* court worked out well for the German surveillance program, the ECtHR did not treat a British surveillance system as kindly in *Liberty and Others v. United Kingdom*. The program at issue allowed the British Ministry of Defense to operate an Electronic Test Facility (ETF) "built to intercept 10,000 simultaneous telephone channels" between London and Dublin.<sup>139</sup> The applicants alleged that the ETF intercepted all forms of communication (telephone, email, and facsimile) between British telecom links carrying a good portion of Ireland's communication's traffic.<sup>140</sup> As the United Kingdom had enacted a public law the court found sufficient legal basis in the law.<sup>141</sup> But the law did not limit the type of external communications subject to interception,<sup>142</sup> a significant difference from the Section 702 program. At the time of issuing a warrant the Secretary of State had to "make such arrangements as he consider[ed] necessary" to ensure material not covered by the certificate was not examined and that material requiring examination was only disclosed and reproduced to the extent necessary.<sup>143</sup> The problem with this structure was that the arrangements were not made public.<sup>144</sup> Even a separate approval from a Prime Minister-appointed Commissioner could not cure the defect of a lack of public availability.<sup>145</sup>

The court stressed some of the facts that made the *Weber* program legitimate that were absent from the U.K. program.<sup>146</sup> In *Weber*, the monitoring could only be executed with the help of search terms that related to the dangers they sought to stop, and those terms were listed in the monitoring order itself.<sup>147</sup> The German government had published detailed rules for destroying and storing data, and the authorities had to verify every six months that the data was still necessary (if no longer needed, the data was to be destroyed, with such destruction documented).<sup>148</sup>

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<sup>137</sup> *Id.* at 346

<sup>138</sup> *Liberty and Others v. the United Kingdom*, no. 58243/00 (Eur. Ct. H.R. July 1, 2008), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-87207>.

<sup>139</sup> *Id.* at para. 5.

<sup>140</sup> *Id.*

<sup>141</sup> *Id.* at para. 60.

<sup>142</sup> *Id.* at para. 64.

<sup>143</sup> *Id.* at para. 66.

<sup>144</sup> *Id.*

<sup>145</sup> *Id.* at para. 67.

<sup>146</sup> *Id.* at para. 68.

<sup>147</sup> *Id.*

<sup>148</sup> *Id.*

Finally, the German system provided some details regarding transmission, retention, and use of data.<sup>149</sup>

### 3. *Digital Rights Ireland*<sup>150</sup>

As helpful as those cases are in analyzing Section 702 collection they provide little help for Section 215 operations. Section 215 differs from the *Weber* and *Liberty* programs in many ways, but two stand out. First, and most importantly, there is no content of communications at issue.<sup>151</sup> Second, Section 215 does not involve any sort of intercept as telephony companies transfer phone records over to the NSA pursuant to a FISC order.<sup>152</sup> Section 215 does not permit the NSA to monitor phone calls or track calls; it simply runs analytics on business records (albeit, a tremendous amount of business records) and produces metadata.

The issue of metadata, and when its collection and review can run afoul of human rights law, was addressed by the Court of Justice of the European Union in *Digital Rights Ireland*. This case involved the review of Directive 2006/24/EC<sup>153</sup> of the European Parliament and of the Council, a directive that sought to harmonize data retention guidelines for member states for the prevention, investigation, detection and prosecution of criminal offenses.<sup>154</sup> Partly motivated by the terrorist attacks on the London underground,<sup>155</sup> the directive mandated public communications networks to retain six types of metadata: “data necessary to trace the identity and source of a communication;” “data necessary to identify the destination of a communication;” “data necessary to identify the date, time, and duration of a communication;” “data necessary to identify the type of a communication;” and “data necessary to identify users’ communications equipment.”<sup>156</sup> The metadata applied to both telephone calls (fixed line and mobile) and internet communications such as emails, internet access, and internet telephony.<sup>157</sup> The Directive, however, prohibited the retention of data that could reveal the “content of the communication.”<sup>158</sup>

The court found (without a great deal of explanation) that the obligation to collect “data relating to a person’s private life and to his communications” (i.e.,

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<sup>149</sup> *Id.*

<sup>150</sup> Case C-293/12, *Digital Rights Ireland Ltd. v. Minister for Communications, Marine and Natural Resources and Others*, EU:C:2014:238 available at <http://curia.europa.eu>.

<sup>151</sup> See discussion *supra* Part I.A.

<sup>152</sup> See *id.*

<sup>153</sup> Council Directive 2006/24/EC, 2006 O.J. (L 105) 54, available at <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32006L0024&qid=1432211757508&from=EN>.

<sup>154</sup> *Digital Rights Ireland*, EU:C:2014:238 at para. 6.

<sup>155</sup> *Id.* at para. 14.

<sup>156</sup> *Id.* at para. 16 (citing Directive 2006/24/EC, *supra* note 153, at art. 5.1).

<sup>157</sup> *Id.* (citing Directive 2006/24/EC, *supra* note 153, at art. 5.1.(a)).

<sup>158</sup> *Id.* (citing Directive 2006/24/EC, *supra* note 153, at art. 5.2).

metadata) interfered with the right to privacy.<sup>159</sup> Allowing authorities access to this information at a later date constituted a further interference with the right (here, the court cited *Weber*, although *Weber* dealt with the content of intercepted communications, not metadata).<sup>160</sup> Even though the metadata collection constituted a “serious interference” with privacy, the interference was not one to “adversely affect the essence” of privacy rights since the content of the communications was not collected.<sup>161</sup> Also, the court acknowledged the importance of National Security.<sup>162</sup> Retaining data to protect against serious crime, particularly organized crime and terrorism, was deemed “of the utmost importance,” and the efficacy of efforts to combat these serious crimes may depend upon modern techniques.<sup>163</sup>

Despite these findings, the court still struck the Directive on the grounds that it was disproportional.<sup>164</sup> The Directive’s treatment of everyone in the same generalized manner was the first problem. It applied to all people equally, and those who might never be prosecuted were grouped with those who might.<sup>165</sup> The court then took issue with the lack of objective criteria to determine limits of access and subsequent use.<sup>166</sup> “Above all,” the court said, access was “not made dependent on a prior review carried out by a court or by an independent administrative body” that seeks to limit access and use to those things “strictly necessary for the purpose of attaining the objective pursued.”<sup>167</sup> The “data retention period” proved to be the third problem, as it required the metadata to be retained between six and twenty-four months.<sup>168</sup> The court did not necessarily find that the period was too lengthy, but it required “objective criteria” to determine that duration of retention was limited to necessity.<sup>169</sup> The court then introduced the ubiquitous critique for all surveillance programs: the “risk of abuse,”<sup>170</sup> but it did not identify specific risks associated with the program. The lack of sufficient safeguards to ensure protection of the data from unlawful access and use<sup>171</sup> also contributed to the directive’s downfall. The final deficiency was that the Directive did not require data storage in the European Union.<sup>172</sup>

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<sup>159</sup> *Id.* at para. 34.

<sup>160</sup> *Id.* at para. 35.

<sup>161</sup> *Id.* at para. 39.

<sup>162</sup> *Id.* at para. 41.

<sup>163</sup> *Id.* at para. 51.

<sup>164</sup> *Id.* at para. 56.

<sup>165</sup> *Id.* at para. 57.

<sup>166</sup> *Id.* at para. 60.

<sup>167</sup> *Id.* at para. 62.

<sup>168</sup> *Id.* at para. 63.

<sup>169</sup> *Id.* at para. 64.

<sup>170</sup> *Id.* at para. 66.

<sup>171</sup> *Id.*

<sup>172</sup> *Id.* at para. 68.

The proportionality analysis in *Digital Rights Ireland* demonstrates that not all courts grant the state the vast deference implied under *Weber*. Both *Weber* and *Digital Rights Ireland* dealt with national security, but the *Digital Rights Ireland* court did not find in security's favor despite the fact that the measures under review interfered with privacy much less than those under *Weber*.

The test presents some interesting implications for privacy law. A concept absent from U.S. privacy law, proportionality would theoretically provide the government with greater justifiability to promote national security over privacy interests in the event circumstances were dire enough. When the state's goal is national security, especially on an existential level, the resulting balancing of interests will tilt toward the state. This is supported by the deference that the *Weber* court says is due to governments for national security. Proportionality implies that we are willing to accept more intrusive measures if the goal of the surveillance is protection from security threats. When it comes to considerations such as protection from terrorists, few interests will trump, even those enshrined in human rights doctrine (assuming the threats are severe enough).

#### IV. APPLICATION OF RULES TO THE NSA PROGRAMS

##### A. Is the Information Collected Included in the Right to Privacy?

The first consideration regarding the application of the international right to privacy to Section 215 and Section 702 is whether or not their operations disturb protected information. With respect to Section 702, the intercepted communications most likely contain personal or private information. Since the communication itself is captured along with relevant metadata, more likely than not it is personal information. The Section 215 metadata is a bit different. That information is simply a list of previous phone calls, to whom they went, from whom they came, and how long they lasted. In U.S. courts, telephony metadata has been held by the third party doctrine to not be subject to a reasonable expectation of privacy,<sup>173</sup> so one could certainly argue that Section 215 data does not possess the requisite character to trigger application of the right to privacy. Human rights notions, however, do not incorporate an expectation-based approach, although they do evaluate reasonableness under the circumstances.

UN Resolution 68/167 uses the term "personal data" rather than "personal information," but again the UN fails to provide much context to the term's meaning.<sup>174</sup> "Data" is presumably broader than "information," and there is therefore a strong case to be made that the term includes telephony metadata. Such data does relate to an individual's phone calls, so it should be included in the term "personal data" even if it is not included in the term personal information. LaRue does not

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<sup>173</sup> See *Smith v. Maryland*, 442 U.S. 735 (1979).

<sup>174</sup> G.A. Res. 68/167, *supra* note 79, at 1.

significantly differentiate between metadata and content and would protect the two equally.<sup>175</sup> *Digital Rights Ireland*, however, does make this distinction.<sup>176</sup> Still, it protects metadata without much discussion or reflection, although it did acknowledge that metadata compromises the essence of privacy less.

## B. Do the Programs Interfere with the Right to Privacy?

If the programs do indeed deal with relevant privacy information, one next inquires as to whether or not there was any interference. A crucial consideration for any bulk collection or monitoring program is at what point does the inference actually take place? One can choose a variety of points in the bulk data continuum to choose for determining interference: enacting of legislation (as *Weber* does),<sup>177</sup> collection, query, or analysis.

Many would likely select the collection phase on bulk data, when emails or telephone records are collected in bulk. At this point, though, no person has seen the content or metadata of any communication. Moreover, given the volume of bulk data, odds are that no person will ever see a given communication. The longer the data is retained the greater probability that the data can be used now or in the future, but at this stage damage is more potential or abstract rather than concrete.

Upon the query, things become a little more interesting. Only the few responsive communications get pulled from the database and reviewed. The other billions simply get deleted without ever being reviewed or analyzed. While it certainly causes some discomfort knowing that for a significant amount of time one's communications are stored in a database out of one's control, if the communications do not respond to an indicator they will be deleted without ever being seen. It is not until the query, when the NSA runs the selector against the database that any single communication actually has the remotest possibility of being acknowledged by another human. It reasonably follows then, that any interference occurs only when the operator executes the query and the analytics produce a result, rather than at the time of collection. At the time of collection, privacy interference is potential rather than actual. Under this approach there is little if any interference with the right to privacy, especially from Section 215, due to the absence of collected content and the extreme unlikelihood that one's metadata will even be seen.

Under a *Weber* analysis, however, one does not have to even show actual interference.<sup>178</sup> Recall that the court decreed that a surveillance program must be enshrined in a law accessible to the public.<sup>179</sup> If public knowledge is required of a

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<sup>175</sup> See discussion *supra* Part II.E.

<sup>176</sup> See discussion *supra* Part II.F.3.

<sup>177</sup> See discussion *supra* Part II.F.1.

<sup>178</sup> See *id.*

<sup>179</sup> *Weber and Saravia v. Germany*, 2006-XI Eur. Ct. H.R. 309, 333.

surveillance program, and if the knowledge of such programs is sufficient to establish interference, then the *Weber* court has essentially eliminated “interference” as a requirement of the violation of privacy. Under the *Weber* framework, the interference analysis is essentially moot in the presence of legislation such as Section 702 and Section 215. Every surveillance regime must be founded in law, and *Weber* argues that such a foundation equates to interference, even if no collection has in fact ever been done.

The *Weber* court admirably wrestled a novel and complicated issue, but the approach it takes is far from settled. As yet the decision has not attained the status of customary international law. It is certainly not binding on the United States, and other international courts are still free to decline following its conclusion. The great downside to *Weber* is that it cuts out one of the most contentious and fact-specific issues: when has interference actually occurred. With all due respect to the *Weber* court, the interference issue needs further discussion.

LaRue’s approach similarly requires deeper analysis. When defining the scope of the privacy right, LaRue’s conception is unreasonably broad in that he would grant a privacy interest in data in perpetuity. This reflects neither the virtual nor the physical world. When one sends a letter via the mail, the recipient has, generally speaking, lost control of the information in the letter. Absent a recognized legal duty otherwise, the recipient is free to copy the letter or to relay the contents to others. The recipient of an email likewise can print, forward, or copy the contents of any email that he or she receives without obtaining prior consent from either the email’s originator or those who may have forwarded it. LaRue’s approach to digital privacy essentially provides more protection than privacy in the real world.

If the right to privacy includes control over who holds one’s information, then few nations comply with the right. All sorts of government organizations and bureaucracies, from revenue collection to census, maintain information of their citizens without any consent. Most people would probably delete their records from taxation or law enforcement agencies if given the opportunity, so implementing this component of LaRue’s calculus would undermine even the most basic of governmental functions, not only national security.

### C. Is the Interference Unlawful and Arbitrary?

Assuming for purpose of this discussion that the NSA’s programs interfere with generally recognized privacy (or assuming that *Weber* controls and therefore interference is a given due to FISA), the analysis then turns to the issues of unlawfulness and arbitrariness. Here the U.S. programs comply fairly well.

Applying *Weber* and *Liberty*, Section 702 essentially meets all of the criteria. For the Section 702 collections, there is, as in *Weber*, a basis in the law, and it is accessible as FISA is publicly available. As the NSA PCLOB submission demon-

strates, the NSA executed the surveillance based upon previously established and judicially approved criteria.<sup>180</sup> Section 702 clearly articulates what communications are susceptible to surveillance (those that would provide information needed to protect against “actual or potential attacks” from foreigners, sabotage, international terrorism, or weapons of mass destruction proliferation by a foreigner, and clandestine intelligence activities by foreign powers),<sup>181</sup> so the public knows what conduct triggers, in the European Court’s words, “the conditions on which the public authorities were empowered.”<sup>182</sup> The program undergoes regularly scheduled verification from the NSA, the AG, and the DNI.<sup>183</sup>

Section 702 also hits the six safeguards under *Weber*. The statute is clear what offenses justify the surveillance, and those liable for surveillance are readily identified (non-U.S. persons’ communications relating to certain criminal activity made outside of the United States).<sup>184</sup> The duration is limited (two or five years, depending on how the information was obtained),<sup>185</sup> and the NSA’s procedure for “examining, using, and storing data” are in place and blessed by the FISC prior to implementation.<sup>186</sup> Just as in *Weber*, Section 702 information can only be accessed once it responds to an identifier, and this use of identifiers provides operators with substantially less data than the *Liberty* program did. The identifiers also support a conclusion that Section 702 is proportional. Only data responding to identifiers is even seen, and the NSA cannot query terms designed to obtain information related to political viewpoints or freedom of expression.<sup>187</sup> The minimization procedures, as they apply to U.S. citizens at least, lay out precautions if the need for dissemination arises. Finally, the NSA PCLOB submissions make it clear that the data is automatically deleted after two or five years, so the final safeguard (inclusion of data erasure provisions) is covered.<sup>188</sup>

FISA also allows for a remedy for those who will potentially have their data used against them. If the Government intends to use the results of FISA surveillance, to include Section 702 surveillance, in a trial or other proceeding against a person whose communications were collected, the Government must notify the person so

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<sup>180</sup> NSA PCLOB Submission, *supra* note 29, at 1-2.

<sup>181</sup> See 50 U.S.C. § 1881a(a) (referencing “foreign intelligence information,” which is defined by 50 U.S.C. § 1801(e)(1)(A)-(C)).

<sup>182</sup> *Liberty and Others v. the United Kingdom*, no. 58243/00 (Eur. Ct. H.R. July 1, 2008), at para. 93.

<sup>183</sup> See NSA PCLOB Submission, *supra* note 29, at 2.

<sup>184</sup> See 50 U.S.C. § 1881a(a).

<sup>185</sup> NSA PCLOB Submission, *supra* note 29, at 8.

<sup>186</sup> See *id.* at 2.

<sup>187</sup> See 50 U.S.C. § 1881a(b)(5).

<sup>188</sup> NSA PCLOB Submission, *supra* note 29, at 8.

that person can challenge whether the communications were acquired lawfully.<sup>189</sup> Putting all of that together, 702 would fare well in the *Weber* court.

Section 215 also comes out rather well when analyzed against the relevant judicial criteria. While the regulation at issue in *Digital Rights Ireland* was problematic, Section 215 would fare much better under the *Digital Rights Ireland* analysis. As helpful as the *Digital Rights Ireland* case is for illustration purposes, there are several distinguishing factors between the program covered there and Section 215. Directive 2006/24/EC was much more comprehensive than its American counterpart. Section 215 only collects phone records,<sup>190</sup> while the Ireland program collected a whole trove of metadata related to other forms of communication.<sup>191</sup> Section 215 therefore has even less effect on the “essence” of the right to privacy than Directive 2006/24/EC, but it still combats terrorism, one of the court’s goals of “utmost importance.”<sup>192</sup> This may produce a contrary proportionality determination from the European Court of Justice. Another significant difference is judicial review. Unlike Section 215, 2006/24/EC authorities had no independent judicial review in place prior to collection. The role of the FISC would meet the court’s requirement for “prior review carried out by a court or by an independent administrative body”<sup>193</sup> (thereby making sure there are sufficient access limitations and tailoring).

Section 215 hits most if not all of the court’s criteria,<sup>194</sup> but it may contradict *Digital Rights Ireland*’s requirement to avoid treating everyone in the same “generalised [sic] manner.”<sup>195</sup> Any such treatment however occurs only in the collection phase. Using identifiers associated with known or suspected foreign terrorists segregates the vast majority of data from that which will be reviewed and analyzed.<sup>196</sup> There is also a bit of chicken and egg problem with any collection program. How is the government able to differentiate between suspicious communications and innocent ones? A government must be able to cull the suspicious from the general. It is only after the query that the government knows which communications to subject

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<sup>189</sup> 50 U.S.C. § 1806(d).

<sup>190</sup> 50 U.S.C. § 1861 (a)(1).

<sup>191</sup> Case C-293/12, *Digital Rights Ireland Ltd. v. Minister for Communications, Marine and Natural Resources and Others*, EU:C:2014:238, at para. 16, available at <http://curia.europa.eu>. (citing Directive 2006/24/EC, *supra* note 153, at art. 5.1).

<sup>192</sup> *Id.* at para. 51.

<sup>193</sup> *Id.* at para. 62.

<sup>194</sup> *But see* Jaffer and Murphy, *supra* note 42, at 4-6 (arguing that the metadata collection as practiced is not authorized under Section 215, so such collection operations are not, in fact, authorized by law). This view therefore undermines the determination that Section 215 is executed lawfully, so it would violate ICCPR Art. 17.

<sup>195</sup> *Digital Rights Ireland*, EU:C:2014:238 at para. 57.

<sup>196</sup> The collection dynamic presents a different challenge under U.S. law than it does under European law. Under U.S. law, failure to treat everyone in the same generalized manner is often labeled “profiling.”



to further scrutiny. If, after that point, the government treated every communication the same, then that would raise significant legal concerns.

Whether the interference is arbitrary will mostly depend on the eye of the beholder. Any requirement for a law to be “reasonable under the circumstances”<sup>197</sup> will inevitably engender a wide array of legal conclusions. On one hand, one could reasonably argue that collecting information on people who have no relation to terrorism is not “reasonable under the circumstances.” Even if the information is not traditionally tangible or physical the programs still collect information about potentially everyone with a communications device. That certainly makes the programs broad.

But that does not necessarily make them unreasonable. Interferences with privacy regularly take place on a macro level in order to thwart attacks. Airport searches, for example, occur in every airport against every person, in an effort to catch or discourage that one terrorist among the millions of harmless travelers. Ninety-nine percent of the people who pass through screening worldwide must do so even though they have absolutely no connection to a terrorist plot.<sup>198</sup> In that context, collecting old phone records and running them against an identifier in a signals intelligence (SIGINT) database looks somewhat minor. Again, no one will ever see the name or number of calls, unless those calls were to or from suspected terrorists.<sup>199</sup>

Reasonableness must be reviewed in the context of circumstances, and in the case of Section 215 and Section 702 the circumstances matter a great deal. The efforts are trying to halt future terrorist attacks or obtain crucial foreign intelligence. As terrorists increasingly rely upon cell phone technology and the internet for their communications, investigators must analyze such means of communications for relevant data. When one considers that future terrorists attacks may be prevented (domestically and internationally), then perhaps allowing personal information to sit in a database for two years where it in all likelihood will never be seen by any human being is a reasonable measure.

Certainly there will be those who will disagree with the author’s perspective regarding when the right to privacy is triggered and whether or not storage of five-year-old phone records is cause for alarm. That is debate worth having, but in the place of reasoned debate we have over-reaction and premature legal conclusions. Sections 215 and 702 will never completely satisfy privacy advocates, but in reality what program would?

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<sup>197</sup> ICCPR Art. 17 General Comment, *supra* note 92, at para. 4.

<sup>198</sup> One could argue that airport searching is not interference since it is done with “consent.” Such consent, however, is somewhat compelled by the lack of alternatives. If one does not consent, one does not travel by air. Also, what is a more significant infringement to privacy: a revealing image of your body, or phone records in a database that no person will ever see?

<sup>199</sup> See discussion *supra* Part I.A.

A detached and objective review of the NSA's policies reveals programs that are not shadowy Orwellian attempts to infiltrate the private sphere of the world's citizens. Rather, by and large the NSA has faced a difficult security and regulatory challenge with admirable compliance with the privacy requirements under international law. No government program, however, is perfect, and the Section 215 and Section 702 programs are now the subject of numerous recommendations intended to reform (or even to terminate) bulk data collection and retention.

## V. ANALYSIS OF PROPOSED REFORMS

In the aftermath of the publicity maelstrom surrounding Section 215 and Section 702, there have been many suggestions regarding how to amend the programs to better ensure legal compliance. The recommendations predominantly address U.S. constitutional law, but several are applicable to the right to privacy under human rights law.

### A. Presidential Policy Directive 28 (PPD-28)<sup>200</sup>

The most significant effort at reform of Section 215 and Section 702 comes from President Barack Obama. PPD-28 published general policy changes for an operational area traditionally classified and seldom discussed in public. While the President does not cite international human rights law as a motivation for the policy changes, some of the suggestions implicate the international right to privacy and improve upon the programs' compliance with international standards.

For example, the directive for the Assistant to the President and National Security Advisor and DNI to formally evaluate and review the programs on an annual basis<sup>201</sup> could have come straight out of *Liberty v. the United Kingdom*. As noted above, one of the fatal flaws with the U.K. program was the lack of review, where the program in *Weber* underwent a review every six months in order to validate its necessity.<sup>202</sup> Even though Section 702 already mandates a six-month review from the AG and the DNI,<sup>203</sup> the advantage to the review required by PPD-28 is that the results are reported directly to the President, so future political accountability is strengthened.

Section 4 of PPD-28, *Safeguarding Personal Information Collected Through Signals Intelligence*, answers international criticism regarding U.S. treatment of

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<sup>200</sup> Presidential Policy Directive 28, Signals Intelligence Activities, 2014 DAILY COMP. PRES. DOC. 31 (Jan. 17, 2014), available at <http://www.gpo.gov/fdsys/pkg/DCPD-201400031/pdf/DCPD-201400031.pdf> [hereinafter PPD-28].

<sup>201</sup> *Id.* at 3.

<sup>202</sup> See discussion *supra* Part II.F.1. and Part II.F.2.

<sup>203</sup> See, NSA PCLOB Submission, *supra* note 29, at 2.

foreigners' information.<sup>204</sup> From now on, U.S. SIGINT programs will include "appropriate safeguards" for all personal information, "regardless of the nationality of the individual."<sup>205</sup> Procedures for minimization, dissemination, and retention will apply equally to American and non-Americans alike.<sup>206</sup> This directive certainly lacks specificity, especially in identifying safeguards and procedures, but the fact that foreigners' information is placed nearly on par with that of American citizens is significant. Now, the NSA will have to satisfy the FISC that all information, not just that of U.S. persons, is being protected.

This policy harmonizes the NSA bulk data programs with the ICCPR in that it lessens any incongruity with respect to "national origin." The ICCPR makes no distinction between the citizen of the collecting state and those from other states, so a state should complement the treatment of its citizens and foreigners as much as possible.<sup>207</sup>

## B. Moving Storage of Metadata from NSA to Private Companies

President Obama established the President's Review Group on Intelligence and Communications Technologies in the aftermath of the Snowden disclosures.<sup>208</sup> The President tasked the Review Group to

assess whether, in light of advancements in communications technologies, the United States employs its technical collection capabilities in a manner that optimally protects our national security and advances our foreign policy while appropriately accounting for other policy considerations, such as the risk of unauthorized disclosure and our need to maintain the public trust.<sup>209</sup>

The President's Review Group provided numerous recommendations for improving bulk data collection, among them the suggestion to move data storage from the government (presumably the NSA) to private companies.<sup>210</sup> In this proposal,

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<sup>204</sup> PPD-28, *supra* note 200, at 4.

<sup>205</sup> *Id.*

<sup>206</sup> *Id.*

<sup>207</sup> See discussion *supra* Part II.B. For a discussion regarding responsibilities to foreigners under surveillance operations, see Marko Milanovic, *Foreign Surveillance and Human Rights, Part 1: Do Foreigners Deserve Privacy?*, EJIL: TALK!, Nov. 25, 2013, <http://www.ejiltalk.org/foreign-surveillance-and-human-rights-part-1-do-foreigners-deserve-privacy/>.

<sup>208</sup> Memorandum on Reviewing Our Global Signals Intelligence Collection and Communications Technologies, 2013 DAILY COMP. PRES. DOC. 567 (Aug. 12, 2013), at 1, *available at* <http://www.gpo.gov/fdsys/pkg/DCPD-201300567/pdf/DCPD-201300567.pdf>.

<sup>209</sup> *Id.*

<sup>210</sup> PRESIDENT'S REVIEW GRP. ON INTELLIGENCE AND COMM'NS TECHS., LIBERTY AND SECURITY IN A CHANGING WORLD: REPORT AND RECOMMENDATIONS OF THE PRESIDENT'S REVIEW GROUP ON INTELLIGENCE AND COMMUNICATIONS TECHNOLOGIES, 25, (Dec. 12, 2013), *available at* <http://www.>

private companies would hold the data until the government needs to query the database. Some would breathe easier knowing that the government did not hold the information, but ultimately this just increases the number of people who have access to the data. There would also be an increased variance in the treatment of data, as each company would undoubtedly have its own distinct capacities, resources, and policies, and there would be some security lapses in violation of the *Digital Rights Ireland's* requirement to ensure data protection.<sup>211</sup>

In order to fulfill the requirements of minimal access and data security, there is one location that makes sense above all others: the NSA. A top-secret facility with restricted access, a mature oversight culture, and a history of keeping data shielded from unauthorized audiences, the NSA provides the most secure location with the smallest number of potential viewers. One might argue that the Snowden disclosures demonstrate a lack of reliable security at the NSA, but while the programs themselves have become more public, the contents of the databases have not.<sup>212</sup> It may seem counterintuitive, but if the goal is data security and limited access to information, it would be hard to find a more fitting location than the NSA.<sup>213</sup>

One thing that the NSA should do with respect to data retention, however, is to provide more justification for the duration of the retention. The data retention period, two or five years,<sup>214</sup> may not per se violate legal standards, but the NSA should explain how the amount of time it holds the data is consistent with *Digital Rights Ireland* court. They may present the rationale for their retention criteria to the FISC in private, but the government does need to provide some explanation for the length of data retention. Operational demands may prohibit public disclosure of the criteria, but, if so, NSA should at least let the public know this is the case. Data retention policies would seem relatively minor and operationally unthreatening, especially compared to some of the program information already released.<sup>215</sup>

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[whitehouse.gov/sites/default/files/docs/2013-12-12\\_rg\\_final\\_report.pdf](http://whitehouse.gov/sites/default/files/docs/2013-12-12_rg_final_report.pdf) [hereinafter President's Review Group Report].

<sup>211</sup> Case C-293/12, *Digital Rights Ireland Ltd. v. Minister for Communications, Marine and Natural Resources and Others*, EU:C:2014:238, at para. 6, *available at* <http://curia.europa.eu>.

<sup>212</sup> *See* Schwartz, *supra* note 28.

<sup>213</sup> The Review Group's later recommendation to terminate the use of "for profit" corporations to conduct personnel investigations is strange in the context of this suggestion. President's Review Group Report, *supra* note 210, at 238. Why would the private sector be trusted to hold, manage, analyze and protect intelligence data when they are apparently not trusted enough to run relatively simple background checks? Note that President Obama has made the same proposal. *See*, Statement on the National Security Agency's Section 215 Bulk Telephony Metadata Program, 2014 DAILY COMP. PRES. DOC. 213 (Mar. 27, 2014), *available at* <http://www.gpo.gov/fdsys/pkg/DCPD-201400213/pdf/DCPD-201400213.pdf>.

<sup>214</sup> NSA PCLOB Submission, *supra* note 29, at 8.

<sup>215</sup> The Section 215 White Paper, *supra* note 11 and the NSA PCLOB Submission, *supra* note 29 reveal many more details about the metadata collection program.

### C. Reducing the Amount of “Hops” Permitted After a Query

Of all of the recommendations, the most directly applicable to the international standards for the right to privacy would be the President’s change in policy reducing the permissible number of hops from three to two.<sup>216</sup> The first hop, with those numbers directly in contact with someone communicating with a suspected terrorist, certainly justifies closer inspection. But the more hops that are permitted, the more attenuated the connection between the suspected terrorist identifier and an individual. The more hops one does, the less likely that those whose data one reviews are sufficiently connected to terrorism.

The more hops one allows, the less connected the operation becomes in relation to the suspect. Each additional hop increases the chances of accessing the data of those unconnected to the original identifier. By requiring additional review for additional hops, the process adds a layer of protection for those who do not fit the purpose of the Section 215 program. Operational efficacy, while compromised somewhat, is not completely undermined since investigators would have the opportunity to explore more hops by following established procedures to obtain additional authorization from the FISC. Former Director of NSA General Keith Alexander expressed the opinion that this would not unduly burden Section 215 operations.<sup>217</sup>

### D. Applying a Different Human Rights Framework

From the original ICCPR text, to human rights reports, and ultimately even to human rights courts, one can charitably characterize articulation and application of the right to privacy as imprecise. When legal analysis turns on an undefined standard of “arbitrary,” the results can be, well, arbitrary. With a crucial judgment such as “arbitrary” left open to interpretation, there will always be inconsistent conclusions regarding any surveillance programs. Those who find the Section 215 and Section 702 programs unacceptable from a policy perspective will no doubt disagree that the programs largely comply with international law, but in all honesty, Article 17 of the ICCPR sets the legal bar relatively low.

This debate over Article 17 is especially frustrating in that there is really only one competing consideration at play in bulk surveillance programs: national security. The arbitrary argument is always manifested by a debate between privacy and national security. UN Resolutions even manifest this tension, as the Security Council itself under Chapter VII has called upon member states to “find ways of intensifying and accelerating the exchange of operational information, especially regarding actions or movements of terrorist persons or networks” and the “use of

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<sup>216</sup> Press Release, The White House, Office of the Press Sec’y, FACT SHEET: The Administration’s Proposal for Ending the Section 215 Bulk Telephony Metadata Program (Mar. 27, 2014), *available at*: <http://www.whitehouse.gov/the-press-office/2014/03/27/fact-sheet-administration-s-proposal-ending-section-215-bulk-telephony-m>.

<sup>217</sup> See Schwartz, *supra* note 28.

communications technologies by terrorist groups.”<sup>218</sup> While not explicitly authorizing surveillance or bulk collection, the Security Council recognizes that terrorists are using new technology for their communications and that the prevention of future terrorist attacks depends upon states’ knowledge of these communications networks.<sup>219</sup> These are precisely the goals of both Section 215 and Section 702.

As that is the case, this article recommends utilizing a human rights framework that reflects this dynamic. Such a framework can be found in Article 19 of the ICCPR, the right to freedom of expression.<sup>220</sup> The ICCPR permits restrictions to the right of expression, but only those that are “provided by law and are necessary” for the protection of “national security or of public order...or of public health or morals.”<sup>221</sup> This, in essence, is the fight over Section 215 and Section 702.<sup>222</sup> The advantage to this approach is that it distills the debate into its most crucial competing interests: privacy and national security. As a standard, “arbitrary” merely restates the national security debate in other terms. Those who prioritize privacy over national security will inevitably find Section 215 and 702 “arbitrary,” and vice-versa.

Recognizing the shortcomings in the current standard, Frank LaRue advocates for a new standard that requires surveillance measures to be “strictly and demonstrably necessary to achieve a legitimate aim.”<sup>223</sup> Jordan Paust also looks to strengthen the right to privacy, but he looks to the European Convention on Human Rights<sup>224</sup> to craft a new protocol where surveillance programs must be “necessary in a democratic society in the interests of national security.”<sup>225</sup> Both standards certainly clarify the privacy right, but one downside to these approaches (including this article’s) is that they focus on the controversy of the moment to the exclusion of perhaps even greater threats to privacy rights.

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<sup>218</sup> S.C. Res. 1373, para. 3.(a), U.N. Doc. S/RES/1373 (Sept. 28, 2001), available at [http://www.un.org/en/ga/search/view\\_doc.asp?symbol=S/RES/1373\(2001\)](http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/1373(2001)). Peter Marguilles astutely points out tensions between UN positions on the right to privacy and earlier Security Council Resolutions that stress the importance of anti-terrorism measures. See Marguilles, *supra* note 7, at 2154-55.

<sup>219</sup> One could argue that, according to the UN at least, undermining terrorist exploitation of the internet is even more important than internet privacy considerations as Security Council Resolutions acting under Article VII of the UN Charter are binding to member states (Article 25, UN Charter) and General Assembly Resolutions are not (Article 14, UN Charter).

<sup>220</sup> Under the ICCPR, the right to freedom expression “shall include the freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers, either orally, or in writing or in print, in the form of art, or through any other media of his choice,” ICCPR, *supra* note 74, at art. 19.2.

<sup>221</sup> *Id.* at art. 19.3. Note that Article 19.3(a) includes a requirement “for the respect of the rights or reputations of others,” but this requirement is not germane to the right to privacy. *Id.*

<sup>222</sup> Article 19 should not be imported in its entirety, as the protection of “morals” would certainly not be compelling enough for a state to justify bulk data collections.

<sup>223</sup> Special Rapporteur Report, *supra* note 100, at para. 83(b).

<sup>224</sup> See, European Convention on Human Rights, *supra* note 115.

<sup>225</sup> Jordan J. Paust, *Can You Hear Me Now?: Private Communication, National Security, and the Human Rights Disconnect*, 15 CHI. J. INT’L L. 612, 649 (2015).

Not every privacy threat comes from surveillance programs. Governments collect, store and disseminate medical information,<sup>226</sup> DNA,<sup>227</sup> and even their citizens' credit worthiness,<sup>228</sup> but these efforts have inspired nary a whisper from privacy advocates or the media.<sup>229</sup> Article 17 of the ICCPR does not only protect citizens from surveillance programs; all government action is covered.<sup>230</sup> If the legal standard is set too high, we risk outlawing beneficial programs that provide a great service to society. Financial and health databases certainly benefit society, but whether or not they are "strictly and demonstrably necessary" as required by Frank LaRue is debatable.<sup>231</sup> They also contribute nothing to national security. The programs, could, however, qualify under a "public order...[or] public health"<sup>232</sup> provision, adding more support for applying Article 19's formula to the right to privacy.

What then to make of traditional foreign intelligence? Amid the outcry over the tapped phones of politicians, foreign intelligence collection has become the *bête noire* of the human rights community.<sup>233</sup> This perspective completely misses the larger contributions of foreign intelligence operations, especially in the human rights arena. The intelligence community needs to support governments in their efforts to either thwart or prosecute human rights violations such as belligerent invasions in violation of international law<sup>234</sup> and human rights abuses.<sup>235</sup> Intelligence operations

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<sup>226</sup> See Peter Roff, *Big Brother: Obamacare Looks to Collect Private Medical Info*, U.S. NEWS AND WORLD REPORT, July 28, 2011, <http://www.usnews.com/opinion/blogs/peter-roff/2011/07/28/big-brother-obamacare-looks-to-collect-private-medical-info>.

<sup>227</sup> See Dominic Casciani, *Q&A: The National DNA Database*, BBC NEWS, May 7, 2009, [http://news.bbc.co.uk/2/hi/uk\\_news/7532856.stm](http://news.bbc.co.uk/2/hi/uk_news/7532856.stm).

<sup>228</sup> See Richard Pollock, *New Federal Database Will Track Americans' Credit Ratings, Other Financial Information*, WASH. EXAMINER, May 30, 2014, <http://washingtonexaminer.com/new-federal-database-will-track-americans-credit-ratings-other-financial-information/article/2549064>.

<sup>229</sup> When considering the character of the information contained in such databases, it is difficult to justify the obsession with a database of old telephone records in one of the most secure facilities in the world. These other databases contain infinitely more sensitive information, but their operation and maintenance are not governed by anything remotely as strict as the FISC nor is the data stored in a facility as secure as NSA.

<sup>230</sup> ICCPR, *supra* note 74, at art. 17.

<sup>231</sup> Special Rapporteur Report, *supra* note 100, at para. 83(b).

<sup>232</sup> ICCPR, *supra* note 74, at art. 19.

<sup>233</sup> Some argue that pursuing foreign intelligence is not in and of itself a laudable end. See, Pitter, *supra* note 5, at 17 (arguing that the definition of "foreign intelligence" under FISA should be amended to disallow "collection of foreign intelligence information merely because it aids in the conduct of foreign affairs"). Such reasoning based on "international law" is odd as it completely disregards centuries of established state practice.

<sup>234</sup> See Adam Entous, Julian E. Barnes, & Siobhan Gorman, *U.S. Scurries to Shore Up Spying on Russia*, WALL ST. J., Mar. 24, 2014, <http://online.wsj.com/news/articles/SB10001424052702304026304579453331966405354>.

<sup>235</sup> See Joby Warrick, *More Than 1,400 Killed in Syrian Chemical Weapons Attack, U.S. Says*, WASH. POST, Aug. 30, 2013, [http://www.washingtonpost.com/world/national-security/nearly-1500-killed-in-syrian-chemical-weapons-attack-us-says/2013/08/30/b2864662-1196-11e3-85b6-d27422650fd5\\_story.html](http://www.washingtonpost.com/world/national-security/nearly-1500-killed-in-syrian-chemical-weapons-attack-us-says/2013/08/30/b2864662-1196-11e3-85b6-d27422650fd5_story.html).

to fulfill these goals arguably fail the legal tests above, but they are crucial for the development of human rights and international law.

Perhaps the addition of one final clause is in order: at the end of Article 19 one can insert, "...or in other efforts protecting the rights enshrined in this convention."<sup>236</sup> This approach would echo the UN Human Rights Committee's requirement that interference of the right to privacy must "comply with the provisions, aims and objectives of the covenant."<sup>237</sup> Intelligence operations supporting the international human rights contained in the ICCPR would therefore be legal. The proportionality requirement from *Digital Rights Ireland* would also protect the right to privacy and keep it from being automatically subordinated to other rights from the ICCPR. It may not be fashionable to say so, but we must maintain a legal basis for international intelligence gathering, even if the best method for doing so is bulk data collection.

## VI. CONCLUSION

Despite the numerous claims of violating international law, when one looks closer at both of the Section 702 and Section 215 programs a different conclusion emerges. The technology may be daunting, and they may present the government with entirely new capabilities for monitoring its citizens,<sup>238</sup> but increased capability does not equate with violations of the law.<sup>239</sup> These programs narrowly tailor their targets, and any interference only truly occurs once information in a database responds to an identifier. Even applying the expansive view of privacy from the European Courts fails to change the outcome. While reasonable minds can conclude that the international right to privacy has been violated, an honest review of the issues acknowledges that significant credit is due the NSA and the FISC. Section 215 and Section 702 are not the blatant violations of rights that human rights groups

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<sup>236</sup> Under this article's formula, restrictions to privacy would be allowed when, "required by law and are necessary for the protection of national security, public order, public health or in other efforts protecting the rights enshrined in this convention."

<sup>237</sup> See ICCPR Art. 17 General Comment, *supra* note 91, at para. 3.

<sup>238</sup> Some claim that such capabilities have produced a "golden age of surveillance." See, Alan Rusbridger, *What Now for the Surveillance State?*, THE GUARDIAN, Dec. 2, 2013, <http://www.theguardian.com/world/2013/dec/02/alan-rusbridger-surveillance-state-spies-gchq-nsa>.

<sup>239</sup> *But see* U.S. v. Jones, 132 S. Ct. 945 (2012), where the concurring opinions from Justices Sotomayor and Alito raised the possibility that technological change may alter the legal calculus for future privacy determinations under U.S. Constitutional Law. Justice Sotomayor thought the third party disclosure approach from *Smith v. Maryland*, 442 U.S. 735 (1979), "ill suited to the digital age, in which people reveal a great deal of information about themselves to third parties in the course of carrying out mundane tasks." *Jones*, 132 S. Ct. 945 at 957. Justice Alito argues that the long-term surveillance capabilities of a GPS tracker contradict traditional notions of privacy: "society's expectation has been that law enforcement agents and others would not—and indeed, in the main, simply could not—secretly monitor and catalogue every single movement of an individual's car for a very long period." *Id.* at 964.



and European governments have claimed, but compliance with human rights norms would be strengthened with the adoption of measures discussed above.

Simply because a program complies with the international right to privacy does not mean that discussions will end there. As currently articulated, the right to privacy is imprecise and easily malleable. Courts and commentators decry the potential for abuse in surveillance programs, but other government data programs pose similar threats to our privacy. When something is “subject to abuse,” a government must establish oversight and institutions that will ensure that abuse is minimized and that operators who may be tempted to exceed legal limits are kept in check. That is precisely what has been done with the Section 215 and Section 702 programs. The programs can be improved, but the system in place deserves credit for largely complying with international human rights law despite an arguable lack of a legal or policy requirement to do so.



“50 YEARS LATER...STILL INTERPRETING THE MEANING  
OF ‘BECAUSE OF SEX’ WITHIN TITLE VII AND WHETHER IT  
PROHIBITS SEXUAL ORIENTATION DISCRIMINATION”

*MAJOR VELMA CHERI GAY\**

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\* Judge Advocate, United States Air Force. Presently assigned as Chief, Administration Litigation Branch (East), Labor Law Field Support Center, Joint Base Andrews, Maryland. L.L. M. 2014, The George Washington University Law School; J.D., 2001, St. Thomas University School of Law; B.A., 1996, Florida State University. Member of the Florida Bar and the Supreme Court of the United States bar. This article was submitted in partial completion of the Masters of Law requirements of The George Washington University Law School directed by Charles Craver, Freda H. Alverson Professor of Law. I would like to thank two of my mentors, Colonel Peter Marksteiner, for your motivation, encouragement, brilliant suggestions and continuous positivity and Colonel Bryan Watson for all of your support and constant encouragement for me to strive toward my goal.

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## I. INTRODUCTION

I can remember sitting at my grandparents' kitchen table in Fort Lauderdale, Florida, on a Saturday afternoon, looking for something to get into. I was fumbling with pieces of paper that were in front of me and came across a personal letter addressed to my grandfather. The letter did not have my name on it and I knew I was not supposed to read it, but at the time, I was around ten years old and very inquisitive, (some would call it nosy) so I read the letter anyway. As I began to read the letter, something told me to stop reading it because the contents were certainly a personal family matter and none of my business; needless to say, I continued to read it. The letter was from my Aunt, my grandfather's oldest daughter. I did not see my aunt that often because after finishing college, she joined the Peace Corps and moved across the country to California, where she presently resides. She wrote to tell my grandfather that she was a lesbian and she realized her sexual orientation back when she was in high school. My aunt explained her sexual orientation was the reason she moved so far away from the family, because she was not ready to tell everyone and she was not ready to deal with the repercussions, whatever they may be. That was 27 years ago.

Although I remember opening that letter, and reading it word for word, I cannot say I knew exactly what everything meant. At ten years old, all I knew was she was still my aunt, and I loved her just the same. I also remember that no one in my family ever treated my aunt any differently because of her sexual orientation, and our love for her never changed. That is not how everyone reacts to finding out that his or her family member, friend or loved one, is homosexual.<sup>1</sup> Whether the difference is because a person is not the same sex, national origin, color, race or religion; the person is unlike them, and therefore he or she may be treated differently. The idea that "all men are created equal," as we first heard from Thomas Jefferson,<sup>2</sup> is a great concept; but, in what ways are we created equal? One could argue that we are equal genetically, but most people would probably admit that we all have different levels of ability and opportunity. Economically, socially, physically, intellectually, politically, it cannot be held that we all start out on the same playing field. But Jefferson

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<sup>1</sup> The only federal definition for "homosexual" comes from the repealed discriminatory Don't Ask, Don't Tell policy, under which a "homosexual" is defined as an individual who "attempts to engage in, has a propensity to engage in, or intends to engage in homosexual acts." Such acts include "any bodily contact, actively undertaken or passively permitted, between members of the same sex for the purpose of satisfying sexual desires." 10 U.S.C.A. §§ 654 (f)(1), 1 (f)(3)(A) (1993) *repealed by* Don't Ask, Don't Tell Repeal Pub. L. No. 111-321, 124 Stat. 3515. Lesbians and bisexuals are encompassed within this definition. 10 U.S.C.A. §§ 654 (f)(1)-(2).

<sup>2</sup> The opening of the United States Declaration of Independence states:

We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the Pursuit of Happiness. That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed.

THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776).

meant that we all were born with the same equal rights. Our government, through various laws, should continue to seek to equalize the systematic inequalities that arise from birth.<sup>3</sup> This need for equality comes from the observation that although we all have the same equal rights, some people are born with unequal opportunities. In the workplace, what should matter is work performance, not race, religion, gender, skin color or your sex or sexual orientation.<sup>4</sup>

Imagine, for a moment, if we lived in a world where employers made employment decisions based only on our qualifications and performance, as it relates to our jobs. Would that not be a great place to live? If we did not have to worry about an employer not hiring someone based solely on his or her race, religion, sex, and national origin? But, we don't live in that world, and that is exactly why the Civil Rights Act of 1964 (Title VII)<sup>5</sup> was enacted, to prevent employers from making adverse employment decisions for any reason other than our performance.

It is difficult to completely eradicate the biases of people because—well, they are people. Some may prefer to work around quiet introverts; others may like lively chatter in the office to break up what might otherwise be pretty monotonous. You may not prefer to be seated next to someone who wants to play bagpipe music all day on a CD player. I may not want to share an office with someone who eats sardines for every meal. In a purely definitional sense, these preferences may cause us to “discriminate.” Although it is difficult to eradicate all types of discrimination in the workplace, a workplace free from illegal discrimination would be ideal. The reason this is important is because, without employment, people cannot afford the basic necessities such as food, clothing and shelter; they cannot obtain quality education or afford health care. Individuals should be afforded the equal opportunity to earn a living and to provide for themselves and their dependents. Lesbian, Gay, Bisexual and Transgender (LGBT) employees continue to face widespread discrimination and harassment in the workplace. Studies show that anywhere from 15 percent to 43 percent of lesbian, gay, and bisexual (LGB) people have experienced some form of discrimination and harassment in the workplace.<sup>6</sup> Specifically, 8 percent to 17 percent of LGBT workers report being passed over for a job or fired because of their sexual orientation or gender identity; 10 percent to 28 percent received a

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<sup>3</sup> See The Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27 (1866) (current version at 42 U.S.C. § 1982). The purpose of the Act was to insure that the abolition of slavery was accomplished in fact as well as in theory and to implement protections afforded by the thirteenth amendment.

<sup>4</sup> “Sexual Orientation” is the term used when referring to an individual’s physical and/or emotional attraction to the same and/or opposite gender. Heterosexual, bisexual, and homosexual are all examples of sexual orientations. A person’s sexual orientation is different from a person’s gender identity. HUMAN RIGHTS CAMPAIGN, <http://www.hrc.org/resources/entry/sexual-orientation-and-gender-identity-terminology-and-definitions> (last visited February 4, 2014).

<sup>5</sup> Civil Rights Act of 1964, 42 U.S.C. § 2000e (prohibits an employer from discriminating against an employee because of race, color, religion, sex, or national origin).

<sup>6</sup> Christy Mallory and Brad Sears, *Documented Evidence of Employment Discrimination & Its Effects on LGBT People*, THE WILLIAMS INSTITUTE, July 2011), available at <http://williamsinstitute.law.ucla.edu/wp-content/uploads/Sears-Mallory-Discrimination-July-20111.pdf>.

negative performance evaluation or were passed over for a promotion because they were LGBT; and 7 percent to 41 percent of LGBT workers encountered harassment, abuse, or antigay vandalism on the job.<sup>7</sup>

To be clear, not all forms of discrimination are wrong or illegal. However, certain types of workplace discrimination are especially egregious because it threatens the livelihood and economic survival of American workers and their families. Employers should be focused on skill and talent, not on the race, religion, sex, national origin or sexual orientation of an employee. Vandy Beth Glenn of Atlanta, Georgia, lost her job with the Georgia General Assembly after her boss fired her for being transgender.<sup>8</sup> Brook Waits of Dallas, Texas, was immediately let go after her manager saw a picture on Waits's cell phone of her and her girlfriend kissing on New Year's Eve.<sup>9</sup> Officer Michael Carney was denied reinstatement as a police officer in Springfield, Massachusetts, because he told his supervisors he was gay.<sup>10</sup> These are just a few examples but serve as evidence that LGBT people encounter pervasive discrimination and harassment on the job on a day-to-day basis.

The U.S. Supreme Court has not directly ruled on this issue, but it is interpreted within employment case law that Title VII legislation does not prohibit discrimination on the basis of sexual orientation.<sup>11</sup> Why is it still okay for an employer to fire or demote an employee because he or she is lesbian, gay, bisexual or transgender? Since Title VII was enacted, a variety of bills have been offered to either amend Title VII or to enact a freestanding statute that would prohibit discrimination on the basis of sexual orientation.<sup>12</sup> None of these efforts have succeeded. Therefore, private sector employers who openly discriminate on the basis of sexual orientation are not currently subject to liability under federal law.<sup>13</sup> The public employers who discriminate on the basis of sexual orientation are not totally off the hook; they have to deal with federal constitutional challenges under equal protection and due

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<sup>7</sup> *Id.*

<sup>8</sup> *H.R. 3017, Employment Non-Discrimination Act of 2009: Vandy Beth Glenn*, YouTube, uploaded by EdLabor Democrats, September 23, 2009, available at <http://www.youtube.com/watch?v=YuU5d4-s8BM>.

<sup>9</sup> *Employment Non Discrimination Act Hearing: Brooke Waits*, YouTube, [http://www.youtube.com/watch?v=Wq\\_4sGw1HLg](http://www.youtube.com/watch?v=Wq_4sGw1HLg) (uploaded September 25, 2007).

<sup>10</sup> *Employment Non Discrimination Act Hearing: Michael Carney*, YouTube, [http://www.youtube.com/watch?v=JlvNHPKKY\\_U&feature=relmfu](http://www.youtube.com/watch?v=JlvNHPKKY_U&feature=relmfu) (uploaded September 25, 2007).

<sup>11</sup> *See, e.g.,* *Simonton v. Runyon*, 232 F.3d 33, 35 (2d. Cir. 2000) ("Title VII does not prohibit harassment or discrimination because of sexual orientation."); *Higgins v. New Balance Athletic Shoe, Inc.*, 194 F.3d 252, 259 (1st Cir. 1999) ("Title VII does not proscribe harassment simply because of sexual orientation."); *Williamson v. A.G. Edwards & Sons, Inc.*, 876 F.2d 69, 70 (8th Cir. 1989) ("Title VII does not prohibit discrimination against homosexuals.").

<sup>12</sup> *See infra* note 75.

<sup>13</sup> A number of state legislatures have enacted laws applying to both the public and private sector that prohibit sexual orientation-based discrimination in employment. *See* discussion *infra* Part IV.

process guarantees of the Fifth and Fourteenth Amendments, but these challenges are rarely successful.<sup>14</sup>

In response to the lack of protection from the federal law, many states, counties, and municipalities have enacted laws extending civil rights coverage to homosexual men and women.<sup>15</sup> Despite these local advances, gays and lesbians have little protection from discrimination in the workplace. There is, and there should be, a continuous struggle to change employment practices through legal regulation. Regulations are necessary to define the boundaries between appropriate reasons for an employer's conduct and illegal use of prejudicial criteria. Without additional regulation, we will continue to see the effects of blatant discrimination. Research confirms that families headed by same-sex couples suffer from significant economic insecurities that are likely related to employment discrimination.<sup>16</sup> According to Census data, families headed by same-sex couples make on average \$15,500 less per year than families headed by opposite-sex couples.<sup>17</sup> Likewise, children being raised by same-sex parents are twice as likely to live in poverty as children being raised by married opposite-sex parents.<sup>18</sup> With high levels of workplace discrimination, LGBT families face harsh employment and economic insecurities. This article discusses how courts have distinguished between discrimination claims based on biological sex (i.e., femaleness and maleness)<sup>19</sup> and gender-nonconformity (i.e., femininity and masculinity)<sup>20</sup> from claims based on sexual orientation, finding the latter claims not actionable under Title VII while the former is a form of redress under Title VII.<sup>21</sup>

This article will further focus on the notion that Title VII's "because of sex" provision should protect both heterosexuals and homosexuals from workplace discrimination. This article will also discuss the Employment Non-Discrimination Act, its history, and the current status of the law. The last section will analyze successes and failures of the specific types of employment discrimination claims brought on the basis of sexual orientation and give suggestions on how plaintiffs could bring successful suits in federal court.

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<sup>14</sup> Eric A. Roberts, *Heightened Scrutiny under the Equal Protection Clause: A Remedy to Discrimination Based on Sexual Orientation*, 42 *DRAKE L. REV.* 485 (1993); *but see infra* note 186 and accompanying text.

<sup>15</sup> *See* discussion *infra* Part VI.

<sup>16</sup> Movement Advancement Project, Family Equality Council, and Center for American Progress, *All Children Matter: How Legal and Social Inequalities Hurt LGBT Families* (2011), available at <http://action.familyequality.org/site/DocServer/AllChildrenMatterFullFinal10212011.pdf?docID=2401>.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Holloway v. Arthur Andersen & Co.*, 566 F.2d 659, 662 (9th Cir. 1977).

<sup>20</sup> *See* discussion *infra* Part III(a).

<sup>21</sup> *See supra* note 11.

## II. BACKGROUND

### A. Historical Background of Title VII

To understand the history of the “because of sex” provision of Title VII, it is important to trace the history of Title VII. Title VII can be traced back to the Unemployment Relief Act of 1933, which provided “[t]hat in employing citizens for the purpose of this Act, no discrimination shall be made on account of race, color, or creed.”<sup>22</sup> However, during that time, there were no real enforcement mechanisms in the Act, and the ineffectiveness of the regulations was shown by the exclusion of blacks from new jobs created by defense industries prior to World War II.<sup>23</sup> Additionally, black leaders pressed President Roosevelt to sign a meaningful Executive Order that would ban discrimination in these industries.<sup>24</sup> As a result, on June 25, 1941, President Roosevelt signed Executive Order 8802, which established the Fair Employment Practice Committee (FEPC) with the powers to investigate complaints of discrimination and to take appropriate steps.<sup>25</sup>

On March 6, 1961, President Kennedy signed into law an Executive Order requiring all government contractors to pursue affirmative action policies in the hiring of minorities and establishing the President’s Committee on Equal Employment Opportunity.<sup>26</sup> In 1963, President Kennedy recognized the problems of prejudice in the field of employment, where individuals were being fired or not hired based solely on characteristics such as skin color and gender.<sup>27</sup>

For almost the entire life of the bill, Title VII only covered race, religion, and nation origin and did not include sex within its scope.<sup>28</sup> It was during these hearings

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<sup>22</sup> Act of March 31, 1933 (Unemployment Relief Act), Pub. L. No. 73-5, 48 Stat. 22.

<sup>23</sup> See CIVIL RIGHTS ACTS, THE ORIGINS OF CIVIL RIGHTS LEGISLATION, THE RECONSTRUCTION ERA, THE EMERGENCE OF JIM CROW, available at <http://encyclopedia.jrank.org/articles/pages/6065/Civil-Rights-Acts.html> (last visited May 7, 2014).

<sup>24</sup> *Id.*

<sup>25</sup> Exec. Order No. 8802, 6 Fed. Reg. 1941, 3109 (1941). In 1943, the authority of the Executive Order was extended to all federal contractors, but its enforcement power was limited to negotiation and moral suasion. The order expired in June 1946.

<sup>26</sup> Jo Freeman, *How “Sex” Got Into Title VII: Persistent Opportunism as a Maker of Public Policy*, 9 LAW & INEQ. 163 (1991), available at <http://www.jofreeman.com/lawandpolicy/titlevii.htm>. In 1956, the National Woman’s Party persuaded the House to include sex discrimination in the jurisdiction of the proposed Civil Rights Commission. The mechanism was a floor amendment made by Rep. Gordon McDonough (R. Cal) at the request of his campaign chair, Mary Sinclair Crawford.

<sup>27</sup> *Id.* (quoting PRESIDENT KENNEDY, SPECIAL MESSAGE TO THE CONGRESS ON CIVIL RIGHTS AND JOB OPPORTUNITIES, 248 PUB. PAPERS 483, 488-91 (June 19, 1963)) (African Americans were more than twice as likely to be unemployed as the general populace and proposed federal responses to correct the problem).

<sup>28</sup> Robert Stevens Miller, Jr., *Sex Discrimination and Title VII of the Civil Rights Act of 1964*, 51 MINN. L. REV. 877, 880 (1967).



that the idea of adding “sex” to the prohibited discrimination was proposed by Rep Howard Smith and other members of the House of Representatives’ Rules Committee.<sup>29</sup> It is believed that Rep Smith proposed the addition of “sex” to Title VII as a political strategy because adding “sex” was a perceived threat to the bill.<sup>30</sup> Although Title VII was initially aimed at ending discrimination against African-Americans,<sup>31</sup> Congress ended up drafting Title VII with the broader purpose of eliminating all forms of workplace discrimination, including “sex” discrimination.<sup>32</sup> It is difficult to determine what was in the mind of Congress because the House debate on the addition of “sex” to Title VII is only nine pages long.<sup>33</sup>

Congress passed Title VII to remove discrimination in employment because it hindered productive efficiency and equity.<sup>34</sup> Title VII Section 703(a)(1),<sup>35</sup> provides, in relevant part:

It shall be an unlawful employment practice for an employer-

(1) to fail or refuse to hire or to discharge any individual, or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely

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<sup>29</sup> See 110 CONG. REC. 2,804-05 (1964).

<sup>30</sup> See, e.g., Deborah Epstein, *Can a “Dumb Ass Woman” Achieve Equality in the Workplace? Running the Gauntlet of Hostile Environment Harassing Speech*, 84 GEO. L.J. 399, 409 n.37 (1996) (asserting that the amendment adding the “sex” provision language to Title VII was proposed by anti-civil rights, conservative legislators in an attempt to defeat the bill entirely).

<sup>31</sup> See Deborah N. McFarland, *Beyond Sex Discrimination: A Proposal for Federal Sexual Harassment Legislation*, 65 Fordham L. Rev. 493 n.31 (1996) (citing 110 CONG. REC. 2556 (1964) (statement of Rep. Emanuel Celler) (“You must remember that the basic purpose of Title VII is to prohibit discrimination in employment on the basis of race or color.”); *id.* at 2581 (statement of Rep. Edith Green) (“[L]et us not add any amendment that would place in jeopardy in any way our primary objective of ending that discrimination that is most serious, most urgent, most tragic, and most widespread against the Negroes of our country.”))

<sup>32</sup> See Deborah N. McFarland, *Beyond Sex Discrimination: A Proposal for Federal Sexual Harassment Legislation*, 65 Fordham L. Rev. 493 n.31 (1996) (citing 110 CONG. REC. 6548 (1964) (statement of Rep. Humphrey) (“Title VII is designed to give Negroes and other minority members a fair chance to earn a livelihood and contribute their talents to the building of a more prosperous America.”); *id.* at 2583 (statement of Rep. Kelly) (“Let us recognize that there are many minorities in this country.... For their opportunity, we seek to secure these rights under this bill....”)).

<sup>33</sup> See 110 CONG. REC. 2,577-84 (1964).

<sup>34</sup> *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 801 (1973) (“The broad, overriding interest, shared by employer, employee and consumer, is efficient and trustworthy workmanship assured through fair and racially neutral employment and personnel decisions.”).

<sup>35</sup> 42 U.S.C. § 2000e-2.

affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.<sup>36</sup>

Later the non-discrimination principle was extended to other classifications.<sup>37</sup>

Within Title VII, Congress created the Equal Employment Opportunity Commission (EEOC) to resolve claims and disputes of discriminatory employment practices through compliance, informal voluntary agreements, and informal voluntary employment practices.<sup>38</sup> To enforce these laws, the EEOC has the authority to investigate accusations of discrimination against covered employers that are submitted by an applicant or employee who believes that unlawful discrimination has occurred.<sup>39</sup> Under Title VII, any person who wants to file a lawsuit in court regarding discrimination he or she faced, instead of going directly to court, the person must first file a charge with the EEOC.<sup>40</sup>

Although the term "sex" was included in Title VII, it is uncertain whether members of Congress fully realized or considered the implications of Title VII's sex discrimination provision at the time it was passed.<sup>41</sup> This uncertainty surrounding Congress's intentions is what forced administrative agencies to develop their own guidelines.<sup>42</sup> In sum, there is scant legislative history of Title VII to determine exactly what Congress intended to include in its prohibition of workplace discrimination "because of sex" and the small history that does exist, fails to enlighten.<sup>43</sup> Congress

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<sup>36</sup> *Id.* § 2000e-2(a)(1).

<sup>37</sup> *See, e.g.*, Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621-634; Americans with Disabilities Act of 1990, 42 U.S.C. § 12111 (2009).

<sup>38</sup> 42 U.S.C. § 2000e-4. The Equal Employment Opportunity Commission (EEOC) is an independent and bipartisan federal agency that enforces federal laws that make it illegal to discriminate in the workplace. Five Commissioners, who are appointed by the President and confirmed by the Senate, govern it. The laws the EEOC enforce prohibit discrimination on a variety of personal characteristics, including race, color, religion, sex, national origin, age, disability and genetic information. To enforce these laws, the EEOC has the authority to investigate accusations of discrimination against covered employers that are submitted by an applicant or employee who believes that unlawful discrimination has occurred. 42 U.S.C. § 2000e; 29 U.S.C.A. § 206(b); 29 U.S.C. §§ 621-634 (Age Discrimination in Employment Act); 42 U.S.C. §§ 12111-12117 (Americans with Disabilities Act).

<sup>39</sup> *See supra* note 38 and accompanying text.

<sup>40</sup> *See supra* note 38 and accompanying text.

<sup>41</sup> *See* Mary C. Manemann, *The Meaning of "Sex" in Title VII: Is Favoring an Employee Lover a Violation of the Act?*, 83 *Nw. U. L. Rev.* 612, 639 (1989) (Congress provided little guidance regarding what constitutes discrimination because of sex).

<sup>42</sup> Guidelines on Discrimination Because of Sex, 30 *Fed. Reg.* 14,926 (Dec. 2, 1965) (codified as amended at 29 C.F.R. Part 1604) (listing the Equal Employment Opportunity Commission's interpretations of Title VII's prohibitions on discrimination in employment because of sex).

<sup>43</sup> When Representative Smith proposed the sex amendment, he did not also propose to statutorily define "sex." Instead, he merely inserted the word "sex" in each place that the other protected categories were listed. *See* Miller, *supra* note 28, at 882.

amended the Civil Rights Act in 1972 and 1991;<sup>44</sup> however, these amendments have likewise not explained the meaning or intent behind the inclusion of “sex” in Title VII. Therefore, courts have been forced to develop its own doctrines to determine the scope of Title VII’s prohibition on sex discrimination.

## B. Proving a Case of “Sex Discrimination” Under Title VII

Since Title VII’s enactment, several different theories of sexual discrimination have developed, including disparate treatment,<sup>45</sup> disparate impact<sup>46</sup> and sexual harassment.<sup>47</sup> In most employment discrimination cases, the theory is that employers rarely leave evidence of their discriminatory motives or solid proof of employment discrimination. Therefore, to prove a case under Title VII, courts have created a burden-shifting framework that makes it easier for plaintiffs to succeed on an employment discrimination claim.<sup>48</sup> Under the *McDonnell Douglas* burden-shifting framework, to make out a *prima facie* case under Title VII, plaintiffs must establish (1) membership in a protected class; (2) competency to perform their job; (3) that their employer took an adverse employment action against them; and (4) the existence of circumstances supporting an inference of discrimination.<sup>49</sup> After a plaintiff establishes a *prima facie* Title VII case, the burden shifts to the employer to provide a “legitimate, non-discriminatory reason” for the employment decision at issue.<sup>50</sup> Once the employer satisfies this requirement, the burden shifts back to the plaintiff to prove by a preponderance of the evidence that the employer’s “proffered reasons [were] pretextual.”<sup>51</sup> Although this burden-shifting framework makes it easier for plaintiffs to prove their case, it is key for a plaintiff to first establish membership in a protected class.

### 1. Disparate Treatment/Disparate Impact

Disparate treatment sex discrimination involves overt or intentional discrimination and occurs when an employer treats one individual (or group) differently from another because of the individual’s—or group’s—sex.<sup>52</sup> Under a disparate treatment theory, a plaintiff must show that he or she was exposed to “disadvanta-

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<sup>44</sup> See Civil Rights Act of 1991, Pub. L. No. 102-166, Title I, §§ 105(a), 106, 107(a), 108, 105 Stat. 1074-76 (1991); Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, §§ 8-14, 86 Stat. 109, 109-13 (1972).

<sup>45</sup> See discussion *infra* Part II(b)(i).

<sup>46</sup> See discussion *infra* Part II(b)(i).

<sup>47</sup> See discussion *infra* Part II(b)(ii).

<sup>48</sup> See *supra* note 34.

<sup>49</sup> *McDonnell Douglas*, 411 U.S. at 802.

<sup>50</sup> *Texas Dep’t of County Affairs v. Burdine*, 450 U.S. 248, 254 (1981).

<sup>51</sup> See *Burdine*, 450 U.S. at 256.

<sup>52</sup> 15 Am. Jur. 2d. *Job Discrimination* § 5.

geous terms or conditions of employment that the other sex as not.”<sup>53</sup> Conversely, disparate impact sex discrimination can result from facially neutral employment policies and practices, which are applied evenhandedly to all employees, but which have the effect of disproportionately excluding either women or men from employment opportunities.<sup>54</sup> Unlike disparate treatment claims, disparate impact claims do not involve intentional discrimination, which means the plaintiff is not required to prove that he or she is the victim of discriminatory motive or discriminatory intent.<sup>55</sup> For example, testing a particular skill of women only is disparate treatment. On the other hand, testing all applicants and using the test results to eliminate women disproportionately is disparate impact. In response, the employer must show a legitimate reason for the practice.<sup>56</sup> Therefore, the disparate impact doctrine under Title VII prohibits employers from using a facially neutral employment practice that has an unjustified adverse impact on members of a protected class.<sup>57</sup>

## 2. Sexual Harassment

Sexual harassment is simply one particular form of sex-based discrimination; however, Title VII does not contain any textual provision referring expressly to sexual harassment. In 1976, for the first time since Title VII’s enactment a federal district court recognized that Title VII allowed a sexual harassment cause of action.<sup>58</sup> In 1980, to further support that sexual harassment constitutes a form of sex discrimination actionable under Title VII, the EEOC issued guidelines recognizing that Title VII prohibits sexual harassment in the workplace<sup>59</sup> Then, finally, in 1986, the Supreme Court confirmed that sexual harassment could form the basis of a sex discrimination claim under Title VII.<sup>60</sup>

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<sup>53</sup> Anthony E. Varona & Jeffrey Monks, *En/gendering Equality: Seeking Relief Under Title VII Against Employment Discrimination Based on Sexual Orientation*, 7 WM. & MARY J. WOMEN & L. 67, 72-73 (2000).

<sup>54</sup> 15 Am. Jur. 2d. *Job Discrimination* § 6.

<sup>55</sup> See *Raytheon Co. v. Hernandez*, 540 U.S. 44, 52 (2003); *Puffer v. Allstate Ins. Co.*, 675 F.3d 709, 716 (7th Cir. 2012).

<sup>56</sup> See *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

<sup>57</sup> *Id.*

<sup>58</sup> See *William v. Saxbe*, 413 F. Supp. 654, 657 (D.C. Cir. 1976) (the retaliatory actions of a male supervisor, taken because the female employee had declined his sexual advances, constituted sex discrimination under Title VII).

<sup>59</sup> 29 C.F.R. § 1604.11(a) (1980). The guidelines defined sexual harassment as the following:

Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature...when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual’s employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or (3) such conduct has the purpose or effect of unreasonably interfering with an individual’s work performance or creating an intimidating, hostile, or offensive work environment.

<sup>60</sup> *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57 (1986). To support this conclusion, the *Vinson* Court pointed primarily to the following Title VII language: “It shall be an unlawful

Sexual harassment falls into two categories. The first, most typical sexual harassment case addresses conduct commonly referred to as “*quid pro quo*” harassment. A *quid pro quo* claim consists of an allegation that a supervisor made some demand (typically sexual in nature) and either conditioned an employment opportunity on submission to the demand or threatened the employee with a retaliatory employment-related consequence for failure to accede to this demand.<sup>61</sup> An example of this behavior is an employee being threatened with being fired in exchange for sexual relations with a superior. *Quid pro quo* harassment directly links an employee’s gender to his or her conditions of employment because employers explicitly offer to improve or maintain the employee’s conditions of employment in exchange for their sexual favors.<sup>62</sup>

The second form of sexual harassment claim is referred to as a “hostile work environment” claim. In *Meritor Savings bank, FSB v. Vinson* (“*Meritor*”), the Supreme Court recognized the hostile work environment claim as falling within Title VII’s purview.<sup>63</sup> In *Meritor*, the defendant, a heterosexual male, abused, humiliated, and obtained sexual favors from the plaintiff, a heterosexual female.<sup>64</sup> During her four-year tenure with the bank, the plaintiff’s supervisor raped her, followed her to the bathroom, and fondled her in front of coworkers.<sup>65</sup> During her employment, to preserve her job, she agreed to have sexual intercourse with her supervisor approximately fifty times.<sup>66</sup> *Meritor* addressed the scope of “sex” under Title VII and determined that actionable harassment must be sexual in nature.<sup>67</sup> The Court recognized the cause of action based on a hostile work environment claim and stated that a situation that “creates a hostile or offensive work environment for members of one sex is every bit the arbitrary barrier to sexual equality at the workplace that racial harassment is to racial equality.”<sup>68</sup>

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employment practice for an employer...to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s... sex....” *Id.* at 63 (quoting 42 U.S.C. § 2000e-2(a)(1)).

<sup>61</sup> See, e.g., *Highlander v. K.F.C. Nat’l Mgmt. Co.*, 805 F.2d 644, 648 (6th Cir. 1986). The *Highlander* court held: To prevail on a *quid pro quo* claim of sexual harassment, a plaintiff must assert and prove (1) that the employee was a member of the protected class; (2) that the employee was subjected to unwelcome sexual harassment in the form of sexual advances or requests for sexual favors; (3) that the harassment complained of was based on sex; (4) that the employee’s submission to the unwelcome advances was an express or implied condition receiving job benefit, or that the employee’s refusal to submit to a supervisor’s sexual demands resulted in a tangible job detriment; and (5) the existence of respondeat superior liability. *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> *Meritor Savings Bank*, 477 U.S. at 57.

<sup>64</sup> *Id.* at 60.

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> *Id.* at 65-68.

<sup>68</sup> *Meritor Savings Bank*, 477 U.S. at 66-67.

The Court also declared that an action taken against an employee that rendered the workplace hostile or abusive, even if it was not accompanied by a tangible job loss such as discharge, denial of promotion, or demotion, affected that employee's terms or conditions of employment.<sup>69</sup> To prove a *prima facie* case of hostile work environment sexual harassment under *Meritor*, and thereafter, *Harris v. Forklift Systems*,<sup>70</sup> plaintiffs must establish the following elements: (1) the plaintiff is a member of the protected class; (2) the plaintiff was subjected to unwelcome harassment; (3) the harassment occurred "because of sex;" (4) the conduct affected the terms and conditions of employment; and (5) the employer "knew or should have known about the harassment" and failed to take remedial action.<sup>71</sup>

The unanimous Court recognized both forms of sexual harassment and further held that "unwelcomeness" and not "consent" is the standard for determining whether unlawful harassment had occurred.<sup>72</sup> The Court adopted the EEOC's broad definition of sexual harassment, which includes, "unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature to condemn any harassing of a sexual nature, courts must venture beyond the strict biological definition of 'sex.'"<sup>73</sup>

If a plaintiff establishes unlawful harassment occurred, and that conduct affected the terms or conditions of employment, then there remains the essential requirement that the plaintiff prove the conduct occurred "because of his or her sex." Although these cases give us established guidance on the ways in which a plaintiff can prove sexual harassment, these cases fail to clarify how to determine whether the harassment occurred because of the plaintiff's sex.

### III. THE MEANING OF "BECAUSE OF SEX" DISCRIMINATION

Congress, in drafting Title VII, failed to define exactly what was intended by the word "sex," and therefore left much ambiguity.<sup>74</sup> Based on the limited amount of legislative history, it would seem that the sex provision included in Title VII was added only to protect women.<sup>75</sup> Many cases have, however, interpreted the protection as not being limited to women, which is why the provision lends itself to litigation.<sup>76</sup> In many cases, courts have justified limiting the "because of sex"

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<sup>69</sup> *Id.*

<sup>70</sup> 510 U.S. 17 (1993).

<sup>71</sup> See *Meritor Savings Bank*, 477 U.S. at 66-73.

<sup>72</sup> *Id.* at 67.

<sup>73</sup> *Id.* at 65 (quoting 29 C.F.R. § 1604.11(a)).

<sup>74</sup> See Miller, *supra* note 36, at 234-35 ("little can be gleaned from legislative history of the specific prohibition against sex discrimination").

<sup>75</sup> See 110 CONG. REC. 2,577-84 (1964) (showing that every statement made on the House floor regarding the "sex" provision referenced its significance for women).

<sup>76</sup> See also *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 78 (1998) (Title VII

provision, reasoning that Congress had “only the traditional notions of ‘sex’ in mind” when it passed Title VII.<sup>77</sup> Initially, the courts defined “sex” as merely biological sex and interpreted the provision to only prohibit discrimination against biological men and women for being a man or being a woman.<sup>78</sup> Despite the number of issues the courts have seen concerning sexual orientation or gender or sexual identity, Congress has yet to amend Title VII to clarify the meaning of the word “sex.” Between 1981 and 2013, there were 51 proposed bills introduced in the United States Senate and the House of Representatives, which attempted to amend Title VII’s language and prohibit discrimination on the basis of sexual orientation, but were unsuccessful.<sup>79</sup> Although Title VII does not specifically provide protection from sexual orientation discrimination in employment, gay and lesbian employees have brought several

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prohibition on sex discrimination protects men as well as women); *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669, 682-85 (1983) (“male as well as female employees are protected against discrimination”).

<sup>77</sup> *Holloway*, 566 F.2d at 662 (“Congress has not shown any intent other than to restrict the term ‘sex’ to its traditional meaning” and, therefore, court held that the sole purpose of Title VII is to ensure the equal treatment of men and women.).

<sup>78</sup> See *supra* note 76 and accompanying text.

<sup>79</sup> Civil Rights Amendments of 1981, H.R. 1454, 97th Cong. (1981); Civil Rights Act of 1981, H.R. 3371, 97th Cong. (1981); Civil Rights Amendments Act of 1981, S. 1708, 97th Cong. (1981); Civil Rights Amendments Act of 1983, S. 430, 98th Cong. (1983); Civil Rights Amendments Act of 1983, H.R. 427, 98th Cong. (1983); Civil Rights Amendments Act of 1983, H.R. 2624, 98th Cong. (1983); Civil Rights Amendments Act of 1985, S. 1432, 99th Cong. (1985); Civil Rights Amendments Act of 1985, H.R. 230, 99th Cong. (1985); Civil Rights Amendments Act of 1987, S. 464, 100th Cong. (1987); Civil Rights Amendments Act of 1987, H.R. 709, 100th Cong. (1987); Civil Rights Amendments Act of 1989, S. 47, 101st Cong. (1989); Civil Rights Amendments Act of 1989, H.R. 655, 101st Cong. (1989); Civil Rights Amendments Act of 1991, S. 574, 102nd Cong. (1991); Civil Rights Amendments Act of 1991, H.R. 1430, 102nd Cong. (1991); Civil Rights Amendments Act of 1993, H.R. 423, 103rd Cong. (1993); Civil Rights Act of 1993, H.R. 431, 103rd Cong. (1993); Employment Non-Discrimination Act of 1994, S. 2238, 103rd Cong. (1994); Employment Non-Discrimination Act of 1994, H.R. 4636, 103rd Cong. (1994); Civil Rights Act of 1995, H.R. 382, 104th Cong. (1995); Employment Non-Discrimination Act of 1995, S. 932, 104th Cong. (1995); Employment Non-Discrimination Act of 1995, H.R. 1863, 104th Cong. (1995); Employment Non-Discrimination Act of 1997, S. 869, 105th Cong. (1997); Employment Non-Discrimination Act of 1997, H.R. 1858, 105th Cong. (1997); Civil Rights Amendments Act of 1998, H.R. 365, 105th Cong. (1998); Civil Rights Amendments Act of 1999, H.R. 311, 106th Cong. (1999); Employment Non-Discrimination Act of 1999, S. 1276, 106th Cong. (1999); Employment Non-Discrimination Act of 1999, H.R. 2355, 106th Cong. (1999); Civil Rights Amendments Act of 2001, H.R. 217, 107th Cong. (2001); Employment Non-Discrimination Act of 2001, S. 1284, 107th Cong. (2001); Employment Non-Discrimination Act of 2001, H.R. 2692, 107th Cong. (2001); Employment Non-Discrimination Act of 2002, S. 1284, 107th Cong. (2002); Employment Non-Discrimination Act of 2003, H.R. 3285, 108th Cong. (2003); Employment Non-Discrimination Act of 2003, S. 1705, 108th Cong. (2003); Employment Non-Discrimination Act of 2007, H.R. 2015, 110th Cong. (2007); Employment Non-Discrimination Act of 2007, H.R. 3685, 110th Cong. (2007) (passed by the House, rejected in the Senate); Employment Non-Discrimination Act of 2009, H.R. 3017, 111th Cong. (2009); Employment Non-Discrimination Act of 2009, H.R. 2981, 111th Cong. (2009); Employment Non-Discrimination Act of 2009, S. 1584, 111th Cong. (2009); Employment Non-Discrimination Act of 2011, H.R. 1397, 112th Cong. (2011); Employment Non-Discrimination Act of 2011, S. 811, 112th Cong. (2011); Employment Non-Discrimination Act of 2013, H.R. 1755, 113th Cong. (2013); Employment Non-Discrimination Act of 2013, S. 815, 113th Cong. (2013) (passed in Senate 64-32, awaiting vote in the House).

claims under Title VII by classifying sexual orientation discrimination under the “because of” sex provision of Title VII.<sup>80</sup> Despite asserting these claims however, courts have consistently held that Title VII does not offer gay and lesbian employees any protection from employment discrimination.<sup>81</sup> As Title VII has yet to be amended, an employee proving he or she was discriminated against because of his or her sexual orientation remains a difficult challenge.

It can be argued that to bring a successful sex discrimination claim under Title VII, an employee must prove that he or she was discriminated against because of their maleness or femaleness and not because of a different trait.<sup>82</sup> The employee must establish the adverse employment action was based on his or her sex by providing evidence of situations where similarly situated employees of the opposite sex were not treated the same.<sup>83</sup> Therefore, the employee must establish that the discrimination was “because of sex.” The way in which “because of sex” is narrowly defined and interpreted severely affects lesbian, gay, bisexual and transgender individuals.<sup>84</sup> Employment discrimination case law suggests that, as it concerns LGBT employees, there is a double standard at work.<sup>85</sup> In these cases, an employee’s sexual orientation becomes a burden because courts are ready to reject otherwise actionable discrimination claims on the theory that such claims are an attempt to “bootstrap protection for sexual orientation into Title VII.”<sup>86</sup>

LGBT individuals face discrimination in many contexts every day as victims of hate crimes and other forms of prejudice.<sup>87</sup> However, many courts agree that Title VII’s prohibition on discrimination “because of sex” does not cover cases involving discrimination targeted at a plaintiff’s sexual orientation.<sup>88</sup> There is no statutory provision prohibiting sexual orientation discrimination at the federal level; therefore,

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<sup>80</sup> See *Williamson*, 876 F.2d at 70 (plaintiff asserted sexual orientation discrimination under Title VII); *DeSantis v. Pacific Tel. & Tel. Co.*, 608 F.2d 327, 329 (9th Cir. 1979) (plaintiff argued Title VII prohibits sexual orientation discrimination as sex discrimination); *Blum v. Gulf Oil Corp.*, 597 F.2d 936, 938 (5th Cir. 1979) (plaintiff brought a sexual orientation discrimination claim under Title VII).

<sup>81</sup> See *Williamson*, 876 F.2d at 70 (court of appeals refused to extend Title VII protection to homosexuals); *DeSantis*, 608 F.2d at 329-30 (court held Title VII was inapplicable to sexual orientation discrimination); *Blum*, 597 F.2d at 938 (court held sexual orientation discrimination not prohibited by Title VII).

<sup>82</sup> *Varona & Monks*, *supra* note 53, at 72-73.

<sup>83</sup> *Id.*

<sup>84</sup> See discussion *infra* Parts III(a)-(c).

<sup>85</sup> See *Meritor Savings Bank*, 477 U.S. at 57.

<sup>86</sup> See, e.g., *Dawson v. Bumble & Bumble*, 398 F.3d 211, 217-18 (2d Cir. 2005) (“Like other courts, we have...recognized that a gender stereotyping claim should not be used to ‘bootstrap protection for sexual orientation into Title VII.’”).

<sup>87</sup> Jason Cohen, *How Hate Happens*, HUFFINGTON POST (November 15, 2013), available at [http://www.huffingtonpost.com/jason-cohen/how-hate-happens\\_b\\_4277964.html](http://www.huffingtonpost.com/jason-cohen/how-hate-happens_b_4277964.html).

<sup>88</sup> See, e.g., *Bibby v. Phila. Coca Cola Bottling Co.*, 260 F.3d 257, 261 (3d Cir. 2001); *Simonton*, 232 F.3d at 35.



lesbian and gay plaintiffs often lose their sex discrimination and gender-stereotyping claims because of their sexual orientation.<sup>89</sup>

One of the first cases to address efforts to expand the limits of “because of sex” discrimination under Title VII was a 1984 case involving an Eastern Airlines pilot.<sup>90</sup> Kenneth Ulane began his service in 1968 with Eastern Airlines as a pilot and was fired when he became Karen Ulane.<sup>91</sup> After doctors determined, in 1979, Ulane was transsexual, he underwent sex reassignment surgery the following year.<sup>92</sup> Following the surgery, Ulane was issued a revised birth certificate indicating that he was now female, and the FAA certified her for flight status as a female.<sup>93</sup> The airline was unaware of Ulane’s transsexuality, her medical treatments or her psychiatric counseling regarding her transsexualism until she tried to return to work after the sex reassignment surgery.<sup>94</sup> Ulane filed suit against Eastern Airlines alleging that her discharge violated Title VII and that she was discriminated against as both a female and as a transsexual.<sup>95</sup>

The federal district court ruled that Ulane was fired because she was a transsexual and that discrimination against transsexuals violated Title VII.<sup>96</sup> The district court, in its ruling, stated that while the use of the term “sex did not include sexual preference,” it did include “sexual identity” as “a physiological question – a question of self-perception; and in part a social matter – a question of how society perceives the individual.”<sup>97</sup> The district court concluded that it was reasonable to hold that the word “sex” in Title VII literally and scientifically applied to transsexuals, even if it did not apply to homosexuals or transvestites.<sup>98</sup>

On appeal, the Seventh Circuit relied on two arguments in reversing the district court’s decision. First, in considering the addition of the word “sex” to Title VII, the court stated that “Congress never considered nor intended that this 1964 legislation apply to anything other than the traditional concept of sex” and that, following congressional intent, “sex should be given a narrow, traditional interpretation.”<sup>99</sup> The court also noted the numerous legislative attempts to include

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<sup>89</sup> See, e.g., *Vickers v. Fairfield Med. Ctr.*, 453 F.3d 757, 763 (6th Cir. 2006); *Higgins*, 194 F.3d at 259-61.

<sup>90</sup> *Ulane v. Eastern Airlines, Inc.*, 742 F.2d 1081 (7th Cir. 1984).

<sup>91</sup> *Id.* at 1082.

<sup>92</sup> *Id.* at 1083.

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

<sup>95</sup> *Ulane*, 742 F.2d at 1082.

<sup>96</sup> *Id.* at 1084.

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

<sup>99</sup> *Id.* at 1085-86.

sexual orientation within Title VII's protection, all of which had failed.<sup>100</sup> The Seventh Circuit held that Title VII did not include protection for transsexuals and stated "if the term 'sex' as it is used in Title VII is to mean more than biological male or biological female, the new definition must come from Congress."<sup>101</sup>

The court further concluded that Eastern Airlines had not discriminated against Ulane because she was female, but because she was a transsexual—"a biological male who takes female hormones, cross-dresses, and has surgically altered parts of her body to make it appear to be female."<sup>102</sup> Therefore, because Title VII did not prohibit discrimination against transsexuals, the trial court's decision was reversed and the Seventh Circuit entered a judgment in favor of Eastern Airlines. *Ulane* was one of the first cases to address the limits of "because of sex" 30 years ago, but much has changed since 1984. While there is still no definitive meaning of the provision "because of sex," shortly after *Ulane*, the interpretation of "because of sex" provision was expanded to include discrimination not just based on biological sex, but also discrimination against someone for violating gender norms.<sup>103</sup>

#### A. Sex Stereotyping

Individuals who are homosexual may prevail under Title VII if an employer discriminates based on the employee's failure to conform to sex stereotypes.<sup>104</sup> In *Price Waterhouse v. Hopkins*, a female employee was denied partnership in an accounting firm, despite the fact that she was the highest performer, because she did not act feminine.<sup>105</sup> The partners in the firm specifically instructed her to act more femininely to be considered for partnership in the future.<sup>106</sup> However, the partners' main stated reason for denying Hopkins partnership was that they thought she lacked interpersonal skills.<sup>107</sup> They noted in her reviews that she was abrasive, overly aggressive, and failed to always treat the staff with respect.<sup>108</sup> In some reviews, when discussing Hopkin's personality, there were undertones of sex discrimination.<sup>109</sup> Hopkins was described as "macho," that she "overcompensated for being a woman," and one partner even suggested that she "take a course at charm

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<sup>100</sup> *Ulane*, 742 F.2d at 1085.

<sup>101</sup> *Id.* at 1087.

<sup>102</sup> *Id.*

<sup>103</sup> See discussion *infra* Part III(a).

<sup>104</sup> See *Schroer v. Billington*, 577 F. Supp. 2d 293 (D.D.C. 2008) (employer's decision to withdraw job offer from transsexual applicant constituted sex stereotyping discrimination in violation of Title VII).

<sup>105</sup> 490 U.S. 228 (1989).

<sup>106</sup> *Id.* at 233-34.

<sup>107</sup> *Id.* at 234-35 ("Virtually all of the partners' negative remarks about Hopkins – even those of partners supporting her – had to do with her 'interpersonal skills.'").

<sup>108</sup> *Id.*

<sup>109</sup> *Id.* at 235.

school.”<sup>110</sup> The Court held that Title VII did not permit an employer to evaluate female employees based upon their conformity with the employer’s stereotypical view of femininity.<sup>111</sup> Therefore, harassment of an individual for failure to conform to sex stereotypes, even if the animosity towards nonconformance is caused by a belief that such behavior indicates homosexuality, could constitute harassment “because of sex.”<sup>112</sup>

Sex-stereotyping, as outlined in *Price Waterhouse*, occurs when the gender the person is commonly associated with (his or her masculinity or femininity) and how the person expresses themselves are not the same. Therefore, to establish a plaintiff was discriminated against under a gender-stereotyping claim, they must establish that they were discriminated against because they expressed a gender that is stereotypically inconsistent with their sex.<sup>113</sup> Hopkins was a female who expressed a masculine gender; her co-workers saw her as macho and overly aggressive and they encouraged her to highlight her femininity.<sup>114</sup> The Court saw this as discrimination against “because of sex” and that it reflected Congress’s intent that employers not take gender into account at all in making employment decisions.<sup>115</sup> The Supreme Court stated that it did not “require expertise in psychology to know that, if an employee’s flawed ‘interpersonal skills’ can be corrected by a soft-hued suit or a new shade of lipstick, perhaps it is the employee’s sex and not her interpersonal skills that has drawn the criticism.”<sup>116</sup>

The Court further stated, “an employer who acts on the basis of a belief that a woman cannot be aggressive, or that she must not be, has acted on the basis of gender. . . . [W]e are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group.”<sup>117</sup> Similar to the Seventh Circuit’s ruling in *Ulane*, the Court looked to congressional

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<sup>110</sup> *Price Waterhouse*, 490 U.S. at 235.

<sup>111</sup> *Id.* at 250-51.

<sup>112</sup> *Id.* at 250 (According to the Court, “an employer who acts on the basis of a belief that a woman cannot be aggressive, or that she must not be, has acted on the basis of gender.”). Although the Supreme Court did not expressly recognize that sex stereotyping was sex discrimination until *Price Waterhouse*, the beginnings of a sex stereotyping claim were recognized by the Court in *Phillips v. Martin Marietta Corp.*, 400 U.S. 542 (1971). In *Phillips*, the Court held that a company policy not to accept applications from women with pre-school age children (when it accepted applications from men with pre-school age children) constituted sex discrimination. The Court ruled that an employer could not have different hiring policies for men and women, and such a distinction was unlawful because it was “based on stereotyped characterizations of the sexes.” *Id.* at 545.

<sup>113</sup> Jeffrey Kramer, Note, *The “Ultimate” Gender Stereotype: Equalizing Gender-Conforming and Gender-Nonconforming Homosexuals Under Title VII*, 2004 U. ILL. L. REV. 465, 483-89 (2009).

<sup>114</sup> *See Price Waterhouse*, 490 U.S. at 235.

<sup>115</sup> *Id.* at 237.

<sup>116</sup> *Id.* at 256.

<sup>117</sup> *Id.* at 250-51.

intent as a basis for its decision.<sup>118</sup> The Court stated, “in forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at an entire spectrum of disparate treatment of men and women resulting from sex stereotypes.”<sup>119</sup> Therefore, the Court held that Title VII prohibits discrimination against individuals who fail to conform to gender stereotypes.<sup>120</sup>

The Court of Appeals for the Ninth Circuit further clarified the meaning of sex stereotyping in *Nichols v. Azteca Rest. Enters.*<sup>121</sup> In *Nichols*, a male employee, Sanchez, was subjected to insults, name-calling and was referred to as “she” and “her.”<sup>122</sup> They also mocked him and called him names like “faggot” and said he carried his serving tray “like a woman.”<sup>123</sup> Sanchez asserted that the verbal abuse was based on perceptions that he was feminine, and because he failed to conform to a male stereotype.<sup>124</sup> A three-judge panel unanimously concluded that the plaintiff had stated a claim of actionable sexual harassment using the sex-stereotyping theory.<sup>125</sup> The court held that the holding in *Price Waterhouse* applies with equal force to a man who is discriminated against for acting too feminine.<sup>126</sup> The *Nichols* case seems to show that there is hope for victims of sexual orientation discrimination and they can obtain relief under Title VII by showing specific instances of sex stereotyping in the course of the discrimination and citing *Price Waterhouse*.

In another Ninth Circuit case, *Rene v. MGM Grand Hotel*, the court drew upon the precedents of *Price Waterhouse* and *Nichols* to find that harassment because of an employee’s sexual orientation is based on gender stereotypes, and it is prohibited under Title VII.<sup>127</sup> In *Rene*, the plaintiff, Medina Rene, was an openly gay male who worked at the hotel as a butler.<sup>128</sup> Rene’s co-workers and his supervisor subjected him to forms of verbal and physical harassment on almost a daily basis.<sup>129</sup> They whistled at him, hugged and caressed him offensively, poked their fingers in his anus and grabbed his crotch.<sup>130</sup> They told crude jokes in his presence, forced him to look at pictures of men having sex, and forced him to open sexually oriented

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<sup>118</sup> See *supra* note 90.

<sup>119</sup> *Price Waterhouse*, 490 U.S. at 250-51 (quoting *Los Angeles Dept. of Water and Power v. Manhart*, 435 U.S. 702, 707 n.13 (1978)).

<sup>120</sup> *Price Waterhouse*, 490 U.S. at 250-51.

<sup>121</sup> 256 F.3d 864 (9th Cir 2001).

<sup>122</sup> *Id.* at 870.

<sup>123</sup> *Id.*

<sup>124</sup> *Id.* at 874.

<sup>125</sup> *Id.*

<sup>126</sup> *Nichols*, 256 F.3d at 874.

<sup>127</sup> *Rene v. MGM Grand Hotel, Inc.*, 305 F.3d 1061 (9th Cir. 2002) (en banc).

<sup>128</sup> *Id.* at 1069.

<sup>129</sup> *Id.*

<sup>130</sup> *Id.*

joke gifts.<sup>131</sup> MGM Grand discharged Rene in June of 1996 and he sued in federal district court in April 1997, alleging sexual harassment and retaliatory discharge in violation of Title VII.<sup>132</sup>

MGM Grand argued that Rene’s claims were based on sexual orientation discrimination and not sex discrimination, and that Title VII offered him no relief.<sup>133</sup> MGM Grand moved for, and was granted, summary judgment against Rene.<sup>134</sup> Rene appealed to the Ninth Circuit on the harassment issue and a three-judge panel affirmed the district court.<sup>135</sup> Rene’s case was reheard en banc, and reversed.<sup>136</sup> The Ninth Circuit, en banc, reasoned that Rene’s harassment was analogous to the facts presented in *Oncale v. Sundowner*,<sup>137</sup> and held that the inference of sex discrimination was present, allowing Rene to state a claim under Title VII.<sup>138</sup>

Under these cases, sex discrimination occurs whenever a person is treated differently in an employment situation because they are not acting in accordance with stereotypes and gender norms of how people of their biological sex should act.<sup>139</sup> After *Price Waterhouse*, many individuals in the LGBT community have tried to argue that discrimination against LGBT people is based either on the stereotype that men should only be attracted to women and women should only be attracted to men, or that people born biologically male or female should identify as that biological gender and express themselves the same way.<sup>140</sup> Under that theory, sexual orientation discrimination would always be “because of sex” and should be prohibited by Title VII.

## B. Same-Sex Sexual Harassment

While all federal courts have recognized opposite-sex sexual harassment claims years ago, federal courts have taken a variety of stances on the issue of whether same-sex sexual harassment was actionable as sex discrimination under Title VII.<sup>141</sup> Some circuits allowed same-sex harassment claims,<sup>142</sup> others allowed

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<sup>131</sup> *Id.* at 1064.

<sup>132</sup> *Rene*, 305 F.3d at 1064.

<sup>133</sup> *Id.*

<sup>134</sup> *Id.*

<sup>135</sup> *Id.*

<sup>136</sup> *Id.* at 1068. The Supreme Court denied MGM Grand’s petition for *certiorari* on March 24, 2003 and thus established Rene’s right to sue.

<sup>137</sup> *Oncale v. Sundowner Offshore Servs, Inc.*, 523 U.S. 75 (1998).

<sup>138</sup> *Id.*

<sup>139</sup> See Cody Perkins, *Sex and Sexual Orientation: Title VII After Macy v. Holder*, 65 ADMIN. L. REV. 427, 428 (2013).

<sup>140</sup> See Varona & Monks, *supra* note 53, at 83-84, 89-90.

<sup>141</sup> *Oncale*, 523 U.S. at 75.

<sup>142</sup> *E.g.*, *Doe v. City of Belleville*, 119 F.3d 563, 569 (7th Cir. 1997).

them only if the plaintiff could show that the harasser was homosexual, while the one being harassed is heterosexual, or that a general anti-male animus existed in the workplace.<sup>143</sup> Most of the circuits that rejected the same-sex harassment claims relied on the congressional intent argument.<sup>144</sup> For example, the Northern District of Illinois, in *Goluszek v. Smith*,<sup>145</sup> declared that Congress never intended Title VII to encompass same-sex harassment claims.<sup>146</sup> The district court stated, “[t]he discrimination Congress was concerned about when it enacted Title VII is one stemming from an imbalance of power and an abuse of that imbalance by the powerful which results in discrimination against a discrete and vulnerable group.”<sup>147</sup> The court concluded the facts failed to support an actionable Title VII claim because there remained absent an imbalance of power between the sexes when the plaintiff worked in an all-male environment, even though the plaintiff “may have been harassed ‘because’ he is a male.”<sup>148</sup>

The Supreme Court, in its 1998 decision in *Oncale v. Sundowner Offshore Servs., Inc.*, rejected this narrow interpretation of Title VII<sup>149</sup> Prior to the Supreme Court’s *Oncale* ruling, many courts recognized a cause of action for victims of same-sex sexual harassment using “but-for” analysis of the claims to determine whether there was sex-based discrimination.<sup>150</sup> In *Oncale*, the Court held that Title VII’s “because of” sex prohibition extends to instances of workplace sexual harassment, to include “same-sex sexual harassment” and that it bars employers from discrimination on the basis of “sex stereotypes.”<sup>151</sup> However, in writing for the unanimous Court and reversing the district court decision, Justice Scalia stated that “male-on-male sexual harassment in the workplace was assuredly not the principal evil Congress was concerned when it enacted Title VII,” but that “statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our law rather than the principal concerns of our legislators by which we are governed.”<sup>152</sup> Furthermore, the Court noted that since it had already

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<sup>143</sup> *E.g.*, *Yeary v. Goodwill Indus-Knoxville, Inc.*, 107 F.3d 443, 446 (6th Cir. 1997); *McWilliams v. Fairfax County Bd. Of Supervisors*, 72 F.3d 1191, 1195 (4th Cir. 1996).

<sup>144</sup> *See Goluszek v. Smith*, 697 F. Supp. 1452 (N.D. Ill. 1998).

<sup>145</sup> *Id.*

<sup>146</sup> *Id.* at 1456.

<sup>147</sup> *Id.* (citing Note, *Sexual Harassment Claims of Abusive Work Environment Under Title VII*, 97 HARV. L. REV. 1449, 1451-52 (1984)).

<sup>148</sup> *Goluszek*, 697 F. Supp. at 1455.

<sup>149</sup> *Oncale*, 523 U.S. at 75.

<sup>150</sup> *See Williams v. District of Columbia*, 916 F. Supp. 1, 7 (D.D.C. 1996) (“The determinative question is... whether the sexual harassment would have occurred but for the gender of the victim.”); *Pritchett v. Sizeler Real Estate Management Co.*, 67 Fair Empl. Prac. Cas. (BNA) 1377, 1379 (E.D. La. 1995) (“Same gender harassment is clearly a form of gender discrimination because “but for” the gender of the subordinate, she would have not been subjected to the harassment.”).

<sup>151</sup> *Oncale*, 523 U.S. at 75.

<sup>152</sup> *Id.* at 79.

recognized that racial minorities can discriminate against members of their own group,<sup>153</sup> then men and women can discriminate against their own sex as well.<sup>154</sup>

The *Oncale* Court described three ways plaintiffs in such suits might satisfy an actionable claim under Title VII's "because of" sex requirement: first, by offering "credible evidence that the harasser [is] homosexual,"<sup>155</sup> second, by "showing that" the harasser is motivated by general hostility to the presence of [members of the same sex] in the workplace";<sup>156</sup> or third, by providing "direct comparative evidence about how the alleged harasser treated members of both sexes in a mixed-sex workplace."<sup>157</sup> In defining these three ways for a plaintiff to recover, the *Oncale* Court reaffirmed that plaintiffs "must always prove that the conduct at issue was not merely tinged with offensive sexual connotations, but actually constituted "discrimination... because of...sex."<sup>158</sup> This guidance from the Court reaffirms that Title VII sex discrimination plaintiffs can state causes of action against discriminators who are of the same sex. In contrast, courts have consistently affirmed that Title VII lacks protection for plaintiffs experiencing harassment or discrimination because of sexual orientation.<sup>159</sup> This case, coupled with *Price Waterhouse*, creates the possibility of Title VII relief for LGBT employees who suffer workplace harassment based on their sexual orientation.

Most recently in a same sex discrimination case, *EEOC v. Boh Bros. Constr. Co.*,<sup>160</sup> the Fifth Circuit, sitting *en banc*, held that harassment based on gender-stereotypes can be actionable harassment under Title VII's "because of sex" language.<sup>161</sup> In that case, an ironworker on a bridge-maintenance crew, was subjected to "almost-daily verbal and physical harassment because [he] did not conform to [the supervisor's] view of how a man should act."<sup>162</sup> His supervisor ridiculed him because he used baby wipes instead of traditional toilet paper, called him a "pu—y" "princess," and "fa—ot," stood behind him and simulated intercourse, exposed his penis while waving and smiling and joked about forcing oral sex on him.<sup>163</sup> The Fifth Circuit found the EEOC's cognizable even though (1) there was no evidence the harasser was homosexual or motivated by a sexual desire; (2) there was no evidence

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<sup>153</sup> *E.g.*, *Castaneda v. Partida*, 430 U.S. 482, 500 (1977).

<sup>154</sup> *Oncale*, 523 U.S. at 78.

<sup>155</sup> *Id.* at 80.

<sup>156</sup> *Id.*

<sup>157</sup> *Id.* at 80-81.

<sup>158</sup> *Id.* at 81 (quoting 42 U.S.C. § 2000e-2(a)(1) (2006)).

<sup>159</sup> *Simonton*, 232 F.3d at 35; *see also* Arthur S. Leonard, *Sexual Minority Rights in the Workplace*, 43 BRANDEIS L.J. 145, 152-53 (2005) ("Courts [have] unanimously concluded that sexual orientation discrimination, as such, is not covered by Title VII.").

<sup>160</sup> 731 F.3d 444 (5th Cir. 2013).

<sup>161</sup> *Id.* at 445-46.

<sup>162</sup> *Id.*

<sup>163</sup> *Id.*

the harasser was motivated by the general hostility towards a particular gender in the workplace; and (3) there was no evidence the harasser treated men and women differently.<sup>164</sup> Although the EEOC's evidence failed to follow the three evidentiary paths set forth by the *Oncale* Court for addressing same-sex harassment,<sup>165</sup> the Fifth Circuit agreed with the Third, Seventh, Eighth, and Tenth Circuits in holding that those three evidentiary paths were merely "illustrative, not exhaustive."<sup>166</sup> Therefore, the EEOC could prove that the same-sex harassment was "because of sex" by presenting evidence that the harassment was based on a perceived lack of conformity with gender stereotypes.<sup>167</sup> There lacked a requirement for the EEOC to show that the victim was not, in fact, "manly."<sup>168</sup> It was enough to show that the harasser admitted his epithets were directed at the victim's masculinity.<sup>169</sup> This new evidentiary path carved out by the *Boh Bros.* court and several other circuits is good news for the LGBT community.

### C. Transgender/Gender Identity

Many transgender workers experience employment discrimination at high rates. A surprising 90 percent of transgender people report some form of harassment or mistreatment on the job or report having taken some action to hide who they are to avoid harassment.<sup>170</sup> Almost half of transgender people surveyed also report experiencing an adverse job outcome based on their gender identity.<sup>171</sup> This includes being passed over for a job (44 percent), fired (26 percent), or denied a promotion (23 percent).<sup>172</sup> Additionally, compared to the general population, transgender individuals are four times as likely to have low incomes and twice as likely to be unemployed.<sup>173</sup>

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<sup>164</sup> *Id.* at 458, 461.

<sup>165</sup> *Oncale*, 523 U.S. at 80-81.

<sup>166</sup> *Boh Bros.*, 731 F.3d at 456; *see, e.g.*, *Medina v. Income Support Div.*, N.M., 413 F.3d 1131, 1135 (10th Cir. 2005) ("These routes, however, are not exhaustive."); *Pedroza v. Cintas Corp.*, 397 F.3d 1063, 1068 (8th Cir. 2005) (describing *Oncale*'s list as "non-exhaustive"); *Bibby*, 260 F.3d at 263-64 (noting the evidentiary routes stated in *Oncale* and stating: "[b]ased on the facts of a particular case and the creativity of the parties, other ways in which to prove the harassment occurred because of sex may be available"); *Shepherd v. Slater Steels Corp.*, 168 F.3d 998, 1009 (7th Cir. 1999) ("[W]e discern nothing in the Supreme Court's [*Oncale*] decision indicating that the examples it provided were meant to be exhaustive rather than instructive.").

<sup>167</sup> *Boh Bros.*, 731 F.3d at 456.

<sup>168</sup> *Id.* at 457.

<sup>169</sup> *Id.*

<sup>170</sup> Jaime Grant, Lisa Mottet, and Justin Tanis, *Injustice at Every Turn: A Report on the National Transgender Discrimination Survey*, Washington: National Gay and Lesbian Task Force (2011), available at [http://www.thetaskforce.org/downloads/reports/reports/ntds\\_summary.pdf](http://www.thetaskforce.org/downloads/reports/reports/ntds_summary.pdf).

<sup>171</sup> *Id.*

<sup>172</sup> *Id.*

<sup>173</sup> National Center for Transgender Equality and National Gay and Lesbian Task Force, *National Transgender Discrimination Survey* (2009), available at [http://transequality.org/Resources/NCTE\\_prelim\\_survey\\_econ.pdf](http://transequality.org/Resources/NCTE_prelim_survey_econ.pdf).



Following *Price Waterhouse*, transgendered employees attempted to use Title VII's prohibition against sex stereotyping as a means to achieve some of the legal protections previously denied to them under the same Act.<sup>174</sup> The United States Court of Appeals for the Sixth Circuit issued a decision validating the sex-stereotyping theory of recovery under Title VII for transsexuals.<sup>175</sup> Jimmie Smith, a transsexual lieutenant in the Salem, Ohio fire department, kept his sexual identity a secret—that being he was a woman—for seven years.<sup>176</sup> Eventually, Smith started dressing and acting more feminine at work, and other firefighters started to question him and commented on his changing masculinity.<sup>177</sup> Smith spoke with his supervisor about his condition and told his supervisor that he would probably undergo a sex change operation.<sup>178</sup> Smith's superior ultimately devised and carried out a plan to get rid of Smith, and Smith filed a Title VII sex discrimination suit.<sup>179</sup> Smith relied on the *Price Waterhouse* decision and argued that he was discriminated against because he failed to act like a man.<sup>180</sup>

The trial court ruled against Smith, holding that he was trying to disguise what was basically a gender-identity discrimination claim as a sex-stereotype claim.<sup>181</sup> The Sixth Circuit, however, reversed the trial court's decision, stating that it could see no difference between the "aggressive" female manager in the *Price Waterhouse* case and the facts presented in Smith's case.<sup>182</sup> Specifically, the court stated:

After *Price Waterhouse*, an employer who discriminates against women because, for instance, they do not wear dresses or makeup, is engaging in sex discrimination because the discrimination would not occur but for the victim's sex. It follows that employers who discriminate against men because they do wear dresses and makeup, or otherwise act femininely, are also engaging in sex discrimination, because the discrimination would not occur but for the victim's sex.<sup>183</sup>

The Sixth Circuit held that, to the extent that Smith did not conform to what her employer believed males should look and act like, she had sufficiently

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<sup>174</sup> See *infra* note 186.

<sup>175</sup> *Smith v. City of Salem*, 378 F.3d 566, 568 (6th Cir. 2004).

<sup>176</sup> *Id.* at 568.

<sup>177</sup> *Id.*

<sup>178</sup> *Id.*

<sup>179</sup> *Id.*

<sup>180</sup> *Smith*, 378 F.3d 566 at 571.

<sup>181</sup> *Id.*

<sup>182</sup> *Id.* at 572.

<sup>183</sup> *Id.* at 574.

plead a *prima facie* Title VII sex discrimination case.<sup>184</sup> Similarly, in *Barnes v. Cincinnati*, a male police officer undergoing a gender transition to female was denied a promotion because, in her supervisors' opinions, she acted too feminine.<sup>185</sup> Additionally, the Eleventh Circuit reached a similar conclusion on constitutional grounds in a case involving a Georgia state employee who was fired from her job for being transgender.<sup>186</sup> According to the court, “[w]e conclude that a government agent violates the Equal Protection Clause’s prohibition of sex-based discrimination when he or she fires a transgender or transsexual employee because of his or her gender non-conformity.”<sup>187</sup>

Most recently, the EEOC has held that discrimination against an individual because that person is transgender—known as gender identity discrimination—is discrimination “because of” sex and is therefore covered under Title VII.<sup>188</sup> *Macy v. Holder* maybe a ground-breaking decision that will significantly alter the political and legal landscape for transgender people, as well as for lesbian, gay and bisexual people.

In 2010, Mia Macy, a former police detective and military veteran, and transgender woman, applied for a job with the Federal Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF).<sup>189</sup> The ATF all but officially hired Macy when ATF informed her the position had been cut due to a lack of funding.<sup>190</sup> During her background check, Macy disclosed that she was in the process of transitioning from male to female.<sup>191</sup> It was later discovered that another person filled the same position shortly after Macy was told it was eliminated due to budgetary constraints.<sup>192</sup> Macy filed a formal Equal Opportunity Employment complaint with ATF, alleging discrimination in hiring based on sex.<sup>193</sup> When the agency created a separate claim of “discrimination based on gender identity” and failed to identify her claim as sex discrimination, Macy appealed her case to the EEOC.<sup>194</sup>

The EEOC, in reversing its previous position,<sup>195</sup> declared that Title VII’s prohibition of discrimination based on sex included not only “biological sex, but

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<sup>184</sup> *Id.* at 575.

<sup>185</sup> 401 F.3d 729 (6th Cir. 2005).

<sup>186</sup> *Glenn v. Brumby*, 663 F.3d 1312, 1320 (11th Cir. 2011).

<sup>187</sup> *Id.* at 1320.

<sup>188</sup> *See Macy v. Holder*, EEOC Appeal No. 0120120821, 2012 WL 1435995, at 1 (EEOC Apr. 20, 2012).

<sup>189</sup> *Id.*, at 1.

<sup>190</sup> *Id.* at 2.

<sup>191</sup> *Id.*

<sup>192</sup> *Id.*

<sup>193</sup> *Macy*, 2012 WL 1435995, at 1.

<sup>194</sup> *Id.*, at 2.

<sup>195</sup> *See Kowalczyk v. Brown*, Appeal No. 01942053, 1996 WL 124832, at 1 n.1 (EEOC Dec. 27,

also gender stereotyping—failing to act and appear according to expectations defined by gender.”<sup>196</sup> The full commission decided the ruling and all five bi-partisan Commissioners agreed to its issuance.<sup>197</sup> The EEOC based its ruling on well-established Supreme Court precedent regarding sex-stereotyping and statutory interpretations,<sup>198</sup> as well as on federal court cases involving transgender people from the First, Sixth, Ninth, Eleventh, and District of Columbia Courts of Appeal.<sup>199</sup>

In *Price Waterhouse*, the Court found a Title VII violation when an employer discriminated against an individual for failing to conform to gender-based expectations.<sup>200</sup> The EEOC’s decision went even further than *Price Waterhouse*, finding that gender stereotyping is not the only way to prove sex discrimination.<sup>201</sup> The EEOC found that valid theories of sex discrimination include actions motivated by “hostility, a desire to protect people of a certain gender, by assumptions that disadvantage men, by gender stereotypes, or by the desire to accommodate other people’s prejudices and discomforts....”<sup>202</sup>

The ruling also clarified that illegal sex discrimination occurs if adverse action is taken against an applicant or employee because: (1) a person expresses his or her gender in a non-stereotypical manner; (2) a person has transitioned gender or is planning to transition gender; or (3) the person is transgender.<sup>203</sup> The agency explained that each of these three ways are just descriptions of different ways that the gender of the employee played a part in the employer’s discriminatory action and decision. If an employer took into account the employee’s gender or sex, the employer took the action “because of sex,” which is precisely what Title VII forbids.<sup>204</sup>

The EEOC explained that treating a person differently because the person has changed his or her sex, or intends to change their sex, is unlawful sex discrimination under Title VII, just as discrimination against a person who is of one religion

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1994) (agency held withdrawing an offer of employment on the basis of “transsexualism” is not discrimination “because of sex” for Title VII purposes); *Campbell v. Espy*, Appeal No. 01931703, 1994 WL 652840, at 3 (EEOC July 21, 1994); *Casoni v. U.S. Postal Serv.*, Appeal No. 01840104, 1984 WL 485399, at 3 (EEOC Sept. 28, 1984).

<sup>196</sup> *Macy*, 2012 WL 1435995 at 1.

<sup>197</sup> *Id.*

<sup>198</sup> *Price Waterhouse*, 490 U.S. at 228; *Oncale*, 523 U.S. at 75.

<sup>199</sup> *Schroer*, 577 F. Supp. 2d at 293; *Glenn*, 663 F.3d at 1312; *Smith*, 378 F.3d at 566; *Schwenk v. Hartford*, 204 F.3d 1187 (9th Cir. 2000); *Rosa v. Park West Bank & Trust Co.*, 214 F.3d 213 (1st Cir. 2000).

<sup>200</sup> *Price Waterhouse*, 490 U.S. at 228.

<sup>201</sup> *Macy*, 2012 WL 1435995 at 10-11.

<sup>202</sup> *Id.*

<sup>203</sup> *Id.* at 7-9.

<sup>204</sup> *Id.*

and converts to another is considered a type of religious discrimination.<sup>205</sup> The EEOC made it clear that what really matters is whether the employer took into account the employee's gender when deciding whether or not his or her identity or conduct was appropriate; if so, then it was sex discrimination.

This EEOC decision is a valuable addition to the jurisprudence on transgender employee protections. The ruling formally opens the doors and services to the EEOC and its 53 field offices to transgender people who are experiencing harassment or discrimination on the job, or in applying for a job, with any employer, public or private, that has 15 or more employees anywhere in the United States.<sup>206</sup> In addition, because the EEOC authority is national, the *Macy v. Holder* ruling impacts the entire country.<sup>207</sup> Conversely, the federal court cases, which had similar holdings, primarily affected the states in its respective circuits.<sup>208</sup> Therefore, with the *Macy v. Holder* ruling, there is new national access to remedies under Title VII for transgender people living in any of the 34 states that lack established protections for "gender identity and/or expression."<sup>209</sup>

As a practical matter, *Macy* means that if a transgender person asserts that he or she was subjected to adverse actions based on transgender status by a state or local government, or private-sector employer with 15 or more employees, the EEOC will have to take and investigate the complaint.<sup>210</sup> If the EEOC finds clear evidence to support the complaint, it will issue a ruling in favor of the transgender employee and try to conciliate.<sup>211</sup> If the employer does not want to resolve thru the EEOC, the employee can then bring the case to federal court under Title VII.<sup>212</sup> While the EEOC ruling in *Macy v. Holder* is far reaching, it does not definitely determine that Title VII protects all transgender people. The EEOC believes it has no statutory authority and limited power to interpret Title VII.<sup>213</sup> Although lacking

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<sup>205</sup> *Id.* at 10. This comparison has also been made by at least two federal courts. See *Glenn*, 663 F.3d at 1312; *Schroer*, 577 F. Supp. 2d. at 307.

<sup>206</sup> EEOC's Federal Training & Outreach Division, What Does the Macy Decision Mean for Title VII?, U.S. Equal Emp. Opportunity Commission (June 15, 2012), [http://www.eeoc.gov/federal/training/brown\\_bag\\_macy.cfm](http://www.eeoc.gov/federal/training/brown_bag_macy.cfm) (Commissioner Chai Feldblum explaining that the *Macy* case applies to not only federal employees but to anyone who comes to any EEOC office across the country, from an employer with more than 15 employees to someone who works for a state or local government entity).

<sup>207</sup> *Id.*

<sup>208</sup> *Id.*

<sup>209</sup> The National Gay and Lesbian Task Force, *State Nondiscrimination Law in the U.S. available at* [http://www.thetaskforce.org/downloads/reports/issue\\_maps/non\\_discrimination\\_1\\_12\\_color.pdf](http://www.thetaskforce.org/downloads/reports/issue_maps/non_discrimination_1_12_color.pdf). (last visited May 5, 2014).

<sup>210</sup> See *supra* note 206. For discrimination claims brought by federal employees, the EEOC can act as a judicial body and issue decisions itself.

<sup>211</sup> *Id.*

<sup>212</sup> *Id.*

<sup>213</sup> See, e.g., Transcript of April 25, 2012 Meeting, U.S. Equal Emp. Opportunity Commission (2012), <http://www1.eeoc.gov/eeoc/meeting/4-25-12/transcript.cfm?renderforprint=1> (last visited

the force of law granted by statutory mandate, courts grant the EEOC some agency deference when the agency issues guidelines and adjudicatory decisions.<sup>214</sup> While *Macy v. Holder* is a small victory for the transgender community, ultimately, the Supreme Court decides what a federal statute means and the Court may eventually be asked whether “sex” within Title VII’s language includes discrimination transgender people face.

#### IV. EMPLOYMENT NON-DISCRIMINATION ACT

Jessica, a student at a local community college in San Antonio, Texas, worked at a BBQ restaurant.<sup>215</sup> Jessica went to high school with the owner’s niece, who told the owner that Jessica was a lesbian.<sup>216</sup> Once Jessica’s co-workers found out that she was lesbian, they started to make fun of her with anti-gay jokes.<sup>217</sup> Her co-workers often told her they were praying for her to “change.”<sup>218</sup> Jessica complained to her city councilmember, who contacted the restaurant owner to ask the owner to stop Jessica’s co-workers from harassing her.<sup>219</sup> Eventually, Jessica was fired for not putting condiments out in a timely manner.<sup>220</sup> If the Employment Non-Discrimination Act (ENDA)<sup>221</sup> were the law of the land, Jessica’s life and livelihood would be different today. The State of Texas is just one state that does not protect LGBT employees on the basis of sexual orientation, so Jessica has no recourse through the state courts for being terminated.

Many LGBT employees have to make a choice to hide who they are at work in order to support their families at home. Many states, municipalities, and corporations have instituted policies that shield LGBT workers from workplace bias,<sup>222</sup> but LGBT persons still lack adequate legal protections from employment

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May 8, 2014) (“We are an enforcement agency. We have the authority to issue, amend, and rescind federal procedural regulations. We have no authority to make substantive changes in the law by issuing guidance that goes beyond what is contained in the statutes as interpreted by the courts. Our job is to follow Congressional intent and court interpretations; not make new law.”).

<sup>214</sup> See, e.g., *Chevron U.S.A. Inv. V. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 866 (1984) (holding agency action must be given deference by the courts as long as Congress has not spoken directly on the issue and the agency’s construction of the statute is reasonable); *Griggs*, 401 U.S. at 433-34 (“The administrative interpretation of the Act by the [EEOC] is entitled to great deference [and since] the Act and its legislative history support the Commission’s construction, this affords good reason to treat the guidelines as expressing the will of Congress.”).

<sup>215</sup> Deborah J. Vagins, *Working in the Shadows, Ending Employment Discrimination for LGBT Americans*, (2007) [https://www.aclu.org/files/pdfs/lgbt/enda\\_20070917.pdf](https://www.aclu.org/files/pdfs/lgbt/enda_20070917.pdf).

<sup>216</sup> *Id.*

<sup>217</sup> *Id.*

<sup>218</sup> *Id.*

<sup>219</sup> *Id.*

<sup>220</sup> See *supra* note 215.

<sup>221</sup> H.R. 1755/S. 815, § 4, 113th Cong.

<sup>222</sup> GAO, *Sexual Orientation and Gender Identity Employment Discrimination: Overview of State Statutes and Complaint Data*, (2013) <http://www.gao.gov/assets/660/656443.pdf>. The 22 states

discrimination. Specifically, 22 states—including the District of Columbia—have enacted statutes that explicitly prohibit employment discrimination on the basis of sexual orientation.<sup>223</sup> There is an overlap in states protecting individuals from employment discrimination on the bases of sexual orientation and gender identity; 18 states—including the District of Columbia have statutes that explicitly prohibit both sexual orientation and gender identity based employment discrimination,<sup>224</sup> while the remaining four states prohibit discrimination based on sexual orientation only.<sup>225</sup> Thus, in the states with no protection, an employer can potentially terminate, demote, or otherwise engage in an adverse employment action against an employee on the basis of his or her sexual orientation.<sup>226</sup>

The above stated policies appear to offer significant protection to many LGBT workers; however, a majority of LGBT workers still lack any state law legal protection from employment discrimination.<sup>227</sup> Forty-five percent of American workers live in a jurisdiction where they are covered by a non-discrimination policy based on sexual orientation.<sup>228</sup> Only 34 percent of workers live in a jurisdiction where they are covered by a non-discrimination policy based on gender identity.<sup>229</sup> The ENDA would bring uniform protection to all workers under federal law and ensure civic equality for American workers.<sup>230</sup> If passed, the law would require

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with explicit statutory provisions with regard to sexual orientation are: California, Colorado, Connecticut, Delaware, the District of Columbia, Hawaii, Illinois, Iowa, Maine, Maryland, Massachusetts, Minnesota, Nevada, New Hampshire, New Jersey, New Mexico, New York, Oregon, Rhode Island, Vermont, Washington, and Wisconsin.

<sup>223</sup> *Id.*

<sup>224</sup> HUMAN RIGHTS CAMPAIGN, STATEWIDE EMPLOYMENT LAWS AND POLICIES [WWW.HRC.ORG/STATELAWS](http://WWW.HRC.ORG/STATELAWS) (last visited May 20, 2014); California (1992, 2003), Colorado (2007), Connecticut (1991, 2011), Delaware (2009, 2013), District of Columbia (1977, 2006), Hawaii (1991, 2011), Illinois (2006), Iowa (2007), Massachusetts (1989, 2012), Maine (2005), Minnesota (1993), New Jersey (1992, 2007), New Mexico (2003), Nevada (1999, 2011), Oregon (2008), Rhode Island (1995, 2001), Vermont (1991, 2007) and Washington (2006).

<sup>225</sup> *Id.* Maryland (2001), New Hampshire (1998), New York (2003) and Wisconsin (1982).

<sup>226</sup> See Naomi Mezey, *Law as Culture*, 13 *YALE J.L. & HUMAN.* 35, 50 (2001) (noting that “the absence of a federal law prohibiting employers from discrimination. . . [based on] sexual orientation means that where no local or state law dictates otherwise, law affirmatively gives employers permission to discriminate openly against gay, lesbian, or transgendered employees, by refusing to grant such employees a remedy for discrimination.”). *But see supra* note 217 (EEOC advising an agency employee that, although there is no binding precedent on the subject, the Commission expects to see cases applying *Macy* to sexual orientation in the future and suggesting that agencies address sexual orientation discrimination under Title VII based on *Castello* and *Veretto*).

<sup>227</sup> Movement Advancement Project, *The Momentum Report—2009 Edition* (2009), <http://www.lgbtmap.org/file/momentum-report-2009.pdf>.

<sup>228</sup> *Id.*

<sup>229</sup> *Id.*

<sup>230</sup> Crosby Burns and Liz Neemann, *Infographic: Gay and Transgender Workers Lack Comprehensive Workplace Benefits*, Center for American Progress (October 18, 2012), <http://www.americanprogress.org/issues/lgbt/news/2012/10/18/41907/infographic-gay-and-transgender-workers-lack-comprehensive-workplace-protections/>.

that all Americans be judged in the workplace based on their qualifications, skills, and the quality of their work, not on characteristics, such as sexual orientation.<sup>231</sup>

### A. Historical background

Patterned after Title VII, and introduced in various incarnations in every congressional session since the 103rd Congress,<sup>232</sup> ENDA would prohibit discrimination based on an individual's actual or perceived sexual orientation<sup>233</sup> or gender identity by public and private employers in hiring, discharge, promotion, compensation, and other terms and conditions of employment.<sup>234</sup> The bill would also protect workers from retaliation.<sup>235</sup> The legislation's prohibited employment practices follows Title VII's language prohibiting employer malfeasance, which generally makes it unlawful for employers with 15 or more employees to discriminate because of race, color, religion, sex, or national origin.<sup>236</sup> Thus, the Act prohibited all forms of employment and pre-employment bias.

### B. Title VII vs. ENDA

Title VII's prohibition against discrimination on the basis of sex has consistently been interpreted to exclude discrimination on the basis of sexual orientation.<sup>237</sup> Although some courts have held Title VII's prohibition against sex discrimination may encompass claims based on gender identity when unlawful gender stereotyping is involved,<sup>238</sup> the courts have yet to recognize gender identity discrimination on its own to be an unlawful employment practice under Title VII.<sup>239</sup> Because Title VII has yet to have been interpreted to protect against employment discrimination on the basis of sexual orientation, ENDA would significantly expand the scope of protection under current employment discrimination law by explicitly prohibiting sexual orientation discrimination.<sup>240</sup>

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<sup>231</sup> Seth Althaus and Sarah Greenberg, *FAQ: The Employment Non-Discrimination Act*, Center for American Progress (July 19, 2011), <http://www.americanprogress.org/issues/lgbt/news/2011/07/19/9988/faq-the-employment-non-discrimination-act/>.

<sup>232</sup> See *supra* note 79.

<sup>233</sup> See *supra* note 4.

<sup>234</sup> H.R. 1755/S. 815, § 2, 113th Cong.

<sup>235</sup> *Id.*

<sup>236</sup> Like Title VII, ENDA defines "employer" to exclude "bona fide private membership" clubs that qualify for federal tax exemptions. Likewise, most public and private employees would be protected by ENDA, including employees covered by the Government Employee Rights Act of 1991 and the Congressional Accountability Act of 1995. Volunteers who receive no compensation, however, would not be covered under the legislation. 42 U.S.C. § 2000e-2, 16; 2 U.S.C. § 1301.

<sup>237</sup> See discussion *supra* Part III.

<sup>238</sup> See discussion *supra* Part III(c).

<sup>239</sup> *Varona*, *supra* note 53, at 71-72.

<sup>240</sup> However, ENDA should not be construed to invalidate or limit rights under any other federal or state laws. Therefore, ENDA does not appear to alter the current protections that may be available

Like Title VII, the ENDA contains an exception that would make the Armed Forces, which include the Army, Navy, Air Force, Marines, and Coast Guard, exempt from the law.<sup>241</sup> ENDA also includes an exemption for religious organizations, which recognizes that the Constitution protects certain employment decisions of religious organizations, understanding that some religious organizations have significant reasons to make employment decisions, even those that take an individual's sexual orientation or gender identity into account.<sup>242</sup> This is consistent with previous congressional efforts to avoid infringing on a religious organization's exercise of religion with respect to its employment practices.<sup>243</sup> Therefore, under those circumstances, LGBT employees of religious organizations will lack Title VII protection from sexual orientation and gender identity discrimination.<sup>244</sup> ENDA "shall not apply to a corporation, association, educational institution or institution of learning, or society that is exempt from the religious discrimination provisions of title VII of the Civil Rights Act of 1964 pursuant to section 702(a) or 703(e)(2) of such Act."<sup>245</sup> This exemption ensures that such organizations would not be required to hire or retain an individual if the organization had objections to the individual's sexual orientation or gender identity. Under this legislation, even religious organizations whose religious teachings do not oppose homosexuality could be permitted to refuse to hire a gay applicant.<sup>246</sup> Which means the Act may actually broaden the religious organizations' ability to discriminate in hiring because the exception goes further than the Title VII exception, which allows religious employers to discriminate on the basis of religion, but not on the basis of race, color, national origin, or sex.<sup>247</sup>

The language in Title VII and ENDA remain parallel in many instances, but the Acts have a few major differences that are worth discussing. These differences may also contribute to the reason Congress refuses to pass the law. One of the main differences between Title VII and ENDA is that under ENDA, an employer would be liable for employment actions that are "based on actual or perceived sexual orientation or gender identity of a person with whom the individual associates or has associated."<sup>248</sup> As imagined, trying to prove a person's perceived orientation may be difficult. To the contrary, Title VII does not prohibit discrimination on the basis of any perceived characteristics. Therefore, adding the perceived orientation

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to individuals who are LGBT under Title VII or state law.

<sup>241</sup> H.R. 1755/S. 815, § 7, 113th Cong.; 42 U.S.C. § 2000e-16(a). Title VII protects civilian military employees.

<sup>242</sup> H.R. 1755/S. 815, § 2, 113th Cong.

<sup>243</sup> See *supra* note 5.

<sup>244</sup> H.R. 1755/S. 815, § 2, 113th Cong.

<sup>245</sup> *Id.* at § 6.

<sup>246</sup> See Paul Schindler, *ENDA Religious Exemption Still a Big Worry* (October 2, 2013), <http://gaycitynews.com/enda-religious-exemption-still-a-big-worry/> (last visited February 9, 2014).

<sup>247</sup> *Id.* Some activists have also stated that enacting ENDA with the current exemption language (allowing hospitals and universities to claim the exemption) could undermine other nondiscrimination laws nationwide. *Id.*

<sup>248</sup> H.R. 1755/S. 815, § 4(e), 113th Cong.



criteria in these types of sexual orientation cases may make it difficult for courts to develop standards of proof.

There is another major difference between the Acts that may narrow the evidentiary options available to a plaintiff. Under ENDA, employees are only able to bring disparate treatment claims because disparate impact claims are unavailable.<sup>249</sup> To prove a disparate treatment claim requires proof of intent, but this is not required to prove a disparate impact claim, which can often be proven through the use of statistics.<sup>250</sup> The Act prohibits the EEOC from compelling collection or requiring production of statistics from covered entities on actual or perceived sexual orientation or gender identity.<sup>251</sup> Under an ENDA claim, a plaintiff would have to prove that an employer intended to discriminate, which is a higher evidentiary threshold than under Title VII.<sup>252</sup> Therefore, neutral employment policies that may disproportionately impact LGBT workers who are covered by the ENDA would not be proscribed.

Lastly, the enforcement and remedies of the Act are actually parallel to Title VII's enforcement provisions. Therefore, the Department of Justice would enforce the ENDA against state and local governments and the EEOC would be the administrative enforcement with respect to private employment.<sup>253</sup> Similar to Title VII, the EEOC would have the same authority, as it currently does under Title VII, to receive and investigate complaints, to negotiate voluntary settlements, and to seek judicial remedies.<sup>254</sup> Additionally, federal courts will possess the same broad remedial discretion under the ENDA as the courts currently possess under Title VII, including the ability to enjoin the unlawful employment practice and to "order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay...or any other relief as the court deems appropriate."<sup>255</sup>

### C. Current Status

ENDA legislation has been introduced to Congress regularly since the 1990s, but has yet to pass even with some modest bipartisan support under a Democratic-controlled Congress.<sup>256</sup> Enacting the ENDA will be an important step toward ensuring fairness on the job for LGBT employees. The majority of courts have consistently ruled there lacks a Title VII remedy for discrimination based on sexual orientation,<sup>257</sup>

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<sup>249</sup> H.R. 1755/S. 815, § 4(g), 113th Cong.

<sup>250</sup> See discussion *supra* Part II(b)(i).

<sup>251</sup> H.R. 1755/S. 815, § 2, 113th Cong.

<sup>252</sup> See discussion *supra* Part II(b)(i).

<sup>253</sup> H.R. 1755/S. 815, § 10, 113th Cong.

<sup>254</sup> *Id.*

<sup>255</sup> 42 U.S.C. § 2000e-5(g).

<sup>256</sup> See *supra* note 79.

<sup>257</sup> Courts have traditionally been unwilling to allow LGBT employees to use Title VII to sue for

and few federal courts have interpreted Title VII to provide transgender people with some protection from workplace discrimination.<sup>258</sup> In the majority of the jurisdictions, there remains no clear protection against employment discrimination based on sexual orientation or gender identity under federal law.<sup>259</sup> When it comes to fighting workplace discrimination, the Act will put LGBT Americans on the same footing as everyone else.

In late 2013, the Senate voted to pass ENDA to ensure that no American is deprived of the opportunity to work merely because of the sexual orientation or gender identity.<sup>260</sup> However, the Speaker of the House, John Boehner, remains unwilling to allow a vote to take place because he fears the result would be frivolous lawsuits, and believes there exists adequate protections for people already in the workplace.<sup>261</sup>

## V. ANALYSIS

While Title VII's enactment was a big step towards equality back in 1964, it has seen very few changes since then.<sup>262</sup> Last year, 2014, marks Title VII's 50th year in existence, and unfortunately, employment discrimination remains widespread.<sup>263</sup> In 1964, most of the groups discussed above were unheard of by most of the public. Fifty years ago, the meaning of the term "sex" was not up for debate.<sup>264</sup> The passage

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sexual orientation discrimination. *See Simonton*, 232 F.3d at 36; *Williamson*, F.2d at 70; *DeSantis*, 608 F.2d at 329-30, *overruled on other grounds by Nichols*, 256 F.3d at 875.

<sup>258</sup> *See* discussion *supra* Part III(c).

<sup>259</sup> *See Smith*, 378 F.3d at 575 (“[s]ex stereotyping based on a person’s gender non-conforming behavior is impermissible discrimination, irrespective of the cause of that behavior; a label, such as “transsexual,” is not fatal to a sex discrimination claim where the victim has suffered discrimination because of his or her gender non-conformity.”).

<sup>260</sup> *See supra* note 79.

<sup>261</sup> “I am opposed to discrimination of any kind, in the workplace and any place else. But I think this legislation that I’ve dealt with as chairman of The Education & The Workforce Committee... is unnecessary and would provide a basis for frivolous lawsuits. People are already protected in the workplace. I’m opposed to continuing this. Listen, I understand people have differing opinions on this issue, and I respect those opinions. But as someone who’s worked in the employment law area for all my years in the State House and all my years here, I see no basis for this legislation.” Andy Towle, *John Boehner: “I see no basis or need” for legislation protecting LGBT people in the workplace*, TOWLEROAD, available at <http://www.towleroad.com/2013/11/john-boehner-i-see-no-basis-or-need-for-legislation-protecting-lgbt-people-in-the-workplace.html>.

<sup>262</sup> *See supra* note 44.

<sup>263</sup> U.S. Equal Employment Opportunity Commission, <http://www.towleroad.com/2013/11/john-boehner-i-see-no-basis-or-need-for-legislation-protecting-lgbt-people-in-the-workplace.html> (last visited June 5, 2014).

<sup>264</sup> *Ulane*, 742 F.2d at 1085. As observed in *Ulane*, “When Congress enacted the Civil Rights Act of 1964 it was primarily concerned with race discrimination. ‘Sex as a basis of discrimination was added as a floor amendment one day before the House approved Title VII, without prior hearing or debate.’ [citations omitted]. This sex amendment was the gambit of a congressman seeking to scuttle adoption of the Civil Rights Act. The ploy failed and sex discrimination was abruptly added

of Title VII was during a social climate where a person's sexual orientation was not discussed and the subject remained a secret. But 50 years later those issues are discussed on a daily basis. Despite the regular discourse, however, Congress has yet to enact legislation providing guidance and shedding light on the meaning of the word "sex" under Title VII<sup>265</sup>

Just think for a moment, how various laws have evolved due to societal changes. To achieve the broad remedial policy goals set by Title VII requires change. Numerous homosexual men and women experience on-the-job discrimination, including harassment, every day.<sup>266</sup> Unless these victims work in states that provide statutory protection against employment discrimination based on sexual orientation,<sup>267</sup> Title VII may be these victims's only recourse. The Supreme Court has now held that the "because of sex" prohibition extends to instances of workplace sexual harassment,<sup>268</sup> same- sex harassment,<sup>269</sup> and it bars employers from discrimination on the basis of sex stereotypes.<sup>270</sup> Conversely, courts have affirmed that Title VII does not afford protection for those persons experiencing harassment or discrimination because of sexual orientation.<sup>271</sup> Notwithstanding, sexual orientation plaintiffs have advanced, with mixed success, different legal theories actionable under Title VII that analyze sexual orientation discrimination as discrimination "because of sex."<sup>272</sup> This section explains why some of these theories are correct and makes recommendations of how the courts should go forward when dealing with plaintiffs asserting a Title VII claim based on sexual orientation discrimination.

#### A. The Supreme Court and Gay Rights

Lesbians, gays, bisexuals, and transgenders have experienced different treatment than heterosexuals on virtually all social and legal fronts.<sup>273</sup> In contrast to women over the last 40 years, LGBT individuals have seen slow progress in their attempts for equal rights.<sup>274</sup> Although the Supreme Court's record on gay rights issues has been mixed, there is a growing movement towards supporting gay rights in the

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to the statute's prohibition against race discrimination. [citation omitted]." *Id.*

<sup>265</sup> See discussion *supra* Part III.

<sup>266</sup> See *supra* note 6.

<sup>267</sup> See *supra* notes 222 and 224.

<sup>268</sup> *Meritor Savings Bank*, 477 U.S. at 66.

<sup>269</sup> *Oncale*, 523 U.S. at 82.

<sup>270</sup> See *supra* Part III(a).

<sup>271</sup> Leonard, *supra* note 159 at 152-53 ("Courts [have] unanimously concluded that sexual orientation discrimination, as such, is not covered by Title VII.").

<sup>272</sup> See discussion *supra* Part III(c) and discussion *infra* Part V(d).

<sup>273</sup> See discussion *supra* Part III.

<sup>274</sup> *Id.*

United States.<sup>275</sup> In the absence of any national law on sexual orientation discrimination, the Supreme Court decisions on these issues have assumed great importance.

The first Supreme Court decision that affected the LGBT community was over fifty-six years ago in *One, Inc. v. Olesen*.<sup>276</sup> The case dealt with the United States Post Office and the FBI, who deemed *One: The Homosexual Magazine*, which was a lesbian, gay and bisexual publication, obscene, and, as such, could not be delivered via U.S. mail.<sup>277</sup> The publishers of the magazine sued and lost both the first case and the subsequent appeal.<sup>278</sup> The Supreme Court granted *certiorari* and reversed the Ninth Circuit's ruling, marking the first time the Supreme Court ruled in favor of homosexuals. The decision in its entirety was no more than eight lines and stated, in pertinent part, "The petition for writ of certiorari is granted and the judgment of the United States Court of Appeals for the Ninth Circuit is reversed."<sup>279</sup>

Although *Olesen* was a small victory for lesbian, gay, bisexual, and transgender individuals where free press rights was concerned, the LGBT community continued to face discrimination because there remained criminal statutes on the books that prohibited acts of sexual intimacy between same-sex couples.<sup>280</sup> Just 28 years ago, the Supreme Court upheld the constitutionality of sodomy laws in *Bowers v. Hardwick*.<sup>281</sup> In *Bowers*, police arrested the plaintiff in his bedroom for having sex with another man and the Supreme Court, in upholding a Georgia sodomy law, ruled 5-4 that the United States Constitution's Due Process Clause under the Fourteenth Amendment does not guarantee a fundamental right for consenting adults to engage in private homosexual acts.<sup>282</sup> The Court arrived at its decision by applying the lowest level of constitutional scrutiny and finding a rational basis for the state's sodomy law. The right to privacy protects intimate marital and familial relations, but the Court said it does not cover gay sodomy because "no connection between family, marriage, or procreation on the one hand and homosexuality activity on the other hand has been demonstrated."<sup>283</sup> The *Bowers* case was later scrutinized for mischaracterizing homosexuality as sodomy.<sup>284</sup> The Court made a distinction between homosexual

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<sup>275</sup> *Id.*

<sup>276</sup> *One, Inc. v. Olesen*, 355 U.S. 371 (1958).

<sup>277</sup> *Id.*

<sup>278</sup> 241 F.2d 772 (9th Cir 1957).

<sup>279</sup> *Olesen*, 355 U.S. at 372.

<sup>280</sup> See, e.g., Alabama, Ala. Code 13A-6-65(a)(3) (1994); Arizona, Ariz. Rev. Stat. Ann 1-1411 to 1412 (1989); Arkansas, Ark. Code Ann 5-14-122 (1997); Idaho, Idaho Code 18-6605 (1987).

<sup>281</sup> 478 U.S. 186 (1986) (Court upheld constitutionality of a Georgia sodomy law criminalizing oral and anal sex in private between two consenting adults when applied to homosexuals).

<sup>282</sup> *Bowers*, 478 U.S. at 186.

<sup>283</sup> *Id.* at 191.

<sup>284</sup> See ROBERT WINTEMUTE, SEXUAL ORIENTATION AND HUMAN RIGHTS: THE UNITED STATES CONSTITUTION, THE EUROPEAN CONVENTION AND THE CANADIAN CHARTER 7, 31 n.84 (Oxford: Oxford University Press 1997) ("The Court's inconsistent language shows an interesting failure to distinguish between a right of particular persons ('homosexuals') and a right of any person to

behavior and actions such as birth control, abortion, and interracial marriage.<sup>285</sup> While the Court had previously found that all of these were covered by the right to privacy under the Fourteenth Amendment's Due Process Clause, according to the Court, the Due Process Clause afforded no protection for private homosexual acts.<sup>286</sup> This decision was a serious blow to the gay-rights movement and served as a foundation for discrimination against gays, lesbians, and bisexual individuals.<sup>287</sup>

In contrast to *Bowers*, 10 years later, in *Romer v. Evans*, the Supreme Court opened the door to constitutional challenges to other discriminatory state criminal and civil laws.<sup>288</sup> In a 6-3 decision, the Supreme Court in *Romer* struck down, on Equal Protection grounds, an amendment to the Colorado Constitution that prohibited any state or local branch of government from extending "special protections" to individuals on the basis of sexual orientation.<sup>289</sup> Applying the rational basis test, the Court determined that a "desire to harm a politically unpopular group cannot constitute a legitimate government interest."<sup>290</sup> The Court noted that Amendment 2 to the state constitution identified homosexuals by name and denied them equal protection across the board.<sup>291</sup>

In another setback to the gay-rights movement, the Supreme Court ruled that the constitutional right to freedom of association allows a private organization like the Boy Scouts of America (BSA) to exclude a person from membership when "the presence of that person affects in a significant way the group's ability to advocate public or private viewpoints."<sup>292</sup> In a 5-4 decision, the Court ruled the BSA had a constitutional right to ban gays because the organization's opposition to homosexuality is part of its "expressive message" and to allow homosexuals as leaders would interfere with that message.<sup>293</sup> In his dissenting opinion, Justice Stevens, joined by

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engage in particular conduct ('homosexual sodomy').")

<sup>285</sup> *Bowers*, 478 U.S. at 190.

<sup>286</sup> *Id.*

<sup>287</sup> The *Bowers* decision would later be overturned by the Court in 2003. *See infra* note 304.

<sup>288</sup> 517 U.S. 620 (1996). In 1992, Colorado voters approved Amendment 2, which prohibited or preempted any law or policy "whereby homosexual, lesbian or bisexual orientation, conduct, practices or relationships shall constitute or otherwise be the basis of or entitled any person or class of persons to have or claim any minority status, quota preference, protected status or claim of discrimination." *Id.* at 624. The law banned any Colorado municipality from passing a sexual orientation anti-discrimination law.

<sup>289</sup> *Id.*

<sup>290</sup> *Id.* at 634.

<sup>291</sup> *Id.* at 647.

<sup>292</sup> *Boy Scouts of America v. Dale*, 530 U.S. 640, 648 (2000). The Court reversed a New Jersey Supreme Court decision that determined New Jersey's public accommodations law required the BSA to readmit assistant Scoutmaster James Dale, who had made his homosexuality public and whom the Boy Scouts had expelled from the organization. *Id.*

<sup>293</sup> *Id.* at 661.

Justices Souter, Ginsburg, and Breyer,<sup>294</sup> declared, “until today, we have never once found a claimed right to associate in the selection of members to prevail in the face of a State’s anti-discrimination law. To the contrary, we have squarely held that a State’s anti-discrimination law does not violate a group’s right to associate simply because the law conflicts with that group’s exclusionary policies.”<sup>295</sup> Justice Stevens ended his dissent by noting that serious and ancient prejudices facing homosexuals could be aggravated by the “creation of a constitutional shield.”<sup>296</sup> This case allowed the BSA to openly discriminate against homosexuals and stood for the premise that gay youth are no longer welcome in the program, which sent a message to both gay and non-gay scouts.<sup>297</sup>

On July 27, 2015, the BSA National Executive Board ratified a resolution that removes the national restriction on openly gay adult leaders and employees.<sup>298</sup> This ratification was in line with BSA’s 2013 resolution to remove the restriction denying membership to youths on the basis of sexual orientation.<sup>299</sup> After these policy changes, BSA no longer claims that discrimination is the core purpose of their association; therefore, state non-discrimination laws should now apply to the Scouts.<sup>300</sup>

The Supreme Court’s decision in *Lawrence v. Texas* represented an important step in the Court’s LGBT jurisprudence.<sup>301</sup> In 2003, the Court, in a 6-3 decision, invalidated a Texas sodomy law and voted 5-4 to overturn its 1986 decision in *Bowers v. Hardwick*.<sup>302</sup> According to the majority opinion, authored by Justice Anthony Kennedy:

The petitioners are entitled to respect for their private lives. The State cannot demean their existence or control their destiny by making their private sexual conduct a crime. Their right to liberty

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<sup>294</sup> *Id.* at 663.

<sup>295</sup> *Id.* at 679.

<sup>296</sup> *Id.* at 699-700.

<sup>297</sup> In mid-2012, a secret committee of the BSA reviewed their policy of actively discriminating against lesbians, gays and bisexuals. They decided that it was in the best interest of the organization to continue it unchanged. By this time, acceptance of equal rights for the LGB community had undergone a rapid increase throughout the U.S. *Editorial: The Boy Scouts Fall Short*, THE N.Y. TIMES (January 29, 2013), [http://www.nytimes.com/2013/01/30/opinion/the-boy-scouts-fall-short-in-policy-on-gays.html?\\_r=0](http://www.nytimes.com/2013/01/30/opinion/the-boy-scouts-fall-short-in-policy-on-gays.html?_r=0)

<sup>298</sup> SCOUTING.ORG, <http://www.scouting.org/MembershipStandards/Resolution/results.aspx> (last visited August 3, 2015).

<sup>299</sup> *Id.*

<sup>300</sup> *Id.*

<sup>301</sup> 539 U.S. 558 (2003) (This landmark decision struck down the sodomy laws in Texas and, by extension, invalidated sodomy laws in thirteen other states, making same-sex sexual activity legal in every U.S. state and territory).

<sup>302</sup> *Id.*

under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government.<sup>303</sup>

Although this decision was a major victory for gay rights activists, laws that make it a crime for consenting adults to engage in sodomy remain on the books in 12 states.<sup>304</sup> These laws continue to be enforced in several of those states 11 years after the Supreme Court declared such laws unconstitutional.<sup>305</sup> Most cases in which police and prosecutors enforce sodomy statutes involve gay men arrested by undercover police officers for engaging in or soliciting sex in parks or other public places.<sup>306</sup> Even though the majority of sodomy cases are eventually dismissed,<sup>307</sup> the fact that people are still charged under the law shows that despite the Supreme Court's ruling, discrimination against the LGBT community is still ongoing.

## B. It's All "Because of Sex!"

As discussed in Part II of this article, the Supreme Court's decisions in *Price Waterhouse* and *Oncale* have expanded Title VII's statutory proscription of discrimination "because of sex" to the point where sex stereotyping is arguably an included prohibition.<sup>308</sup> The sex stereotyping theory should be applied to all LGBT victims, and therefore discrimination based on sexual orientation should also be impermissible sex discrimination under Title VII. When LGBT individuals are discriminated against because of their sexual orientation, it is because the person is violating the gender norm that men should be attracted to only women and that women should be attracted only to men.<sup>309</sup> Therefore, when an LGBT employee is discriminated against on the basis of his or her sexual orientation, the discrimination likely occurs because the employee is violating the gender norm of being attracted to someone of the opposite sex.<sup>310</sup>

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<sup>303</sup> *Id.* at 592.

<sup>304</sup> *12 States still ban sodomy a decade after court ruling*, USA TODAY (April 21, 2014, 6:42 PM), <http://www.usatoday.com/story/news/nation/2014/04/21/12-states-ban-sodomy-a-decade-after-court-ruling/7981025/>.

<sup>305</sup> *Id.*

<sup>306</sup> Lou Chibbaro Jr., *Sodomy laws remain on the books in 17 states, including Va. and Md.*, WASHINGTON BLADE (April 17, 2013), available at <http://www.washingtonblade.com/2013/04/17/sodomy-laws-remain-on-books-in-17-states-including-md-and-va/>.

<sup>307</sup> *Id.*

<sup>308</sup> See *supra* Part I(a); see, e.g., Sonya Smallets, *Oncale v. Sundowner Offshore Services: A Victory for Gay and Lesbian Rights?*, 14 BERKELEY WOMEN'S L.J. 136, 136-37 (1999) (discussing public press and gay and lesbian advocacy groups's reaction to the *Oncale* decision).

<sup>309</sup> See *supra* note 82.

<sup>310</sup> Varona & Monks, *supra* note 53 ("[G]ay people, simply by identifying themselves as gay, are violating the ultimate gender stereotype—heterosexual attraction. Since there is a 'presumption and prescription that erotic interests are exclusively directed to the opposite sex,' those who are attracted to members of the same sex contradict traditional notions about appropriate behavior for men and women.") (citing Sylvia Law, *Homosexuality and the Social Meaning of Gender*, 1988 WIS. L. REV. 187, 196 (1988)).

Gender norms start at an early age. The result is gay men and women are often discriminated against because of rejection of the traditional male and female roles. Being gay, lesbian, or bisexual goes directly against these assigned gender roles and any mistreatment of LGBT individuals should be seen as sex-stereotyping discrimination. A woman who is gay and being discriminated against for being a woman who acts masculine and is attracted to women is just as impermissible as the plaintiff in *Price Waterhouse* being discriminated against for being a woman who transgressed gender norms by acting masculine.<sup>311</sup> In *Price Waterhouse*, the Supreme Court already recognized that any time employers “evaluate employees by assuming or insisting that they match the stereotype associated with their group,” they have discriminated “because of sex” under the meaning of Title VII.<sup>312</sup> This reasoning should apply to both men and women who exhibit gender nonconforming characteristics as well.

LGBT individuals, simply by identifying themselves as lesbian, gay or bisexual, are violating the ultimate gender stereotype-heterosexual behavior. Similar to the plaintiff in *Price Waterhouse*, LGBT individuals fail to match the stereotype associated with their group; therefore, any employment discrimination against a LGB person is “because of sex” under Title VII. Recently, a ruling in the District of Columbia Circuit agreed with this premise.

United States District Court Judge Colleen Kollar-Kotelly ruled that the plaintiff could go forward in his Title VII lawsuit for being terminated after his boss found out he was gay.<sup>313</sup> The plaintiff, Peter TerVeer, was hired in February 2008 as a Management Analyst at the Library of Congress’s Office of the Inspector General.<sup>314</sup> TerVeer became close to his supervisor’s daughter, and, in August 2009, the daughter learned the Plaintiff was homosexual.<sup>315</sup> After the supervisor, John Mech, learned of TerVeer’s sexuality, TerVeer alleged Mech no longer gave him detailed instructions for assignments but would instead give ambiguous instructions without clear communication.<sup>316</sup> Mech also called a meeting to educate TerVeer on Hell and told him “that it is a sin to be a homosexual...[that] homosexuality was wrong[,] and that [TerVeer] would be going to Hell.”<sup>317</sup> Four days after the meeting, TerVeer received his annual review.<sup>318</sup> TerVeer felt his review failed to accurately reflect his work and that Mech’s religious beliefs and sexual stereotyping influenced the

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<sup>311</sup> 490 U.S. at 228.

<sup>312</sup> *Id.* at 251.

<sup>313</sup> *TerVeer v. Library of Congress*, 12-1290 (D.C. March 31, 2014) (memorandum opinion denying summary judgment).

<sup>314</sup> *Id.* at 2.

<sup>315</sup> *Id.* at 3.

<sup>316</sup> *Id.*

<sup>317</sup> *Id.*

<sup>318</sup> *TerVeer*, 12-1290 at 3.



performance appraisal.<sup>319</sup> TerVeer reported his complaints to the next line supervisor, Nicholas Christopher, but Christopher took no remedial action.<sup>320</sup> In February 2011, Mech issued TerVeer another negative performance evaluation and notified TerVeer he was being placed on a “90-day written warning.”<sup>321</sup> Subsequently, after being denied his within-grade-increase, TerVeer initiated a complaint with Equal Employment Opportunity.<sup>322</sup> In October 2011, TerVeer filed his formal complaint alleging discrimination based on religion, sex, sexual harassment, and reprisal with the Office of Opportunity Inclusiveness and Compliance.<sup>323</sup>

The government sought to dismiss the claims in TerVeer’s lawsuit, including his claim that Title VII’s sex discrimination ban protected against discrimination based on his sexual preference.<sup>324</sup> Judge Kollar-Kotelly dismissed some of the claims in the ruling, but she allowed the Title VII claims of sex and religious discrimination to move forward.<sup>325</sup> TerVeer argued, and the judge agreed, that a person could bring a claim of protection against sexual orientation under Title VII’s ban on sex discrimination because an employer views an employee’s sexual orientation as “not consistent with...acceptable gender roles.”<sup>326</sup> In discussing the Title VII sex discrimination claim, Judge Kollar-Kotelly wrote:

Plaintiff has alleged that he is ‘a homosexual male whose sexual orientation is not consistent with the Defendant’s perception of acceptable gender roles,’ that his “status as a homosexual male did not conform to the Defendant’s gender stereotypes associated with men under Mech’s supervision or at the LOC,’ and that ‘his orientation as homosexual had removed him from Mech’s preconceived definition of male.’ As Plaintiff has alleged that Defendant denied him promotions and created a hostile work environment because of Plaintiff’s nonconformity with male sex stereotypes, Plaintiff has met his burden of setting forth “a short and plain statement of the claim showing that the pleader is entitled to relief” as required by Federal Rule of Civil Procedure 8(a). Accordingly, the Court denies

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<sup>319</sup> *Id.* at 4.

<sup>320</sup> *Id.* Christopher also told TerVeer that he didn’t believe, in his opinion, employees had rights. He did not contact the Library’s Equal Employment Opportunity Office—the Office of Opportunity Inclusiveness and Compliance—and he did not advise TerVeer of appropriate complaint procedures.

<sup>321</sup> *Id.* at 5.

<sup>322</sup> *Id.* TerVeer appealed the denial of his within-grade-increase and his appeal was denied by his supervisor, Mech.

<sup>323</sup> *TerVeer*, 12-1290 at 6.

<sup>324</sup> *Id.* at 7.

<sup>325</sup> *Id.* at 2.

<sup>326</sup> *Id.* at 21.

Defendant's Motion to Dismiss Plaintiff's sex discrimination claim  
(Count 1) for failure to state a claim.<sup>327</sup>

Although Judge Kollar-Kotelly's decision is not a final decision on the merits of TerVerr's claim, the ruling means that if facts support his claim, TerVeer could succeed in his lawsuit on the Title VII claim.<sup>328</sup> Hostility against LGBT individuals is often based on bias against gender nonconformity.<sup>329</sup> While this decision is good news for the LGBT community within the D.C. Circuit, the same has not been true of sexual orientation claims in other circuits.

As recently as March 25, 2014, a state appeals court in Ohio held that the state's sex discrimination ban did not protect people against sexual orientation discrimination.<sup>330</sup> The plaintiff, Colby Burns, a resident of veterinary clinical sciences at the Ohio State University College of Veterinary Medicine, brought a lawsuit against her associate professor, Dr. Stephen Birchard.<sup>331</sup> Burns claimed that after Dr. Birchard learned that she was a lesbian, he began treating her differently than other students by excluding her from social and research activities and making vulgar and sexual comments and jokes about her.<sup>332</sup> Burns also made allegations that Dr. Birchard contacted or communicated with prospective employers, resulting in the cancellation of job interviews, and that he refused to provide Burns a reference to a potential employer.<sup>333</sup> Burns claims she reported her problems with Dr. Birchard to the College, which investigated, but that Dr. Birchard's conduct continued during and after the investigation.<sup>334</sup> Burns argued that, under Title VII, the word "sex" included forms of discrimination beyond gender and that the Act afforded protection for discrimination based on sexual orientation.<sup>335</sup>

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<sup>327</sup> *Id.*

<sup>328</sup> Judge Kollar-Kotelly's ruling cleared the way for TerVeer to move forward with his Title VII allegations against James Billington, librarian of the Library of Congress, over hostile work environment, denied pay raises and wrongful termination TerVeer says he faced after his supervisor learned he was gay. *See TerVeer v. Billington*, No. 12-cv-01290, 2014 WL 1280301 (D.D.C. Mar. 31, 2014)

<sup>329</sup> Toni Lester, *Protecting the Gender Nonconformist from the Gender Police- Why the Harassment of Gays and Other Gender Nonconformists is a Form of Sex Discrimination in Light of the Supreme Court's Decision in Oncale v. Sundowner*, 29 N.M.L. REV. 89, 116 (1999). Lester argues that gay men, "who behave in [a] stereotypical feminine manner" are "subjected to most some of the vehement forms of homophobia." *Id.*

<sup>330</sup> *Burns v. The Ohio State University*, 14-1190, 2014 Ohio App. LEXIS 1101. While many states have laws prohibiting workplace discrimination and harassment on the basis of gender identity or sexual orientation, Ohio does not. *See supra* notes 222, 224.

<sup>331</sup> *Id.*

<sup>332</sup> *Id.*

<sup>333</sup> *Id.*

<sup>334</sup> *Id.*

<sup>335</sup> *Burns*, 14-1190. The court of claims dismissed the resident's claims of sexual discrimination, sexual harassment, retaliation and violation of public policy as insufficient.

The court of appeals held the conduct against the resident, while repugnant, was not actionable as discrimination under Title VII because the term “sex” under Title 4112.02(A) of the Ohio Revised Code did not encompass sexual orientation.<sup>336</sup> Although state laws in Ohio fail to afford protections to workers facing discrimination and harassment based on gender identity and sexual orientation, there are many states that prohibit workplace discrimination and harassment on these same bases.<sup>337</sup> This Ohio appeals court decision is a prime example of the need to have specific protection for LGBT individuals, to protect them from employment discrimination, because after all, it is all because of sex.

### C. Did Sexual Harassment Occur...If So, Who Cares About the Sexual Orientation of the Victim?

Did the harassment of an employee actually occur? If so, who cares if the individual is heterosexual or homosexual? If a plaintiff can prove that sexual harassment actually occurred, then why does a plaintiff’s sexual orientation matter? If courts focus on whether the harassment actually occurred, and not the subjective belief of the employer regarding the victim’s sexual orientation, we will be more in line with the purpose of Title VII. The Supreme Court has recognized that sexual harassment constitutes a form of sexual discrimination actionable under Title VII.<sup>338</sup> All that is necessary is that the harassment be “sufficiently or severe or pervasive ‘to alter the conditions of [the victim’s] employment and create an abusive work environment.’”<sup>339</sup>

For purposes of Title VII discrimination claims, an individual’s sexual orientation should be irrelevant and treated no different than any other trait that lacks protection under Title VII, which simply means homosexual individuals should be on the same playing field as heterosexual individuals.<sup>340</sup> Conversely, the Ninth Circuit, in *DeSantis v. Pacific Tel. & Tel. Co.*, found that if an employer treats all homosexuals alike, whether male or female, then such conduct is not considered dis-

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<sup>336</sup> *Id.* The resident, incorrectly argued for a change in the law so that sexual orientation could be protected, instead of arguing that the law currently protects sexual orientation. The court responded by saying, “Legislative measures proposing to amend R.C. Chapter 4112 and Title VII to add the term sexual orientation have been, as yet, unsuccessful,” and “this claim and this court are not the forum for achieving the change that appellant seeks.” *Id.* The court of appeals also ruled that the resident did not demonstrate that a clear public policy against harassment or discipline based on sexual orientation existed at the state level to support her claim of violation of public policy.

<sup>337</sup> *See supra* Part III(c).

<sup>338</sup> *See supra* note 60.

<sup>339</sup> *See supra* note 60, at 67 (quoting *Henson v. City of Dundee*, 682 F.2d 897, 904 (11th Cir. 1982)).

<sup>340</sup> *See* Zachary A. Kramer, *Heterosexuality and Title VII*, 103 Nw. U.L. REV. 205 (2009) (Kramer suggests that by rendering sexual orientation irrelevant for purposes of Title VII, “the re-oriented approach seeks to put heterosexual employees on equal footing with lesbian and gay employees regarding the legal implications of sexual orientation.”).

crimination in violation of Title VII.<sup>341</sup> The reasoning is that the employer is treating men and women alike, in that homosexuals of both sexes are treated less favorably than heterosexuals.<sup>342</sup> This argument is flawed and has already been rejected by the Supreme Court when it dealt with state laws banning interracial marriages.<sup>343</sup> The Court found anti-miscegenation laws to be race discrimination because the laws “proscribe generally accepted conduct [only] if engaged in by members of different races.”<sup>344</sup> Therefore, a black person was penalized for doing something, such as marrying a white person, for which a white person faced no legal consequence. If we analyze the sexual orientation argument, it is similar in that discrimination on the basis of sexual orientation is sex discrimination because a man is penalized for doing something, such as having or at least preferring sexual relations with a man, for which a woman would face no legal consequence.<sup>345</sup> Therefore, it smacks of irony that individuals who seek to limit expanding Title VII’s protections to cover sexual orientation discrimination are using the same line of argument the State of Virginia asserted in *Loving* in defense its law banning interracial marriages.<sup>346</sup>

With regard to sexual orientation, the current argument is that the repeated failure of Congress to amend Title VII proves that Congress did not intend Title VII to prohibit discrimination on the basis of sexual orientation.<sup>347</sup> Similarly, in *Loving*, Virginia felt the Framers of the Fourteenth Amendment did not intend to prevent the states from barring interracial marriage.<sup>348</sup> While the Supreme Court has yet to address the issue of sexual orientation issue, the *Loving* Court reasoned that the Framers’ intent was “inconclusive.”<sup>349</sup> But does it really matter what Congress intended

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<sup>341</sup> 608 F.2d at 331 (stating that “whether dealing with men or women the employer is using the same criterion: it will not hire or promote a person who prefers sexual partners of the same sex.”). *DeSantis* was a judicial consolidation of three separate actions for appeal. The first involved a nursery school employee who alleged he was fired for wearing an earring to work before the school year began. The second involved three gay men who alleged that Pacific Telephone & Telegraph Company either refused to hire them or had constructively discharged them through ongoing harassment. The final case involved a lesbian couple who alleged harassment and discriminatory discharge because of their relationship. The Ninth Circuit’s decision precluded relief for these individuals and sent a message to employees and employers everywhere that Title VII did not prohibit harassment or other discrimination against homosexuals or perceived homosexuals.

<sup>342</sup> See Bennett Capers, Note, *Sex(ual Orientation) and Title VII*, 91 COLUM. L. REV. 1158, 1179 (1991) (“[T]he implication of this reasoning is that an employer who disfavors gay males and not lesbians [or vice versa] may be in violation of Title VII.”).

<sup>343</sup> See *Loving v. Virginia*, 388 U.S. 1 (1967). The Court explicitly rejected the argument that laws banning interracial marriages do not constitute racial discrimination because they bar members of each race, equally, from marrying a partner of the opposite sex.

<sup>344</sup> *Id.* at 11.

<sup>345</sup> See generally, Samuel A. Marcossou, *Harassment on the basis of Sexual Orientation: A Claim of Sex Discrimination Under Title VII*, 81 GEO L.J. 1, 5-6 (1991).

<sup>346</sup> See *supra* note 339.

<sup>347</sup> See *supra* note 69.

<sup>348</sup> *Loving*, 388 U.S. at 9.

<sup>349</sup> *Id.*

back in 1964? What we can be sure of is that Congress intended to bar employer policies using gender classifications.<sup>350</sup> But was it known that in 1964, Congress would foresee antigay discrimination being included in Title VII's "because of sex" provision? Probably not, but Congress's intent at the time does not matter.<sup>351</sup> It is true that when language is ambiguous, congressional intent may help in discerning the text's meaning.<sup>352</sup>

In this particular situation, did the discriminatory conduct occur "because of the employee's sex?" In other words, in a sexual harassment situation involving LGBT victims, does the employer treat men and women differently in the same way that anti-miscegenation laws treated blacks and whites differently? Is a woman not penalized for dating or flirting with a man, but a man is penalized for dating or flirting with another man? This is sex discrimination and it is wrong to conclude employment decisions based on sexual orientation do not constitute sex discrimination. If one is a victim of sexual harassment, why should the victim's orientation matter? The term "because of sex" in Title VII should be a shield to protect all individuals from sex discrimination, irrespective of sexual orientation.

#### D. The EEOC Has Interpreted Title VII Correctly

In the past, courts have ruled that a successful case can be brought by lesbian and gay workers only where there is clear evidence that an employee was targeted because of behaving or appearing insufficiently masculine (as a man) or insufficiently feminine (as a woman), which represents classic gender stereotyping.<sup>353</sup> In two cases, issued 21 days apart, the EEOC took a step away from this approach and towards a *per se* rationale for treating sexual orientation discrimination as a form of sex discrimination.<sup>354</sup>

##### 1. *Veretto v. United States Postal Service*<sup>355</sup>

Jason E. Veretto worked as a Rural Carrier at the United States Postal Service (USPS) in Farmington, Connecticut.<sup>356</sup> On March 9, 2010, an article appeared in the society section of the Hartford, Connecticut, newspaper announcing that Veretto

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<sup>350</sup> See *supra* note 5.

<sup>351</sup> See *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 452-53 (1987) (Scalia, J., concurring in judgment) ("Judges interpret the law rather than reconstruct legislators' intentions.")

<sup>352</sup> See *Union Bank v. Wolas*, 112 S. Ct. 527, 531 (1991) (Scalia, J., concurring) (rejecting the argument based on legislative history for a limited scope to statutory language because "[t]he fact that Congress may not have foreseen all of the consequences of a statutory enactment is not a sufficient reason for refusing to give effect to the plain meaning.").

<sup>353</sup> See discussion *supra* Part III(a).

<sup>354</sup> *Veretto v. United States Postal Service*, Appeal No. 0120110873 (July 1, 2011); *Castello v. United States Postal Service*, EEOC Appeal No. 0120111795 (July 22, 2011).

<sup>355</sup> *Veretto*, 2011 WL 2663401, at 1.

<sup>356</sup> *Id.*

would marry his male partner.<sup>357</sup> Two days later, Veretto alleged a male coworker (CW1) approached another employee with the newspaper and asked him if he had seen Veretto's wedding announcement.<sup>358</sup> The employee stated not only did he know about the wedding, but he had been invited and planned to attend.<sup>359</sup> CW1 "became extremely upset and began, at once, yelling about [Veretto] and the wedding and the fact that [Veretto] was marrying another man."<sup>360</sup>

Three weeks later, Veretto had a minor dispute with CW1's wife, who worked next to him, and CW1 intervened into Veretto's work area, bumping his chest into Veretto's chest, and trapped him.<sup>361</sup> Throughout the assault, CW1 threatened Veretto, saying, "I will beat you, you fucking queer."<sup>362</sup> After the incident, the Agency (USPS) removed CW1 from the workplace for three months.<sup>363</sup> Once CW1 returned to the workplace, Veretto asked that CW1 be reassigned to another location, but management neglected to act on his request.<sup>364</sup>

The Agency dismissed Veretto's formal complaint for failure to state a claim, stating that Veretto's complaint was based on his sexual orientation, not his gender, and therefore he had not asserted an actionable Title VII claim.<sup>365</sup> On appeal, Veretto argued he asserted a valid Title VII sex discrimination.<sup>366</sup> Veretto argued that if he had been a woman marrying a man, CW1 would have acted differently, not acting upset or being motivated to take action against him.<sup>367</sup> In its decision, the EEOC said that while the Agency was correct that Title VII's prohibition of discrimination does not cover sexual preference or orientation as a basis, it does prohibit sex-stereotyping discrimination.<sup>368</sup> The EEOC reasoned that CW1 was motivated by the sexual stereotype that marrying a woman is an essential part of being a man and became upset when Veretto failed to adhere to this stereotype.<sup>369</sup>

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<sup>357</sup> *Id.*

<sup>358</sup> *Id.*

<sup>359</sup> *Id.*

<sup>360</sup> *Veretto*, 2011 WL 2663401, at 1.

<sup>361</sup> *Id.*

<sup>362</sup> *Id.*

<sup>363</sup> *Id.*

<sup>364</sup> *Id.*

<sup>365</sup> *Veretto*, 2011 WL 2663401, at 2. The Agency also dismissed the March 2010 incidents as untimely raised with the EEO counselor, noting Complainant's initial request for counseling was on July 22, 2010, more than 45 days from the latest March incident.

<sup>366</sup> *Id.*

<sup>367</sup> *Id.* With regards to the timeliness issue, Veretto argued that he thought Agency management had taken the appropriate action to protect him from CW1 until he reappeared in the workplace on July 6. Veretto asserts that he initiated EEO counseling shortly thereafter, well within 45 days.

<sup>368</sup> *Id.* at 3. The EEOC has also made it clear that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the complainant can prove no set of facts in support of the claim which would entitle the complainant to relief.

<sup>369</sup> *Id.* at 3.

The EEOC reversed the Agency's dismissal decision and remanded the matter for further processing, noting that CW1's actions were motivated by his attitudes about stereotypical gender roles in marriage.<sup>370</sup>

## 2. *Castello v. United States Postal Service*<sup>371</sup>

Cece Castello worked as a mail handler at the Agency's Processing and Distributing Center in New Orleans, Louisiana.<sup>372</sup> On December 28, 2010, Castello filed an EEO complaint alleging the Agency subjected her to harassment when the Distribution Operations manager stated, "Cece [Castello] gets more pussy than the men in the building."<sup>373</sup> The Agency determined that Castello was alleging harassment on the basis of sexual orientation and dismissed her complaint for failure to state a claim.<sup>374</sup> On appeal, the EEOC affirmed the Agency's dismissal of Castello's complaint based on harassment due to his sexual orientation but determined that Title VII does prohibit sex-stereotyping.<sup>375</sup> The EEOC stated, in pertinent part:

We find that Complainant [Castello] has alleged a plausible sex stereotyping case which would entitle her to relief under Title VII if she were to prevail. Complainant alleged that she was subjected to a hostile work environment when [a supervisor] made an offensive and derogatory comment about her having relationships with women. Complainant has essentially argued that [the supervisor] was motivated by the sexual stereotype that having relationships with men is an essential part of being a woman, and made a negative comment based on Complainant's failure to adhere to this stereotype. In other words, Complainant alleged that [the supervisor's] comment was motivated by his attitudes about stereotypical gender roles in relationships.<sup>376</sup>

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<sup>370</sup> *Id.* The EEOC also concluded that the Agency erred in dismissing the March incidents as untimely raised. The EEOC explained that a complainant alleging a hostile work environment will not be time barred if all acts constituting the claim are part of the same unlawful practice and at least one act falls within the filing period. In this case, the Agency's decision to return CW1 to the workplace and deny Verreto's request that he be transferred to another facility occurred in July 2010, which was within the 45-day limitation period. Therefore, the EEOC determined that Verreto's entire claim, including the March 2010 incidents, was timely raised.

<sup>371</sup> *Castello*, 2011 WL 6960810.

<sup>372</sup> *Id.* at 1.

<sup>373</sup> *Id.*

<sup>374</sup> *Id.*

<sup>375</sup> *Id.* at 2.

<sup>376</sup> *Id.* at 2-3.

### 3. Analysis of the EEOC's decisions

While these two cases lack precedential value and do not constitute agency official policy, it could bring about a substantial change to the current legal system for lesbian and gay workers.<sup>377</sup> These two cases indicate the EEOC intends to allow claims based on sexual orientation under a sex-stereotyping theory under Title VII. In *Veretto v. Donahoe*, the Office of Federal Operations (OFO) found that discrimination against a man for marrying another man was a valid sex-stereotyping claim because it dealt with stereotypes about gender roles in marriage.<sup>378</sup> Similarly, in *Castello v. Donahoe*, the OFO found that discrimination against a woman for being attracted to other women was a valid stereotyping claim under Title VII.<sup>379</sup> The stereotype is that women should only be attracted to men and only have relationships with men.

These two opinions, while binding on the parties involved, lack the precedential weight of actual EEOC decisions as agencies have no requirement to adopt their interpretations of federal law.<sup>380</sup> The only truly binding authority comes from the 30 to 50 cases that actually make their way to the full Commission each year.<sup>381</sup> Both of these cases are signs that the full Commission may be ready to rule that discrimination against lesbian, gay, and bisexual people is also properly understood as discrimination based on sex. However, the EEOC's treatment of sexual orientation is somewhat convoluted right now. There is already binding precedent from the Commission that "Title VII's prohibition of discrimination based on sex does not include sexual preference or sexual orientation."<sup>382</sup> Although the decisions in *Veretto* and *Castello* are contrary to binding precedent, these decisions indicate the EEOC intends to allow Title VII claims based on sexual orientation under a sex-stereotyping theory.<sup>383</sup> One of the EEOC Commissioner's indicated, during a training session on how to treat these type of cases, that agencies should begin

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<sup>377</sup> Not all appeals of federal sector employment discrimination go before the full Commission, therefore, not all decisions have the same precedential and binding effect of the agencies. *See supra* note 206 (only thirty to fifty cases actually go before the full Commission per year, and only these cases have precedential effect on future federal sector cases).

<sup>378</sup> *Veretto*, 2011 WL 2663401, at 3.

<sup>379</sup> *Castello*, 2011 WL 6960810, at 2-3.

<sup>380</sup> *See supra* note 206.

<sup>381</sup> *Id.*

<sup>382</sup> *Johnson v. Frank*, Appeal No. 01911827, 1991 WL 1189760, at 3 (EEOC Dec. 19, 1981); *see also Morrison v. Dalton*, Appeal No. 01930778, 1994 WL 74696, at 1 (EEOC June 16, 1994) (holding that harassment in the form of one coworker informing other coworkers that complainant was gay and had been observed kissing another man was not based on his sex, but rather his sexual orientation, and was therefore not impermissible discrimination "due to sex" under Title VII); *see also Yost v. Runyon*, Appeal Nos. 01965505 & 01965383, 1997 WL 655997, at 2 (EEOC Oct 2, 1997) (holding that discrimination based on sexual orientation was not prohibited by Title VII).

<sup>383</sup> *See supra* note 206 (stating *Castello* and *Veretto*, while not binding, reflect the EEOC's intention to find that discrimination on the basis of sexual orientation is impermissible discrimination "based on sex" under Title VII).



to treat discrimination based on sexual orientation as cognizable causes of action under Title VII.<sup>384</sup> There is still no official guidance or binding precedent from the EEOC to clear up this point, but this is the way forward under Title VII. Most EEOC decisions are treated as indications of what will constitute “good practice” in the future, and these decisions should be treated the same.<sup>385</sup> The EEOC should issue official guidance to the agencies that discrimination based on sexual orientation is impermissible sex discrimination under Title VII.

#### E. What Next?

Why does there need to be new legislation to protect one’s sexual orientation from discrimination at the workplace? Job performance should determine whether you get hired, fired, or promoted—not your sexual preference. The issue of workplace discrimination should be important to every American. In terms of economic security, discrimination contributes to job instability, employee turnover, and unemployment, which eventually affect us all.<sup>386</sup>

Discrimination “because of sex” should include discrimination based on sexual orientation. Sexual orientation discrimination is based on stereotypes about how men and women “should” behave. Sexual orientation harassment usually takes place because the employee failed to satisfy expectations of masculinity or femininity. However, given the existence of federal precedent refusing to extend Title VII to discrimination based on sexual orientation,<sup>387</sup> the EEOC needs to issue official guidance and a binding decision that includes LGBT as covered persons under Title VII. Rather than attempting to wring meaning from sparse verbiage of Title VII’s legislative history, it may be more useful to supplement Title VII with EEOC guidelines to determine whether Title VII’s protections extend to sexual orientation.

A second option would be to pass the EDNA. Congress has had the vision to enact laws that ban discrimination based on other protected classes—now, with the ENDA, there is an opportunity to expand the law a little further. With the ENDA, it is possible to ensure that everyone can enter and succeed in the workplace based on qualifications and performance without regard to sexual orientation and gender

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<sup>384</sup> See *id.* (showing EEOC Commissioner Chai Feldblum advising an agency EEO employee that, although there were no binding precedent on the subject, she expects to see cases applying *Macy* to sexual orientation in the future, and so it would be smart for agencies to treat discrimination based on sexual orientation as “because of sex” under Title VII).

<sup>385</sup> See *id.*

<sup>386</sup> See *supra* note 16.

<sup>387</sup> See, e.g., *Vickers*, 435 F.3d at 764-65 (court held that discrimination on the basis of sexual orientation cannot be found to be because of sex under a sex stereotyping theory); *Dawson*, 398 F.3d at 217-18 (distinguishing between sex stereotypes and stereotypes based on sexual orientation to find no Title VII discrimination); *DeSantis*, 608 F.2d at 331 (holding that discrimination against a man for being attracted to another man is not impermissible under Title VII because it treats men and women equally).

identity. More than likely, the ENDA will not pass in the current 114th Congress, so ENDA's sponsors will need change the religious exemption language in the current draft of the law.<sup>388</sup> The language provides religiously affiliated groups, including hospitals and universities, with more leeway to be selective than is customary in civil rights legislations.<sup>389</sup> If the religious exemption language is amended, there may be a chance it may pass during the next Congressional session.

People may wonder whether we still need the ENDA in light of the various state and local laws that provide protection from employment discrimination. The answer is *yes*, the ENDA is still needed. As a federal law, it would add strength to the recent court rulings that hold Title VII protects transgender employees;<sup>390</sup> it would educate employers and the community about these rights, and it would make it clear that gender-conforming gay, lesbian, and bisexual persons are also protected. If a federal law like the ENDA fails to pass, it is possible that the Supreme Court could reverse the federal courts holding that Title VII protects transgender employees and reverse the progress of the LGBT community that lower courts have helped create.<sup>391</sup>

Finally, the Supreme Court can hand down a decision that interprets the "sex" provision within Title VII to encompass all gay, lesbian, and transgender discrimination cases. The EEOC's ruling in *Macy v. Holder* has figured out many pieces of the puzzle. Simply put, if employers are faced with an EEOC investigation that is actually taken seriously by an agency that views discrimination against transgender people as illegal, they are far more likely to mediate, give people their jobs back and stop harassment (discrimination) that is occurring on the job. The EEOC has helped to change the workplace environment; however, to protect LGBT people across the country, laws and policies protecting LGBT people are still necessary. Until the Supreme Court rules, other courts may give the ruling significant deference, but it is not guaranteed the Supreme Court will agree with the EEOC.

## VI. CONCLUSION

Today, in the land of the free and home of the brave, there is still no piece of federal legislation that protects citizens from being fired or denied job opportunities based solely on who they are and who they love. Americans should not be deprived of the opportunity to work merely because of his or her sexual orientation or gender identity.<sup>392</sup> Likewise, it is wrong to deny employment to individuals who can perform the job, just because of their sexual orientation.

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<sup>388</sup> See discussion *supra* Part IV.

<sup>389</sup> See discussion *supra* Part IV.

<sup>390</sup> See discussion *supra* Part III(c).

<sup>391</sup> See discussion *supra* Part III(c).

<sup>392</sup> There are cases addressing BFOQ's in the health care arena. In a case involving a male OBGYN who was denied employment because the practice found female patients to prefer female health care providers the court found "such care implicates the patient's privacy rights, personal dignity and self-respect...healthcare presents unique circumstances that may justify reasonable efforts to

Although Title VII does not specifically prohibit discrimination based on sexual orientation or gender identity, some of the cases discussed throughout this article indicate that courts are giving sex discrimination a broader application than has previously existed. Congress has yet to make changes in the language of the law; however, courts are now showing an increased willingness to afford protection from discrimination based on sexual orientation and gender identity. The workplace is changing, as is the law, and each drive the other. It is unknown where the trend of gender identity claims will go, but employers should make employment decisions based upon valid business factors and legitimate reasons, not biases and stereotypes.

Passing employment discrimination laws that protect LGBT citizens in *every* state across this great nation is something that is long overdue. Regardless of whether it is through Title VII's current language or through new legislation, employers should be aware the federal trend appears to be in favor of protecting sexual orientation and gender identity in the workplace. Many companies, including some of our nation's most profitable, already have employment nondiscrimination policies like this in place.<sup>393</sup> Furthermore, with public opinion easing on issues like same-sex marriage, prohibitions on workplace discrimination involving sexual orientation and gender identity seem poised to follow. There is no uncertainty about what our next step must be, and we cannot afford to be apathetic in a common sense fight for equality within the workplace.

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accommodate a patient's expression of preference of doctor by gender and that female patients may have a legitimate privacy interest in seeking to have female doctors perform their gynecological examinations." *See, e.g.,* Veleanu v. Beth Israel Medical Center, 98 Civ. 7455 VM, 2000 U.S. Dist. LEXIS 13948 (S.D.N.Y., September 25, 2000).

<sup>393</sup> The Williams Institute, *New Study Finds 50% Increase in Number of Top Federal Contractors with Gender Identity Non-Discrimination Policies since 2011* (April 29, 2013) <http://williamsinstitute.law.ucla.edu/?p=13586> (last visited May 21, 2014) (over ninety percent of the country's largest companies now prohibit discrimination based on sexual orientation and nearly 80% prohibit discrimination based on gender identity, according to a new study from UCLA's Williams Institute).



CONVENTIONAL MILITARY FORCE AS A RESPONSE TO  
CYBER CAPABILITIES: ON SENDING PACKETS AND  
RECEIVING MISSILES

*MAJOR JASON F. KEEN\**

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\* Major Jason F. Keen, USAF (B.A., Iowa State University (1995); J.D., University of Minnesota Law School (2002); M.S., Air Command and Staff College (2012); LL.M., University of Nebraska College of Law (2014)) is the Chief of Cyber Special Programs Law, Headquarters 24th Air Force/ Air Forces Cyber, Office of the Staff Judge Advocate. He is a member of the Minnesota Bar. This article was prepared in partial satisfaction of the degree of Master of Laws in Space, Cyber, and Telecommunications at the University of Nebraska School of Law, using only publicly-available information. The author wishes to thank Professor Jack Beard for his insight into the real-world analysis of ongoing state practice in the cyber domain, and Julie, Connor, and Megan for their unwavering energy and assistance in completing this project. The views expressed in this paper are those only of the author and do not reflect the official policy or position of the Department of the Air Force, the Department of Defense, or any other U.S. Government agency.

## I. INTRODUCTION

Malicious cyber activity has been on the rise throughout the last two decades, and international government attention on those attacks has progressively increased. Midway through that timeline, in 2005, the Government Accountability Office warned that the federal government had failed to fully address 13 Presidentially-required categories of responsibility to the civilian cyber infrastructure.<sup>1</sup> This report was a message to Congress, and was intended to spur action in formulating a cohesive national strategy for the cyber defense of the different networks primarily owned and operated in the United States. That call to develop a strategy was felt not just in the Congress of the United States of America, but throughout the developed world as cyber intrusions increased. For some, both in legislative bodies and academia, the resultant strategy involves potentially answering cyber-only threats with the use of conventional military force.

### A. Threat Background

When 2014 started, there were over 3 billion people online, amounting to a greater than 500 percent increase since the year 2000.<sup>2</sup> While 500 percent might seem a notable amount itself, internet *malicious* activity had increased even more rapidly. In 1990, there were only four known computer viruses; by the end of 2012, there were over 5,000 known computer viruses, with 110 new viruses appearing each month since that time.<sup>3</sup> With access to, and activity on, the internet at an all-time high and still increasing, global political initiative in the area of effective government cyber response capabilities arguably lags well behind the pace at which the technology evolves. This is made obvious by the news of successful malicious activity more prominent and more frequent than that of successful security initiatives or government actions.

While the growing threat is one of understandably international character, based at least in part on nothing more than the trans-border nature of internet technology, a majority of what makes international headlines is malicious cyber activity initiated against only the United States. Targeting both individuals and corporations (not to mention government institutions), this activity has been steadily progressively successful; attacks on intellectual property alone cost the United States billions of dollars per year, and this amount is rising each year.<sup>4</sup> General Keith Alexander, while

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<sup>1</sup> U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-05-434, CRITICAL INFRASTRUCTURE PROTECTION: DEPARTMENT OF HOMELAND SECURITY FACES CHALLENGES IN FULFILLING CYBERSECURITY RESPONSIBILITIES 2 (May 2005).

<sup>2</sup> *World Internet Users and 2014 Population Stats*, INTERNET WORLD STATS, <http://www.internetworldstats.com/stats.htm> (last visited June 2, 2014).

<sup>3</sup> Frequently Asked Questions, GEORGIA TECH INFORMATION SECURITY CENTER, <http://www.gtisc.gatech.edu/faqs.html> (last visited June 2, 2014).

<sup>4</sup> *Intellectual Property Theft*, FEDERAL BUREAU OF INVESTIGATION, [http://www.fbi.gov/about-us/investigate/white\\_collar/ipr/ipr](http://www.fbi.gov/about-us/investigate/white_collar/ipr/ipr) (last visited June 2, 2014).

-serving as both the Commander of USCYBERCOM and the Director of the National Security Agency, stated that cyber attacks on key United States infrastructure had seen a 17-fold increase between 2009 and 2011.<sup>5</sup> General Alexander also made a bold statement by going on record and estimating that, on his own perceived scale of 1 to 10, when it came to capabilities in responding to major cyber attacks the United States rated “around a 3.”<sup>6</sup> Rhetoric from the United States has been at times even more extreme than this, most notably in October of 2012 when Secretary of Defense Leon Panetta famously cautioned against the forthcoming “cyber-Pearl Harbor.”<sup>7</sup> In 2013, however, not long after Leon Panetta had made his dire prediction, PNC Financial, SunTrust Banks, and BB&T Corp took the unusual step, for an industry that appears to value privacy and freedom from regulation, of asking the government to “stop or mitigate the [cyber]attacks” they were suffering.<sup>8</sup>

While the United States has made an abundance of news relating to this international phenomenon, on a practical (rather than predictive) scale, other nations have likely fared much worse. In January 2011, Defense Research and Development Canada was hacked, with the government admitting that classified “data has been exfiltrated” and “privileged accounts have been compromised.”<sup>9</sup> There were over 30,000 computers physically destroyed in one fell swoop as the result of a coordinated cyber assault on Saudi Aramco in 2012.<sup>10</sup> That damage to the computers and their systems disrupted output from the world’s second leading oil-producing nation.<sup>11</sup> India’s Eastern Naval Command lost classified data in a 2012 hacking scheme that potentially included information regarding “trials of the country’s first nuclear missile submarine, INS Arihant, and operations in the South China Sea.”<sup>12</sup> The Royal Bank of Scotland, 81% government-owned, sustained a serious attack in December 2013 when 465,000 customers were frozen out of their accounts.<sup>13</sup>

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<sup>5</sup> David E. Sanger & Eric Schmitt, *Rise is Seen in Cyberattacks Targeting U.S. Infrastructure*, N.Y. TIMES, July 27, 2012, at A8, available at [http://www.nytimes.com/2012/07/27/us/cyberattacks-are-up-national-security-chief-says.html?\\_r=0](http://www.nytimes.com/2012/07/27/us/cyberattacks-are-up-national-security-chief-says.html?_r=0).

<sup>6</sup> *Id.*

<sup>7</sup> Elisabeth Bumiller & Thom Shanker, *Panetta Warns of Dire Threat of Cyberattack on U.S.*, N.Y. TIMES, Oct. 12, 2012, at A1, available at [http://www.nytimes.com/2012/10/12/world/panetta-warns-of-dire-threat-of-cyberattack.html?\\_r=0](http://www.nytimes.com/2012/10/12/world/panetta-warns-of-dire-threat-of-cyberattack.html?_r=0).

<sup>8</sup> Siobhan Gorman & Danny Yadron, *Banks Seek U.S. Help on Iran Cyberattacks*, WALL ST. J., Jan. 15, 2013, at 6.

<sup>9</sup> Julie Ireton, *Hackers stole secret Canadian government data*, CBC NEWS, <http://www.cbc.ca/m/touch/politics/story/1.990875> (last updated June 3, 2011).

<sup>10</sup> Wael Mahdi, *Saudi Arabia Says Aramco Cyberattack Came From Foreign States*, BLOOMBERG (Dec. 9, 2012), <http://www.bloomberg.com/news/2012-12-09/saudi-arabia-says-aramco-cyberattack-came-from-foreign-states.html>

<sup>11</sup> *Id.*

<sup>12</sup> *India Investigates Cyber Attack on its Eastern Naval Command*, NAVAL TECHNOLOGY (July 5, 2012), <http://www.naval-technology.com/news/newsindia-investigates-cyber-attack-eastern-naval-command>.

<sup>13</sup> Jill Treanor, *RBS Says NatWest website hit by cyber-attack*, THE GUARDIAN (Dec. 6, 2013), <http://www.theguardian.com/business/2013/dec/06/rbs-natwest-website-cyber-attack>.

February 2014 saw 15 Israeli Defense Force computers hacked, and among the systems compromised were those that administer the issue of passes for travel into and out of Israel by Palestinians.<sup>14</sup>

These apocalyptic government predictions and nefarious real-world events are forcing governments to consider just how far they will go in response to the increasingly harmful threats emanating from the cyber domain. This string of information system compromises is exactly why NATO, in March 2014, was not practicing military maneuvers to repel an Eastern European invasion, or rehearsing a response to aggressive military action in the Strait of Hormuz, but instead holding a 17-nation cyber wargame named “Locked Shields.” It is also why and where those who seek to answer cyber threats with conventional means come into play.

One possible takeaway from NATO’s coordinated training to respond to cyber contingencies is that, at least in the case of the 17 participating nations, military action of *some type* is considered an appropriate response to *some* actions originating in the cyber domain.<sup>15</sup> The important international legal question that follows is how far a state (or security collective) can go within the existing normative framework concerning international wrongful acts, specifically as it regards using conventional military force in response to cyber-only threats.

This article seeks to answer that question, by exploring the current international legal regime on the use of force, particularly when framed as a response to an armed attack. While this appears at the outset to be a rather basic analysis, the combination of unclear definitions and indeterminacy in the areas of use of force and armed attack, when combined with the ambiguities and cascading effects of cyber operations, often leaves the practitioner with little more than a new list of questions. However, what is clear from the outset is that unless those questions are met with both a very specific and somewhat unlikely set of facts, it is improbable that cyber-only activities would meet the international legal threshold of an “armed attack,” allowing for the response of large-scale conventional military force.

## B. The Real Question

This article will seek to examine in what legal scenarios (if any) military force can be used in response to cyber-only threats. It will focus on the concept of using conventional military forces to respond, ostensibly by invoking self-defense, against a cyber-only capability that has been employed against them or their State, and which is being declared by said State to be an “armed attack.” This analysis is the central focus within the larger legal issue, because this is precisely the scenario that

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<sup>14</sup> Micah D. Halpern, *Cyber Break-in @ IDF*, HUFFPOSTTECH (Apr. 5, 2014, 5:59 AM), [http://www.huffingtonpost.com/micah-d-halpern/cyber-breakin-idf\\_b\\_4696472.html](http://www.huffingtonpost.com/micah-d-halpern/cyber-breakin-idf_b_4696472.html).

<sup>15</sup> Peter Apps, *Estonia exercise shows NATO’s growing worry about cyber attacks*, REUTERS (May 27, 2014), <http://www.reuters.com/article/2014/05/27/us-nato-cybercrime-exercise-idUSKBN0E72D120140527>.



multiple governments or commentators have posited in recent years. Commentators have noted that “the increase in attacks heightens the possibility that states might respond to a cyber-attack with conventional military means.”<sup>16</sup>

This potential scenario is illustrated by Israeli Defense Force Chief of Staff Benny Gantz’s claim that a full-scale war could be started by “a cyber attack on Israel’s traffic light system.”<sup>17</sup> In the United States context, there is the widely-circulated quote of the “unnamed American military official” whose claim to the Wall Street Journal was that “if you shut down our power grid, maybe we will put a missile down one of your smokestacks.”<sup>18</sup> More subtle is the implication by Al Jazeera (coming after the above quote) that given Stuxnet’s “effects in the real world” and “traditional weaponry...needed to achieve the same result,” the cyber offensive against Iranian nuclear centrifuges might have permissibly led to military action on their part.<sup>19</sup> Another widely-discussed scenario is military response after malicious cyber activities against financial institutions or banking infrastructure, such as those described above against the Royal Bank of Scotland or the disabling of Russia’s Central Bank during the events of 2014 in Crimea.<sup>20</sup>

Prior to the political discussion of whether any of these specific examples merit military response, this article analyzes whether military response is legally permissible in such scenarios. This article considers existing international legal authorities and precedent to examine whether it is likely that a State could successfully petition the UN Security Council for permission to use force in response to a cyber-only capability, whether a State could successfully advocate at the International Court of Justice for a finding that their use of force was in self-defense against what the State would likely term a “cyber armed attack,” or finally whether a State might be able to legally use military means in implementing countermeasures against an enemy cyber capability.

## II. INTERNATIONAL LEGAL REGIME ON THE USE OF FORCE

The question often asked about these international cyber incidents is whether or not they amount to an “act of war,” and what the victim state can, should or must do about that determination. With respect to so-called cyber attacks on computer

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<sup>16</sup> Oona A. Hathaway et al., *The Law of Cyber-Attack*, 100 CALIF. L. REV. 817, 840 (2012).

<sup>17</sup> Yaakov Lappin, *Gantz: Future war could begin with missile on IDF General Staff headquarters*, THE JERUSALEM POST (Aug. 10, 2013), <http://www.jpost.com/Defense/Gantz-Future-war-could-begin-with-missile-on-IDF-General-Staff-headquarters-328152>.

<sup>18</sup> Siobhan Gorman, *Cyber Combat: Act of War*, WALL ST. J. (May 31, 2011), <http://online.wsj.com/news/articles/SB10001424052702304563104576355623135782718>.

<sup>19</sup> Haroon Meer, *Cyberwar, Stuxnet and People in Glass Houses*, AL JAZEERA (June 7, 2011), <http://www.aljazeera.com/indepth/opinion/2011/06/20116673330569900.html>.

<sup>20</sup> Timothy Heritage, *Kremlin website hit by ‘powerful’ cyber attack*, REUTERS (Mar. 14, 2014), <http://www.reuters.com/article/2014/03/14/us-russia-kremlin-cybercrime-idUSBREA2D0FY20140314>.

networks, or even actual damage to physical infrastructure, General Martin Dempsey, the Chairman of the Joint Chiefs of Staff, said in a 2013 speech at the Brookings Institution that “the decision to declare something a hostile act — an act of war — is certainly one that resides in the responsibility of our elected leaders.”<sup>21</sup>

General Dempsey properly recognizes that the concept of “acts of war” is no longer the international legally-significant trigger it once was, and instead lives on as a political determination. Other than usefulness as a headline, in many ways the term is all but lost to history. Certainly Congress is given the authority “to declare war” by the Constitution, and there are numerous statutory authorizations triggered and other legal implications when this happens, but in the international use of force context the term no longer means what it once did.<sup>22</sup>

As the Crimes of War Education Project relates, “The term ‘act of aggression’ has [for] all intents and purposes subsumed the legal term ‘act of war’ and made it irrelevant, although ‘act of war’ is still used rhetorically by States that feel threatened.”<sup>23</sup> That said, the term continues to be legally defined in the United States as follows:

(4) the term “act of war” means any act occurring in the course of—

(A) declared war;

(B) armed conflict, whether or not war has been declared, between two or more nations; or

(C) armed conflict between military forces of any origin.<sup>24</sup>

This definition is not particularly illustrative, as it in essence states that anything occurring during the course of an armed conflict is an “act of war,” and also appears to provide the corollary that if no ongoing armed conflict is present, there can be no such thing as an “act of war.”

Thus, in considering the permissible use of armed force one must move on from the classic considerations of “act of war,” and examine “use(s) of force” and “armed attack,” for it is this set of terms, as seen below, that the UN Charter and follow-on customary international law that has followed its signature established as

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<sup>21</sup> Tamir Eshel, *Cyber Attack on the U.S. Could be Met with Conventional Military Response*, DEFENSE UPDATE (June 28, 2013), [http://defenseupdate.com/20130628\\_dempsey\\_threatens\\_responding\\_cyberattack\\_by\\_military\\_acti on.html#.U6857fdWSo](http://defenseupdate.com/20130628_dempsey_threatens_responding_cyberattack_by_military_action.html#.U6857fdWSo).

<sup>22</sup> U.S. CONST. art. I, § 8.

<sup>23</sup> David Turns, *Crimes of War – Act of War*, CRIMES OF WAR, available at <http://www.crimesofwar.org/a-z-guide/act-of-war-2/> (last visited Mar. 29, 2014).

<sup>24</sup> 18 U.S.C. § 2331 (2013).

the ‘keys to the kingdom’ in getting to the modern *Jus Ad Bellum*, or law regarding the recourse to war.

## A. UN Charter

The UN Charter explicitly recognizes the sovereignty of nations, and in that vein it prohibits, at Article 2(4), the “threat or use of force against the territorial integrity or political independence of any state.”<sup>25</sup> As a practical matter, the Charter permits such uses of force in only two scenarios: first, when the use of force is first sanctioned by the United Nations Security Council; and second, when it is used permissibly in self-defense.<sup>26</sup>

The former of these authorized uses of force exists because Article 39 of the Charter states that “[t]he Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.”<sup>27</sup> When followed, the reference to Article 42 yields the following regarding the Security Council: “it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations.”<sup>28</sup>

In regards to self-defense, Article 51 of the Charter states that “Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security.”<sup>29</sup>

### 1. Article 2(4)

Article 2(4)’s prohibition on the use of force has spawned numerous writings on the legalities of going to war in recent decades, but Titiriga Remus aptly describes the current trend line by pointing out that while Article 2(4) is often considered the cornerstone of *jus ad bellum* in the modern era, it (and its modern peers) has actually caused the *jus ad bellum* to morph into a *jus contra bellum* (law prohibiting the recourse to war) over the last half-century.<sup>30</sup> In a purely historical

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<sup>25</sup> U.N. Charter art. 2, para. 4.

<sup>26</sup> *See id.*; U.N. Charter art. 51.

<sup>27</sup> U.N. Charter art. 39.

<sup>28</sup> U.N. Charter art. 42.

<sup>29</sup> U.N. Charter art. 51.

<sup>30</sup> Titiriga Remus, *Cyber-attacks and International law of armed conflicts; a “jus ad bellum” perspective*, 8 J. INT’L COMM’N L. & TECH. 179, 180 (2013).

context, this evolution makes absolute sense. Article 2(4) was considered, at the time, “the underlying and cardinal principle of the whole Organization,” given that the United Nations came about as a direct result of the horrors that World War II wrought upon five continents.<sup>31</sup>

The United Nations Charter as much as spells this out when it says that its purpose is to “save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind.”<sup>32</sup> Much of this sentiment was undoubtedly influenced by the previously-unseen levels of destruction that the dropping of the atomic bombs at Hiroshima and Nagasaki ushered in. Commentators at the time of the Charter’s adoption, and Article 2(4)’s entry into force, went on record as saying that armed conflict had become “increasingly destructive to the point where it threatens the continued existence of civilization,” and that this bleak reality had “undoubtedly strengthened the common purpose.”<sup>33</sup>

Despite the very pessimistic outlook towards potential future conflict and the related all-encompassing importance of preventing it, this United Nations prohibition on the use of force (save when authorized by the Security Council or in self-defense) could be seen as a retreat position from the Kellogg-Briand Pact; this document was the Post-World War I attempt at international agreement on conflict undertaken after the first of the two incidences of war mentioned in the UN Charter Preamble.

This pact, signed by many of the major powers involved in World War I, was intended as a “frank renunciation of war,” and which on its face outlawed recourse to war as a means of resolving disputes or conflicts “of whatever nature or of whatever origin they may be.”<sup>34</sup> History proved this total ban on war was not realistic, however, as a number of conflicts ensued shortly after its signature, culminating with World War II’s start only a decade after the pact’s entry into force.

At the same time, it could be said that this strict ban did not go far enough, or at the very least was not specific enough. This is because war, as discussed above, was already seen less as a descriptor of actions and more as a “legal concept.”<sup>35</sup> Battles could be waged and if the nation-states involved did not wish to be considered “at war,” they very likely were not. Similarly, nations could easily mutually declare themselves “at war” without a single use of force having yet occurred.<sup>36</sup>

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<sup>31</sup> LELAND M. GOODRICH & EDVARD HAMBRO, CHARTER OF THE UNITED NATIONS: COMMENTARY AND DOCUMENTS 67 (1946).

<sup>32</sup> U.N. Charter Preamble.

<sup>33</sup> GOODRICH & HAMBRO, *supra* note 31, at 3.

<sup>34</sup> Kellogg-Briand Pact, Aug. 27, 1928, 46 Stat. 2343, 94 L.N.T.S. 57.

<sup>35</sup> GOODRICH & HAMBRO, *supra* note 31, at 69.

<sup>36</sup> See generally Quincy Wright, *When Does War Exist?*, 26 AM. J. INT’L L. 362 (Apr. 1932), available at <http://www.w.jstor.org/stable/2189362>.

The meetings to establish the United Nations and the ultimate signature of the Charter appeared to acknowledge the practical failures of Kellogg-Briand, by virtue of the fact that UN founders took the progressive and pragmatic step of prohibiting the threat or use of force, as opposed to addressing the concept of war, while also providing for certain limited exceptions. However, they did not precisely define what would qualify as a now-outlawed “use of force.” Thus, the type and degree of force required to constitute a violation of Article 2(4) is not clearly established within the charter itself. While there are certainly majority views in the international legal community, to be discussed below, there is still no universal consensus.

Common sense itself dictates that military (or “armed”) force always violates the proscription, if not otherwise explicitly authorized. At the time of the Charter’s adoption, Goodrich elaborated on Article 2(4)’s prohibition, stating that “it can be presumed that the word ‘force’ as used in this paragraph means only ‘armed force,’”<sup>37</sup> and Randelzhofer and Dörr propose in Simma’s treatise on the UN Charter that the definition of force as it is used in Article 2(4) is, “according to the correct and prevailing view, limited to armed force.”<sup>38</sup> While it is the “prevailing view” that unjustified armed force alone qualifies as an unlawful use of force under the Charter, member states frequently argue that lesser and different forms of force may also qualify for the prohibition.

These arguments are most often made by those who rely on the language in Article 2(4) prohibiting the use of force against the “political independence” of a state.<sup>39</sup> These arguments center on the assertion that any attempts to coerce a change in a state’s political will, whether through armed force or the use of any other means that can achieve the same ends, violate the spirit of Article 2(4). These claims are buoyed by multiple United Nations General Assembly (GA) resolutions, as outlined below.

General Assembly resolution 2625, the Friendly Relations Declaration, states that not only armed intervention, but “all other forms of interference or attempted threats against the personality of the state or against its political, economic and cultural elements, are in violation of international law.”<sup>40</sup> This resolution goes on to state: “No state may use or encourage the use of economic, political or any other type of measures to coerce another state in order to obtain from it the subordination of the exercise of its sovereign rights and to secure from it advantages of any kind.”<sup>41</sup>

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<sup>37</sup> GOODRICH & HAMBRO, *supra* note 31, at 70.

<sup>38</sup> Albrecht Randelzhofer & Oliver Dörr, *Article 2(4)*, in *THE CHARTER OF THE UNITED NATIONS: A COMMENTARY* 200, 208 (3d ed. 2012).

<sup>39</sup> U.N. Charter art. 2, para. 4.

<sup>40</sup> G.A. Res. 2625 (XXV), U.N. Doc. A/RES/25/2625 (Oct. 24, 1970).

<sup>41</sup> *Id.*

General Assembly resolution 42/22, Declaration on the Non-Use of Force, was passed 17 years later. It reiterates the same idea, and quotes from the older resolution when it mandates that states abstain from all “other forms of interference or attempted threats against the personality of the State,” and reinforces that states may not “use or encourage the use of economic, political or any other type of measures to coerce another State.”<sup>42</sup>

Given that it is a political body, the General Assembly’s resolutions do not amount to binding international law. To the degree that General Assembly resolutions are adopted by consensus, or that states universally ascribe to be bound by them, it is possible for them to attain the status of customary international law.<sup>43</sup> However, the prevailing viewpoint and ongoing state practice do not appear to support this expansive view of Article 2(4)’s prohibitions.<sup>44</sup> Further complicating the potential use of these resolutions’ language as expanded approaches to the use of force is the fact that GA Res. 2625 explicitly states that “nothing in the foregoing paragraphs shall be construed as enlarging or diminishing in any way the scope of the provisions of the Charter concerning cases in which the use of force is lawful.”<sup>45</sup>

In addition to argument about the scope of Article 2(4)’s prohibition, specific means of international relations come into play. Each of these means might be ‘questionable’ relative to another state’s sovereignty and political independence. However, they clearly do not rise to the level of being a prohibited use of force in customary international law for one reason or another.

One of these is what can be termed “economic force.” States falling into the notional category of ‘desiring an expansive view of Article 2(4)’ seem to often promote economic force as a non-armed-force use of force. However, the prevailing view is to reject economic force as a use of force, based largely upon the historical fact that this consideration was explicitly taken up, and intentionally excluded, by the drafters; in 1945, at the San Francisco Conference on International Organization, the Brazilian delegates sought to amend Article 2(4) in order to include the threat or use of “economic measures” along with the included prohibited threat or use of force.<sup>46</sup> This proposal, however, suffered an unambiguous defeat, and the inclusion of economic activity as a potential unlawful use of force was left out of the Charter.

The exclusion of economic activities from the conceptual use of force definition may partially explain the delegates’ voting results. The Charter’s focus on state sovereignty as a fundamental precept of international law demonstrates its intent

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<sup>42</sup> G.A. Res. 42/22, U.N. Doc. A/RES/42/22 (Nov. 18, 1987).

<sup>43</sup> Marko Divac Öberg, *The Legal Effects of Resolutions of the UN Security Council and General Assembly in the Jurisprudence of the ICJ*, 16 EUR. J. INT’L L. 879, 897-99 (2005).

<sup>44</sup> GOODRICH & HAMBRO, *supra* note 31; cf. Randelzhofer & Dörr, *supra* note 38.

<sup>45</sup> G.A. Res. 2625, *supra* note 40.

<sup>46</sup> Doc. 784, I/1/27, 6 U.N.C.I.O. Docs 331, 334-35 (1945).

to protect, if not encourage, economic sovereignty.<sup>47</sup> Therefore, with economically competitive behaviors following close behind economic freedom, an attempt to internationally regulate “forceful” economic activities between states might encroach upon “competing” economies, thereby impacting ongoing trade relations.<sup>48</sup>

Another established non-use of force is espionage. Espionage will be defined here as “consciously deceitful collection of information, ordered by a government” which is “accomplished by humans unauthorized by the target to do the collecting.”<sup>49</sup> It is widely condemned at the state level, and espionage’s definition is focused on human “spying,” implying that the collector is operating in an internationally unfriendly way outside of his or her own territory. That is, these espionage operations are likely occurring either in the territory of the target, or that of a neutral party. These acts might include only the unlawful collection of information; however, they sometimes also include the provision of information to parties hostile to the State, or even the intentional dissemination of misinformation to parties friendly to the State. These actions could have potentially devastating consequences for a state, from exploiting the information gained in order to take out the enemy State’s air defenses, to providing intelligence to subversive internal forces that could then successfully carry out a coup. It is this set of potentially catastrophic outcomes that leads many nations to punish acts of espionage (common domestic offenses include “spying,” “treason,” and “aiding the enemy”) with mandatory death.<sup>50</sup>

However, despite this significant national treatment, there is no public international law prohibition on espionage, and there is certainly no principle of *jus cogens* violated by espionage.<sup>51</sup> Acts of espionage may result in catastrophic outcomes for the target State. However, the underlying act of espionage is still not criminalized internationally, let alone considered an unlawful use of force based upon the resultant conditions. As Thomas Wingfield put it, when considering the potential negative repercussions of engaging in these spy games, the “lack of an international prohibition of espionage leaves decision makers with the usually acceptable liability of merely violating the target nation’s domestic espionage law.”<sup>52</sup>

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<sup>47</sup> See generally U.N. Charter art. 2 (declaring that the Charter is founded upon concepts of the “sovereign equality” of all member states, who enjoy the right to “self-determination”).

<sup>48</sup> See Comment, *The Use of Nonviolent Coercion: A Study in Legality Under Article 2(4) of the Charter of the United Nations*, 122 U. PA. L. REV. 983, 996 (1974).

<sup>49</sup> Geoffrey B. Demarest, *Espionage in International Law*, 24 DENV. J. INT’L L. & POL’Y 321, 325-26 (1996).

<sup>50</sup> Christopher D. Baker, *Tolerance of International Espionage: A Functional Approach*, 19 AM. U. INT’L L. REV. 1091 (2004).

<sup>51</sup> Roger D. Scott, *Territorially Intrusive Intelligence Collection and International Law*, 46 A.F. L. REV. 217, 218 (1999).

<sup>52</sup> Thomas C. Wingfield, *Legal Aspects of Offensive Information Operations in Space*, 9 USAFA J. LEGAL STUD. 121, 140 (1999).

Another potentially-questionable activity that does not trigger the Article 2(4) prohibition is, by definition, retorsion. Retorsion and reprisals are international unfriendly acts which are “aimed at deterring an adversary from future actions and convincing him to return to lawful behavior.”<sup>53</sup> These acts are fundamentally different from other means of international relations in that retorsion is an act that is a coercive, ‘hostile’ act taken in international relations, but which somehow falls short of the Article 2(4) prohibition against the use of force.<sup>54</sup> Similarly, reprisal is an act that would be internationally unlawful per Article 2(4), but which is otherwise “justified as a response to the unlawful act of another state.”<sup>55</sup> What differentiates reprisal from permissible self-defense, then, is a span of time. The difference between permissible reprisals (constituting neither an impermissible use of force nor act of self-defense) and other acts under the charter “lies in the stretching of the requirements of immediacy, since the reprisal can be taken at a time and place difference from the pivotal event.”<sup>56</sup>

## 2. Article 51

Second only to disagreements over the application of the term “use of force” in law of war debates is the concept of the “armed attack.” In fact, authors have gone so far as to label Articles 2(4) and 51 of the Charter “the twin scourges of public international law.”<sup>57</sup> Article 51’s infamy lies in the fact that this provision gives rise to States’ right to self-defense in the UN-driven international legal regime. Article 51 says, “Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security.”<sup>58</sup> Much like the debates that rage on over “uses of force” as regards Article 2(4), the fact that the Charter does not clearly define the term “armed attack” continues to create difficulty in application, as discussed below.

While there are many issues with its interpretation, context reveals the impetus behind the provision’s existence. As discussed above, the Kellogg-Briand Pact of 1928 contained no provision for self-defense in the course of its total renunciation (and prohibition) of recourse to war. Some, such as U.S. Secretary of State (and namesake of the pact) Kellogg, felt that the right to self-defense was considered “inherent” and already enshrined in customary international law; therefore, he stated

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<sup>53</sup> GEORG KERSCHISCHNIG, *CYBERTHREATS AND INTERNATIONAL LAW* 123 (2012).

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> See, e.g., Leung Fiona Nga Woon, *Resolving the Conundrums in Articles 2(4) and 51 of the Charter of the United Nations – A Matter of Treaty Interpretation* (2010), <http://lbms03.cityu.edu.hk/oaps/slw2010-4635-lnw806.pdf>.

<sup>58</sup> U.N. Charter art. 51.



it need not be worked into the pact.<sup>59</sup> The United States went so far in support of this position as to transmit notes to many of her allies, stating that there should be no concern over the lack of reservation for defensive measures in the pact, as “[t]hat right is inherent in every sovereign state and is implicit in every treaty.”<sup>60</sup>

A strictly textualist examination, however, would yield a different view. The new pact completely and explicitly banned resort to war as a means of international affairs, indicating it was to be treated as an applicable multi-lateral agreement intended to supersede what the law had heretofore been. In addition, if the right was as self-apparent and unyielding as Secretary Kellogg claimed, it seems that the United States was going through more trouble in the form of ‘state practice’ than should be necessary to bring the “inherent” fact to everyone’s attention.

When considering the legal dispute in hindsight, the former United States argument is more supported by history and the existing law at the time than the latter textual view, as demonstrated by Article 51’s later reiteration of the inherent right to self-defense.<sup>61</sup>

It was this codification of the right to self-defense in Article 51, however, that contained the new and undefined term of art constituting the trigger for that right: an “armed attack.” One line of reasoning held by scholars is that the term went undefined because armed attack “was apparently considered self-explaining during the drafting of the Charter.”<sup>62</sup> While there may be strong common sense support for this position, the fact remains that many actors will want a clear delineation of what satisfies the threshold test for when their right to self-defense can be permissibly invoked, and that clear threshold was not provided.

Prior to fully considering the hotly-debated issue of what might constitute an armed attack, it is helpful to quickly dispatch with the relevant rules that will be internationally binding as to how the follow-on permissible self-defense is used once the threshold is met.

It is generally accepted that three conditions must be satisfied in exercising self-defensive force as a response to an armed attack: the exercise of self-defense must be *necessary*, it must be *proportionate* to the armed attack, and it must take place with an appropriate degree of *immediacy*.<sup>63</sup> Of particular importance to note for international and operations law practitioners is that the conditions of necessity

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<sup>59</sup> GENERAL PACT FOR RENUNCIATION OF WAR: TEXT OF THE PACT AS SIGNED. NOTES AND OTHER PAPERS, (U.S. Gov’t Printing Off., 1928).

<sup>60</sup> United States, Identical Notes of the United States to Other Governments in Relation to the Kellogg-Briand Pact along with all the Relevant Replies, 22 AM. J. INT’L L. SUPP. 109 (1928).

<sup>61</sup> U.N. Charter art. 51.

<sup>62</sup> KERSCHISCHNIG, *supra* note 53, at 111.

<sup>63</sup> YORAM DINSTEIN, WAR, AGGRESSION, AND SELF-DEFENSE 209 (4th ed. 2005).

and proportionality, in relation to the *jus ad bellum* concept of self-defense, differ from the application of those same terms as used among the cardinal principles of LOAC in the *jus in bello*.<sup>64</sup> Confusion of these homonyms in the two sets of legal principles regulating the use of violence only compounds the difficulty of a bid to standardize the use of force internationally. Necessity, then, as it applies to self-defense, requires a number of sub-parts that must be satisfied in order for this first rule to be complied with.<sup>65</sup>

The first condition to be met by the state acting in self-defense is establishing that the alleged armed attack was definitively perpetrated by the entity to be engaged in self-defense, and no other.<sup>66</sup>

Next is that the use of force to be defended against amounts to an intentional armed attack, wherein the state exercising self-defense was the anticipated target of unlawful forced “aimed specifically” in its direction, and was not simply the victim of an indiscriminate attack or even an accident.<sup>67</sup>

Finally, the state acting in self-defense must determine that using force is the only practical means of self-help. In other words, it must be the case that “no realistic alternative means of redress is available,” and that “force should not be considered necessary until peaceful measures have been found wanting, or when they clearly would be futile.”<sup>68</sup>

The condition of proportionate response can be couched as simple reasonableness in the degree of counter-force used in response to the unlawful force being answered in self-defense.<sup>69</sup> That is, there must be a symmetry, or approximate equality in the scale and effects, of the international wrong committed and the force used in self-defense to counter it.<sup>70</sup> While legal approximations of proportionality are required in the course of battle planning, evaluation on the whole of whether force and counter-force was proportionate can only truly be done after the cessation of hostilities. Thus, as Dinstein points out, “proportionality is unsuited for an investigation of the legitimacy of a war of self-defense.”<sup>71</sup>

Immediacy, as it deals with international self-defense, is merely the proposition that there “must not be an undue time-lag between the armed attack and the

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<sup>64</sup> See generally GARY D. SOLIS, *THE LAW OF ARMED CONFLICT: INTERNATIONAL HUMANITARIAN LAW IN WAR* (2010).

<sup>65</sup> DINSTEIN, *supra* note 63, at 209.

<sup>66</sup> *Id.*

<sup>67</sup> *Id.* at 210.

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> *Id.* at 237.

<sup>71</sup> *Id.*

exercise of self-defense.”<sup>72</sup> This condition is almost self-apparent, as to truly act in a way that will defend against an attack, that defense must be immediately focused on the attack as it happens.<sup>73</sup> However, this common-sense treatment of defense must be tempered by the preceding components of necessity, which mandated the accumulation of undisputed facts regarding the perpetrator, and some attempt at peaceful means of resolution prior to launching any self-defensive response. Therefore, to some degree necessity and immediacy form a type of sliding scale where more focus on one can only occur at the expense of the other.

Given these conditions precedent to the exercise of self-defense, what type of actions might be considered an armed attack that would give way to permissible self-defense? One of the least satisfying ways to answer this question is simply to assert that there is no need to separate the concepts of “use of force” and “armed attack,” and claim that they are one and the same. A small number of scholars hold exactly this position, demanding essentially that there is no textual reason to read Article 51 any more narrowly than Article 2(4).<sup>74</sup>

Troubling to some is the potential for government and military lawyers around the world to adopt the position that ‘uses of force’ and ‘armed attacks’ are the same thing, despite the fact that the existence of two different terms implies the contrary conclusion. One of the scholars embodying this concern is Waxman, who points out that, officially, “[t]he United States government has not publicly articulated a general position on cyber-attacks and Articles 2(4) and 51.”<sup>75</sup> Nevertheless, he goes on to imply a sense of institutional movement toward a position among the United States and other Western states that uses of forces and armed attacks bear very little distinction when he opines that, despite the lack of a public stance on the matter, at times the United States and her allies take a “position on this issue... [which] differs from that of many states and authorities.”<sup>76</sup>

A position refusing to acknowledge any distinction between triggering events relative to Article 2(4) and Article 51 is, in some ways, completely logical for Western states. That is, a state which holds the dominant view that the definition of a use of force is “confined solely to armed force,”<sup>77</sup> and “does not extend to political or economic coercion”<sup>78</sup> is predictably more likely to consider that the difference

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<sup>72</sup> *Id.*

<sup>73</sup> See generally Orin S. Kerr, *Ex Post: A Theory of Law*, 16 GREEN BAG 2D 111 (2012).

<sup>74</sup> See generally Elizabeth Wilmschurst, *Principles of International Law on the Use of Force in Self-Defense*, 55 INT’L & COMP. L.Q. 963, 966 (2005); W.H. Taft IV, *Self-Defense and the Oil Platforms Decision*, 29 YALE J. INT’L L. 295, 300-01 (2004).

<sup>75</sup> Matthew C. Waxman, *Cyber-Attacks and the Use of Force: Back to the Future of Article 2(4)*, 36 YALE J. INT’L L. 421, 431 (2011).

<sup>76</sup> *Id.* at 427; see U.S. CONST. art. I, § 8.

<sup>77</sup> JAMES CRAWFORD, *BROWNIE’S PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 747 (8th ed. 2012).

<sup>78</sup> *Id.*

between this required armed force and the ultimate “armed attack” that would permit force in response to be so inconsequential as to be literally non-existent.

That this position is, to some extent, supported by the dominant view on the meaning of “use of force” is ironic, given that it clearly differs from the prevailing view on the interplay of the two terms, namely that “there exists a gap between Articles 2(4) and 51.”<sup>79</sup> Waxman offers that “it is widely understood that ‘armed attack’ is, although closely related, a narrower category than ‘threat or use of force.’”<sup>80</sup> Dinstein further qualifies the existing distinction by pointing out that “Logically and pragmatically, the gap between Article 2(4) (‘use of force’) and Article 51 (‘armed attack’) ought to be quite narrow, inasmuch as ‘there is very little effective protection against States violating this prohibition of the use of force, as long as they do not resort to an armed attack’.”<sup>81</sup> In this practical consideration, Dinstein does not necessarily convey everything about Randelzhofer’s authoritative conclusion regarding the prevailing view, however. The prevailing view does admit that “States are bound to endure acts of force that do not reach the intensity of an armed attack,” however, this is actually a favorable outcome in the majority international view as the same “concern that an escalation, or even a full-scale war, could be the consequence of a State responding in self-defense to slight uses of armed force” that underlies the Charter is served by this difference in canonical terms.<sup>82</sup>

This clarification on the existence of different standards regarding the “use of force” and “armed attack,” however, does not result in almost any benefit to the practitioner. Instead, there are now simply *two* undefined triggering events potentially relevant to a State’s use of conventional force. To better understand what crosses the threshold of armed attack, one must examine the limited pool of related jurisprudence the International Court of Justice (ICJ) has provided on the matter.

#### (a) *Nicaragua Case*

The Nicaragua case is the first, and most important, of the ICJ cases to address the concepts of “use of force” and “armed attack.” The central facts of the case start in 1979, when the Somoza government in Nicaragua was ousted by the Sandanistas, but reach their most crucial point in 1981, when the United States began to take active involvement in the region based largely upon Nicaragua’s support for guerrillas in El Salvador.<sup>83</sup> While this action involved sanctions and the suspension of aid, it also involved the support of the Contras, which was what ultimately resulted

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<sup>79</sup> Albrecht Randelzhofer & Georg Nolte, *Article 51*, in *THE CHARTER OF THE UNITED NATIONS: A COMMENTARY* 1397, 1403 (3d ed. 2012).

<sup>80</sup> Waxman, *supra* note 75, at 427.

<sup>81</sup> DINSTEIN, *supra* note 63, at 193.

<sup>82</sup> Randelzhofer & Nolte, *supra* note 79, at 1402.

<sup>83</sup> *Summaries of Judgments, Advisory Opinions and Orders of the International Court of Justice: 1948-1991*, U.N. Doc. ST/LEG/SER.F/1 125 (1992).

in Nicaragua's filing of a claim against the United States for engaging in "military and paramilitary activities in and against Nicaragua."<sup>84</sup> At its simplest, Nicaragua's claim is that by supporting the paramilitary activities of the Contras, the United States has violated international law insofar as the prohibition against the use of force and the principle for non-intervention are concerned.<sup>85</sup>

Jurisdictional disputes and procedural hurdles left this dispute settled, and the judgments rendered, in a way less effective and illustrative relative to the UN Charter than it otherwise could have been. Most notably, the United States submitted a declaration and protested the Court's jurisdiction, before then withdrawing from participation in the case.<sup>86</sup> This withdrawal from participation and the United States invocation of their multilateral treaty reservation resulted in the court considering less of both the facts and the law than would have been desirable in order to clearly establish international guidelines.

As a secondary diminution of the case, El Salvador's request to intervene in the proceedings, ostensibly to submit their own claims of Nicaragua's wrongful use of force and/or armed attacks so as to potentially bolster justification for the United States' proffered collective self-defense argument, was denied by the Court.<sup>87</sup>

Finally, the Court largely passed on the issue of defining "armed attack." Specifically, the Court simply stated that there exists "general agreement on the nature of the acts which can be treated as constituting armed attacks."<sup>88</sup> The court did make a helpful qualification of uses of force and acts of aggression, however; the Court provides that it is only "the most grave forms of the use of force" which are "those constituting an armed attack."<sup>89</sup> This proviso clearly draws the line between some uses of force and others is instructive, but still generally falls well short of being determinative or definitional. Nonetheless, even with the failure to address all the facts that might have been helpful in the case, and less than full deliberation of UN Charter application, the case highlights a number of invaluable considerations to the concepts of self-defense and armed attack.

First, because the Court settled this case using customary international law after honoring the United States reservation, even without providing any definitions, the Court ended up addressing the fact that customary international law as to self-defense and Article 51 of the charter are essentially one and the same. The Court initially pronounced that when it comes to considering "use of force" and "armed

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<sup>84</sup> *Id.*

<sup>85</sup> *Id.* at 161.

<sup>86</sup> *Id.* at 126.

<sup>87</sup> *Id.* at 129.

<sup>88</sup> Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14, 103 para. 195 (June 27) [hereinafter *Nicaragua Case*].

<sup>89</sup> *Id.* at 101 para. 191.

attack” both under the customary international law and the Charter, “the substantive rules in which they are framed are not identical in content.”<sup>90</sup> However, when it comes time to state what the customary law is, there appears no practical difference to Article 51 worth noting, as the Court expressed that “[i]n the case of individual self-defense, the exercise of this right is subject to the State concerned having been the victim of an armed attack.”<sup>91</sup> The Court made the same determination regarding collective self-defense, pointing out that as a principle of customary law, “for one State to use force against another, on the ground that that State has committed a wrongful act against a third State, is regarded as lawful, by way of exception, only when the wrongful act provoking the response was an armed attack.”<sup>92</sup>

Second, the Court discussed the high standards of attribution for those unfriendly individuals participating in wrongful acts which a State wishes to conclude were armed attacks ascribed to a certain other State. This high threshold for attribution is clearly seen when the Court examined United States assistance to the Contras, and whether this assistance imputed the Contras’ actions to the United States. On this matter the Court states:

U.S. participation, even if preponderant or decisive, in the financing, organizing, training, supplying and equipping of the [C]ontras, the selection of its military or paramilitary targets, and the planning of the whole of its operation, is still insufficient in itself, on the basis of the evidence in the possession of the Court, for the purpose of attributing to the United States the acts committed by the contras in the course of their military or paramilitary operations in Nicaragua.<sup>93</sup>

The ICJ concluded this analysis by saying that “[t]he Court does not consider that the assistance given by the United States to the contras warrants the conclusion that these forces are subject to the United States to such an extent that any acts they have committed are imputable to that State.”<sup>94</sup> It might be surprising that financing, organizing, training, and selecting targets for those who commit acts that might constitute either a “use of force” or “armed attack” does not suffice to establish responsibility. However, the Court squarely addressed this issue by instituting the standard of “effective control,” when stating that in order to hold a State responsible for an armed attack, it would “have to be proved that that State had *effective control* of the military or paramilitary operations in the course of which the alleged violations were committed.”<sup>95</sup>

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<sup>90</sup> *Id.* at 96 para. 181.

<sup>91</sup> *Id.* at 103 para. 195.

<sup>92</sup> *Id.* at 110 para. 211.

<sup>93</sup> *Id.* at 64 para. 115.

<sup>94</sup> *Id.* at 65 para. 116.

<sup>95</sup> *Id.* at 65 para. 115 (emphasis added).

Finally, while the Court clearly stated that in order to exercise self-defense a State must be the victim of armed attack, the Court also appeared convinced that certain counter-measures falling short of self-defensive force are also permissible when the countered international wrong has itself been something short of an armed attack. This possibility was, ironically, raised in the course of stating that the United States was *not* justified in using counter-measures in Nicaragua. In the course of that discussion, the Court declared the salient point that, “[t]he acts of which Nicaragua is accused, even assuming them to have been established and imputable to that State, could only have justified proportionate countermeasures on the part of the State which had been the victim of these acts.”<sup>96</sup>

(b) *Congo Case*

The *Armed Activities on the Territory of the Congo* case does not significantly add to further understanding of the UN Charter concepts of “use of force” and “armed attack.” Rather, it solidifies the points made in the *Nicaragua* case through the analysis of customary international law. The facts of the case start in August of 1998, when Ugandan forces invaded part of the Democratic Republic of the Congo (DRC), after the new DRC President, Laurent-Desire Kabila, affirmatively sought to restrict the influence of Uganda and Rwanda in the DRC.<sup>97</sup> In response to this political maneuvering, Uganda and Rwanda deployed their own armed forces to a number of regions inside the DRC. More germane to the case is that Uganda “supported Congolese armed groups opposed to President Kabila’s Government.”<sup>98</sup> Specifically, the DRC contended that Uganda “both created and controlled the Congo Liberation Movement (MLC),” which was a rebel group operating primarily in the north part of the country, and led by Jean-Pierre Bemba.<sup>99</sup>

The Court ultimately determined that Uganda violated numerous international law obligations, but that the DRC failed to show the MLC’s conduct should be attributed to Uganda, such that the DRC could then permissibly act in self-defense against the State. The Court determined Uganda had provided both logistics and training for the military branch of the MLC<sup>100</sup> and provided ongoing tactical military support to the MLC during actual operations.<sup>101</sup> The Court also acknowledged that in the Harare Disengagement Plan, the MLC and the Uganda People’s Defense

<sup>96</sup> *Id.* at 127 para. 249.

<sup>97</sup> *Summaries of Judgments, Advisory Opinions and Orders of the International Court of Justice: 2003-2007*, U.N. Doc. ST/LEG/SER.F/1/Add.3 1, 138-39 (2008) [hereinafter “*Summaries of Judgments 2003-2007*”].

<sup>98</sup> *Id.* at 138.

<sup>99</sup> *Id.* at 140.

<sup>100</sup> *Id.*

<sup>101</sup> *Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda)*, 2005 I.C.J. 168, 225 para. 157 (Dec.19) [hereinafter *Congo Case*].

Force (UPDF) were treated as the same entity.<sup>102</sup> Nonetheless, the Court could not determine whether “MLC’s conduct was on the instructions of, or under the direction or control of Uganda,” and thus the Court found “that there is no probative evidence by reference to which it has been persuaded that this was the case.”<sup>103</sup> Therefore, the Court determined that as Uganda does not have “sufficiency of control of [the] paramilitaries,” the DRC is not entitled to use force in self-defense against Uganda to cease the activity of said paramilitaries.<sup>104</sup>

The Court did display that, at least with respect to these issues, they are consistent. In response to Uganda’s claim that their military activities in the eastern portion of the DRC were initially self-defensive in nature, the Court again declined to recognize the claimed right of self-defense by announcing an inability to establish proper attribution. In Uganda’s case for self-defense, the Court found that the Allied Democratic Forces (ADF), who had rear garrison bases in the DRC and were supplied by the DRC and Sudanese, were responsible for six attacks that resulted in the ultimate death or capture of 200 Ugandans. However, the Court then concluded that “there is no satisfactory proof of the involvement in these attacks, direct or indirect, of the Government of the DRC.”<sup>105</sup> Because these “attacks did not emanate from armed bands or irregulars *sent by* the DRC or *on behalf* of the DRC,”<sup>106</sup> the Court concluded that “even if this series of deplorable attacks could be regarded as cumulative in character, they still remained non-attributable to the DRC.”<sup>107</sup> This ultimately led the Court to find that “the legal and factual circumstances for the exercise of a right of self-defense by Uganda against the DRC were not present.”<sup>108</sup>

### (c) *Oil Platforms Case*

The Oil Platforms case provides another ICJ judgment that directly addresses international self-defense, without litigating (or otherwise defining) the provisions of the UN Charter. Against the backdrop of shipping operations affected during the Iran-Iraq war, the United States attacked two Iranian off-shore oil platforms on 19 October 1987. This came after a U.S.-flagged vessel was struck by a missile which the United States believed to be launched by Iran on 16 October 1987.<sup>109</sup> Then, in April 1988, the USS *Samuel B. Roberts* was damaged by a naval mine while return-

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<sup>102</sup> *Id.* para. 156.

<sup>103</sup> *Id.* at 226 para. 160 (internal quotations omitted).

<sup>104</sup> *Id.*

<sup>105</sup> *Id.* at 223 para. 146.

<sup>106</sup> *Id.* (emphasis added).

<sup>107</sup> *Id.*

<sup>108</sup> *Id.* at 223 para. 147.

<sup>109</sup> *Summaries of Judgments 2003-2007*, *supra* note 97, at 20.



ing from an escort mission, and four days later the United States attacked two oil complexes with maritime forces.<sup>110</sup>

The case was brought by Iran in 1992, not as a violation of obligations under general international law, but as a breach of the 1955 *Treaty of Amity, Economic Relations and Consular Rights*.<sup>111,112</sup> In a case where one party fired a missile at the other party's vessel and laid naval mines, and the other party attacked four oil platforms using military force, the ICJ found neither party in breach of the treaty.<sup>113</sup> In the course of delivering what may be seen as a non-answer to the involved complaints, however, the Court provided useful commentary on self-defense and armed attacks. Interestingly, the Court determined that in order to decide whether the attacks and counter-attacks affected "freedom of commerce" or "security interests" it could accept that "Article XX, paragraph 1(d), of the 1955 Treaty was intended to operate wholly independently of the relevant rules of international law on the use of force." The "application of the relevant rules of international law relating to this question thus forms an integral part of the task of interpretation" the Court was to perform.<sup>114</sup> In considering the international law relevant to the series of attacks between Iran and the United States, the Court again imposed the incredibly high threshold for armed attack that was seen both in the *Nicaragua* and *Congo* cases.

Concerning the missile attacks against ships in the Persian Gulf region, and specifically the Silkworm missile attack against the *Sea Isle City* on 16 October 1987, the Court ultimately stated that "the burden of proof of the existence of an armed attack by Iran on the United States, in the form of the missile attack on the *Sea Isle City*, has not been discharged."<sup>115</sup> This conclusion came following satellite and other electronic imagery of four missile sites within the Faro area admittedly under Iranian control, testimony of two Kuwaiti officers about the launch of the missiles (including the observed path of the missile that struck the *Sea Isle City*), U.S. AWACS data eliminating other potential sources of a fired missile, and even Iranian President Ali Khomeini's threat that if the United States did not leave the region, he would attack.<sup>116</sup> This evidence did not show attribution simply because Iran declared it was not responsible, as the Court repeatedly pointed out, the United States could not produce any physical evidence of the missile.<sup>117</sup>

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<sup>110</sup> *Id.*

<sup>111</sup> *Id.* at 18, 20.

<sup>112</sup> Treaty of Amity, Economic Relations and Consular Rights, U.S.-Iran, Aug. 15, 1955, 8 U.S.T. 899 (entered into force June 16, 1957).

<sup>113</sup> *Summaries of Judgments 2003-2007*, *supra* note 97, at 18.

<sup>114</sup> Oil Platforms (Iran v. U.S.), 2003 I.C.J. 161, 182 para. 41 (Nov. 6) [hereinafter *Oil Platforms Case*].

<sup>115</sup> *Id.* at 190 para. 61.

<sup>116</sup> *Id.* at 187-90.

<sup>117</sup> *Id.* at 189 para. 58.

Concerning the apparent systematic minelaying that occurred in the Persian Gulf, and subsequent damage to the USS *Samuel B. Roberts*, the Court held that “evidence of other minelaying operations by Iran is not conclusive as to responsibility of Iran for *this particular* mine.”<sup>118</sup> The Court noted that Iran laid mines in the Khor Abdullah channel, but Iran claimed those mines were placed for defensive purposes, and therefore the United States failure to produce evidence of intent also failed to meet attribution standards.<sup>119</sup> Finally, the Court addressed the apparent smoking-gun fact that other mines moored near the USS *Samuel B. Roberts*’s damage were, in fact, Iranian mines, to include serial numbers proving they were Iranian mines. Concerning the specific mine that damaged the USS *Samuel B. Roberts* (for which no intact serial number could be recovered) the Court blithely stated it “is highly suggestive, but not conclusive.”<sup>120</sup>

While the Court’s standard of attribution seems to climb from the “very high” to “impossibly high” in this case, the threshold for what constitutes an armed attack follows a similar trajectory. Having failed to attribute the attacks to Iran, the Court had no actual need to consider whether or not they rose to the level of “armed attack” such that the United States was justified in using self-defensive force. However, the Court nonetheless highlighted the ever-widening gap between the “use of force” under Article 2(4) of the UN Charter and “armed attack” under Article 51 when they reminded the parties that it is only “the most grave forms of the use of force” that were to be considered as “constituting an armed attack.”<sup>121</sup>

With this qualification firmly in mind, the Court stated that it would proceed “[o]n the hypothesis that all of the incidents complained of are to be attributed to Iran,” which included the Silkworm missile strike on the *Sea Isle City*, the attack on the *Texaco Caribbean*, the firing on U.S. helicopters by Iranian gunboats and from Iranian oil platforms, and the systematic minelaying by *Iran Air*.<sup>122</sup> Considering all of these events, the Court concluded that

“[e]ven taken cumulatively, and reserving, as already noted, the question of Iranian responsibility, these incidents do not seem to the Court to constitute an armed attack on the United States, of the kind that the Court, in the case concerning *Military and Paramilitary Activities in and against Nicaragua*, qualified as a ‘most grave’ form of the use of force.”<sup>123</sup>

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<sup>118</sup> *Id.* at 195 para. 71 (emphasis added).

<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

<sup>121</sup> *Id.* at 187 para. 51.

<sup>122</sup> *Id.* at 191-92 para. 64.

<sup>123</sup> *Id.* at 192 para. 64.

Of keen interest to those who considered the outcome of this case less than satisfactory is Judge Simma's separate opinion, which takes a particularly dim view of the majority opinion. Judge Simma clearly implies that he found preposterous the Court's holding that the U.S. attacks on the Iranian oil platforms did not infringe upon Iran's freedom of commerce. He found equally troubling the treatment of the United States counter-claim that the strikes were necessary to protect essential security interests and a valid exercise of self-defense. Judge Simma wrote, "[i]n my view, this counter-claim ought to have been upheld."<sup>124</sup>

Simma's primary complaint was the "half-heartedness" with which the Court addressed the concepts of use of force and self-defense.<sup>125</sup> He appeared disappointed that the Court did not directly address the UN Charter, further, he found it regrettable that the Court could not muster

the courage of restating, and thus re-confirming, more fully fundamental principles of the law of the United Nations as well as customary international law (principles that in my view are of the nature of *jus cogens*) on the use of force, or rather the prohibition on armed force, in a context and at a time when such a reconfirmation is called for with the greatest urgency.<sup>126</sup>

Part of Simma's disagreement with the Court's treatment of the use of force and self-defense is that the overly-narrow, high-threshold approach they take pushes the very concepts involved toward obsolescence. Thus, his true point of contention centered on the treatment of the United States counter-claim. Regarding the missile, mine, and gunboat attacks against the United States, he wrote that "the Judgment might create the impression that, if offensive military actions remain below the—considerably high—threshold of Article 51 of the Charter, the victim of such actions does not have the right to resort to—strictly proportionate—defensive measures equally of a military nature."<sup>127</sup> Simma ultimately showcased his strong position on this issue by proposing his own approach:

In other words, I would suggest a distinction between (full-scale) self-defense within the meaning of Article 51 against an "armed attack" within the meaning of the same Charter provision on the one hand and, on the other, the case of hostile action, for instance against individual ships, below the level of Article 51, justifying proportionate defensive measures on the part of the victim, equally

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<sup>124</sup> *Id.* at 324 (Simma, J., separate opinion).

<sup>125</sup> *Id.* at 327 para. 6.

<sup>126</sup> *Id.* (emphasis added).

<sup>127</sup> *Id.* at 331 para. 12.

short of the quality and quantity of action in self-defense expressly reserved in the United Nations Charter.<sup>128</sup>

## B. Acts of Aggression

If the ICJ has continued to widen the gulf between “use of force” and “armed attack,” what fills the resultant void? While the terms “use of force” and “armed attack” remain undefined by the UN Charter, in the cases above the Court continually relied upon 1974 General Assembly resolution 3314 to help it decide the issue of “armed attack.”<sup>129</sup> This GA resolution, to the potential confusion of practitioners, undertook not to define either of these vital terms found in the UN Charter, but instead the term “acts of aggression.”

In the preamble of GA Resolution 3314, the General Assembly reminded member states that they must refrain “from all acts of aggression and other uses of force.”<sup>130</sup> This text is significant in that a plain reading, while not defining “use of force” as such, clearly states that acts of aggression are themselves part of the general category of “uses of force” at a minimum. The text also strongly implied in the resolution itself that acts of aggression are a special, and more serious, aggravated type of use of force. If an international unfriendly act is an act of aggression, the act would at least be a use of force. This creates something akin to a three-tiered use of force hierarchy. Some “uses of force” are nothing more than that; some may rise to the level of being considered an “act of aggression” and nothing further; and the gravest of these qualifies as not only a “use of force” and “act of aggression,” but an “armed attack,” as well.

Therefore, separate from all of the other ‘pedestrian’ uses of force, GA Resolution 3314 provides a list of “serious and dangerous”<sup>131</sup> uses of force. From this list, theoretically, the “most grave forms” can be selected as occurrences that rise to the level of armed attacks. Article III of the Resolution then provides a non-exhaustive list of explicit examples of acts of aggression:

- (a) The invasion or attack by the armed forces of a state of the territory of another state, or any military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another state or part thereof,

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<sup>128</sup> *Id.* at 332 para. 12.

<sup>129</sup> See *Nicaragua Case*, *supra* note 88, at 103-04 para. 195; *Congo Case*, *supra* note 101, at 222-23 para. 146.

<sup>130</sup> G.A. Res. 3314 (XXIX), U.N. GAOR, 29th Sess., Supp. No. 31, U.N. Doc. A/9631, at 142 (Dec. 14, 1974).

<sup>131</sup> *Id.* at 143.

(b) Bombardment by the armed forces of a state against the territory of another state or the use of any weapons by a state against the territory of another state;

(c) The blockade of the ports or coasts of a state by the armed forces of another state;

(d) An attack by the armed forces of a state on the land, sea or air forces, or marine and air fleets of another state;

(e) The use of armed forces of one state which are within the territory of another state with the agreement of the receiving state, in contravention of the conditions provided for in the agreement or any extension of their presence in such territory beyond the termination of the agreement;

(f) The action of a state in allowing its territory, which it has placed at the disposal of another state, to be used by that other state for perpetrating an act of aggression against a third state;

(g) The sending by or on behalf of a state of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another state of such gravity as to amount to the acts listed above, or its substantial involvement therein.<sup>132</sup>

This non-exhaustive list has an obvious common theme: the use of armed force directly against the territory or personnel of another state. From this list, those that are the “most grave,”<sup>133</sup> i.e., those exceeding “mere frontier incident[s],”<sup>134</sup> might be considered an “armed attack” in the international legal regime.

### C. Countermeasures

Another crucially important internationally unfriendly act existing below the level of “armed attack” is that of “countermeasures.” The idea of countermeasures is essentially a modern sub-set of what was traditionally viewed as reprisal.<sup>135</sup> The term “reprisals” is generally only used in reference to actions taken during the course of armed conflict, whereas “countermeasures” may be used to refer to retributive

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<sup>132</sup> *Id.* art. 3.

<sup>133</sup> *Oil Platforms Case*, *supra* note 114, at 192 para. 64.

<sup>134</sup> *Nicaragua Case*, *supra* note 88, at 103 para. 195.

<sup>135</sup> *Materials on the Responsibility of States for Internationally Wrongful Acts*, U.N. Doc. ST/LEG/SER.B/25, at 304 (2012) [hereinafter “*Responsibility of States*”].

internationally unfriendly and belligerent actions used at any point, not just in the course of ongoing armed conflict.<sup>136</sup>

International legal considerations regarding employment of countermeasures is largely derived from the United Nations International Law Commission, and its work on the law of state responsibility. The Commission spent over 60 years amassing what was intended to be an authoritative summation of customary international law as it guides public international relations issues.<sup>137</sup> In the course of assembling this material, the Commission compiled draft articles on the responsibility of states for internationally wrongful acts, which, in 2001, the United Nations General Assembly adopted, ultimately commending the articles to member States in resolution 56/83.<sup>138</sup> The UN General Assembly has recommended the articles to its members in three resolutions since that time, and according to a Secretary-General report for the 68th Session of the UN, the articles and their commentaries had been authoritatively cited 154 times by international courts and tribunals.<sup>139</sup> All of this appears to support the proposition that, as the International Law Commission intended, the articles would summarize the customary international law in the first place, as they have been used extensively as such a reference.

The articles explore the basics of countermeasures and the use thereof, to include concepts such as the injured state, the responsible state, and what constitutes an actionable breach. Most importantly, the articles outline the particular rules and limitations on how countermeasures may be used. Part One of the articles initiates the rules on countermeasures with the concept that “the breach of any international obligation” of a State constitutes an “internationally wrongful act” that may be actionable.<sup>140</sup> Part Two of the articles deals with the “obligations of the responsible State,” and Part Three is concerned with the “implementation of State responsibility,” to include what actions the injured State may take against the responsible State.<sup>141</sup>

Article 42 begins these relevant provisions by stating that an injured State may invoke responsibility against a State if its wrongful activity was taken against the injured State, or a group of States including the injured State.<sup>142</sup> This is an important concept, because it distinguishes the right to collective self-defense in the case of an armed attack from the right to respond with countermeasures only when the State is a direct victim. This is juxtaposed with Articles 48 and 54, however. Taken together, these articles clarify that while countermeasures are not a ‘transferable’ response in international relations, if a State is a member of a ‘collective,’ to include in all cases

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<sup>136</sup> *Id.*

<sup>137</sup> *Id.* at vii-viii.

<sup>138</sup> G.A. Res. 56/83, ¶ 3, U.N. Doc. A/RES/56/83 (Jan. 28, 2002).

<sup>139</sup> *Responsibility of States*, *supra* note 135, at viii.

<sup>140</sup> *Id.* at 272.

<sup>141</sup> *Id.*

<sup>142</sup> *Id.* at 274.

the international community at large, which is harmed by the breach, any member State of the collective may implement appropriate countermeasures.<sup>143</sup>

Article 49, “Objects and Limits of Countermeasures,” establishes that the injured State may only take countermeasures in order to induce the responsible State “to comply with its obligations,” and that countermeasures “shall, as far as possible, be taken in such a way as to permit the resumption of performance of the obligations in question.”<sup>144</sup> This might be analogous to the concept of necessity in self-defense. Countermeasures can only be taken against the responsible State for so long as they might serve the goal of helping to “induce that State to comply with its obligations of cessation and reparation.”<sup>145</sup> Anything beyond this, the articles imply, is merely vengeance.

Article 50 specifies that the right to implement countermeasures shall not affect certain international obligations, to include:

- (a) the obligation to refrain from the threat or use of force as embodied in the Charter of the United Nations;
- (b) obligations for the protection of fundamental human rights;
- (c) obligations of a humanitarian character prohibiting reprisals;
- (d) other obligations under peremptory norms of general international law.<sup>146</sup>

Much of this is seemingly self-apparent, as the rules for employment of countermeasures, by definition, deal with the permissible hostile interaction occurring below the thresholds of “use of force” and “armed attack” as between states. It would hopefully go without saying that preexisting obligations as regards human rights and other normative frameworks remain intact even when responding to being wronged.

Apart from necessity, Article 51 spells out the analogue to proportionality. The article states that countermeasures must be “commensurate with the injury suffered, taking into account the gravity of the internationally wrongful act and the rights in question.”<sup>147</sup> Like Article 50’s warning about human rights violations, it may seem that a rule specifying that a scenario where countermeasures are legal is not a blank check for retaliation is unnecessary. However, in the context of the Post-World War II United Nations, where it was believed that the threat of war

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<sup>143</sup> *Id.* at 334.

<sup>144</sup> *Id.* at 309.

<sup>145</sup> *Id.*

<sup>146</sup> *Id.* at 316.

<sup>147</sup> *Id.* at 324.

“endangers the survival of mankind,” such conservative and cautionary measures to prevent the escalation of hostile interaction are hardly a surprise.<sup>148</sup>

#### D. Principle of Non-Intervention

A final principle dealing with activities generally short of armed attack is non-intervention. This principle is often applied when considering claims of an illegal use of force which fall short of the armed attack threshold, such as those of economic and political coercion. This principle finds its legal basis in the combination of Article 2(1)'s declaration of the “sovereign equality” of all Members,<sup>149</sup> and Article 2(7)'s assurance that the United Nations is not authorized to “intervene in matters which are essentially within the domestic jurisdiction” of a member State.<sup>150</sup> Layered upon these pronouncements is the UN General Assembly's Friendly Relations Declaration, which specifically forbids “activities directed towards the violent overthrow of the regime of another state” as well as attempting to “interfere in civil strife in another State.”<sup>151</sup> That General Assembly Declaration also states that not only are the previous activities proscribed, but that “no State, or group of States, has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State.”<sup>152</sup>

The practical effect of this principle is that it provides a means of categorizing some of the internationally unfriendly acts that do not trigger the prohibitions in some cases, and rights in others, associated with uses of force and armed attacks. This provides another label (finding) that is applied by the ICJ, as even if examined military activity does not rise to the level of a “use of force” or “armed attack” the court may determine that a “military intervention” has occurred.<sup>153</sup> This determination that military forces may be used, while falling short of the threshold of either use of force and armed attack, is directly relevant to the discussion of the use of permissible countermeasures.

### III. ALTERNATIVE SCENARIOS FOR PERMISSIBLE CONVENTIONAL MILITARY RESPONSE

Having considered the international legal regime and associated rules and definitions that would control how any attempted use of conventional military force in response to a cyber-only threat is analyzed by the UN Security Council or ICJ, it is necessary to examine the actual mechanisms through which a State might

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<sup>148</sup> Randelzhofer & Dörr, *supra* note 38, at 203.

<sup>149</sup> U.N. Charter art. 2, para. 1.

<sup>150</sup> U.N. Charter art. 2, para. 7.

<sup>151</sup> G.A. Res. 2625, *supra* note 40.

<sup>152</sup> *Id.*

<sup>153</sup> *Congo Case*, *supra* note 101, at 227 paras. 163-64.



seek to bring military force to bear upon the party responsible for the hypothetical malicious cyber capabilities employed.

#### A. UN Security Council Authorization

The first potential way a State might seek to use force (or, ‘see force used’ in the case of a collective response) is through application to the United Nations Security Council. This is clearly the method favored by the existing international legal regime governing the use of force, as evidenced by the fact that the UN Charter explicitly gives the Security Council both the responsibility and authority for “maintenance of international peace and security.”<sup>154</sup>

Thus, Article 39 of the UN Charter provides the Security Council with authority to determine when there has been any “threat to the peace, breach of the peace, or act of aggression.”<sup>155</sup> The Security Council may then decide what measures are to be taken under Article 41 or 42 of the Charter, and per Article 25 all member States must “accept and carry out the decisions of the Security Council.”<sup>156</sup> A substantive decision about a breach of the peace or measures to be taken must pass the Security Council with nine affirmative votes, to include an affirmative vote from each permanent member of the Council.<sup>157</sup>

Even this cursory examination of the Council and its authority begins to illuminate why this method, i.e., requesting that the Security Council consider a dispute and decide that force will be authorized in response under its Article 42 powers, is easily the least likely method by which a State will employ force in response to a malicious cyber activity. This conclusion is evident for two primary reasons, both of a practical (vice legalistic) nature.

##### 1. Security Council Process

The first reason that this method fails is the very nature of the United Nations, its Security Council, and any bureaucracy in general. When a state is involved in a dispute serious enough to consider military force as a self-defensive response to cyber-only activity, it seems safe to posit that temporal factors will be among the most important variables in the outcome of the dispute. Adding layers of procedure by an international body on top of whatever domestic administrative process exists cannot possibly speed up the response.<sup>158</sup>

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<sup>154</sup> U.N. Charter art. 24, para. 1.

<sup>155</sup> U.N. Charter art. 39.

<sup>156</sup> *Id.* art 25.

<sup>157</sup> Rudolf Geiger, *Chapter V: The Security Council*, in *THE CHARTER OF THE UNITED NATIONS: A COMMENTARY* 751, 751 (3d ed. 2012).

<sup>158</sup> *See generally* Kerr, *supra* note 73, at 111.

To the credit of the UN and the Security Council, and due to the grave responsibility of preserving international peace and security, the Council maintains a state of readiness such that they can assemble very quickly after the President of the Council decides to convene a meeting. As a practical matter this is owed to fact that all of the Security Council members have permanent diplomatic missions staffed at the United Nations Headquarters.<sup>159</sup> Procedurally, this is the case because Article 28 of the Charter mandates that “[t]he Security Council shall be so organized as to be able to function continuously.”<sup>160</sup>

It is, however, the responsibility of the President of the Council to call a meeting once a member State has so requested.<sup>161</sup> Once the meeting has been convened, the Council must first decide whether or not the Council will consider the issue.<sup>162</sup> This is done, procedurally, through a formal adoption or rejection of the submitted dispute as an agenda item.<sup>163</sup> If the agenda item is accepted, the Council is then “seized of the matter.”<sup>164</sup> At this point the Council will determine whether the scenario referred to it is a true “situation” or “dispute.”<sup>165</sup> Only after this Article 36(1) jurisdictional decision can the Council then move on to deliberations and decision-making.

Once the Security Council is “seized of a matter,” if it is contemplated by the Council, or requested by the initiating State, that some Chapter VII enforcement measures are to be taken, the Council must first determine per Article 39 that a “threat to the peace, breach of the peace, or act of aggression” exists.<sup>166</sup> What the initiating State must understand is that the Security Council’s function is not that of a police force, judge, and jury, seeking to sanction the wrong-doer, but instead is that of a body charged with maintaining the peace.<sup>167</sup>

This fundamental purpose provides the reason that prior to authorizing the use of force under Article 42, the Security Council must have already considered that “measures provided for in Article 41 would be inadequate or have proved to

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<sup>159</sup> SYDNEY D. BAILEY & SAM DAWS, *THE PROCEDURE OF THE UN SECURITY COUNCIL* 23 (3d ed. 1998).

<sup>160</sup> U.N. Charter art. 28, para. 1.

<sup>161</sup> *Provisional Rules of Procedure*, S/96/Rev.7, Rule 2 (1983) (“The President shall call a meeting of the Security Council at the request of any member of the Security Council.”).

<sup>162</sup> Theodor Schweisfurth, *Article 35*, in *THE CHARTER OF THE UNITED NATIONS: A COMMENTARY* 1108, 1117 (3d ed. 2012).

<sup>163</sup> *Id.*

<sup>164</sup> *Id.*

<sup>165</sup> Andreas Zimmerman, *Article 27: Voting*, in *THE CHARTER OF THE UNITED NATIONS: A COMMENTARY* 871, 926 (3d ed. 2012).

<sup>166</sup> U.N. Charter art. 39.

<sup>167</sup> Nico Krisch, *Introduction to Chapter VII: The General Framework*, in *THE CHARTER OF THE UNITED NATIONS: A COMMENTARY* 1237, 1245 (3d ed. 2012).

be inadequate.”<sup>168</sup> These Article 41 measures include any of those not rising to the level of the use of force, such as economic sanctions, referral to international tribunal, arbitration, and other non-military enforcement measures.<sup>169</sup> Again, this preference for non-forceful responses, if at all possible, is entirely consistent with the UN Charter framework, given the overarching goal of “world unity and world organization,” in order prevent conflict whenever possible so that conflict does not spiral into war.<sup>170</sup>

All of this procedure illustrates the necessary bureaucratic nature of the Security Council, and highlights that any decision it ultimately renders regarding the use of force is not likely to come quickly. In fact, a case study of State-initiated agenda items before the Security Council makes it fair to say that any such decision would not be a matter of hours, or even days, but very likely weeks, and possibly months.<sup>171</sup>

## 2. Security Council Geopolitics

The second reason that the Security Council option is not likely to lead to an approved use of force in response to a malicious cyber event is the nature of the geopolitics involved. Those who postulate that a cyber event will rise to the level of an armed attack often construct politically-correct hypotheticals where “Vetruvia” uses malicious code against a dam and hydroelectric system in “Arkastan,” creating a safety scenario such that the international community accepts Arkastan’s use of force in response. However, the real world will not involve fictitious States who owe no political allegiance to members of the Security Council, and to whom no allegiance is owed. Rather, this situation will involve UN member States which the Security Council would have to agree should be dealt with forcibly, and do so after so much of the cyber mischief (read: state practice) discussed above has gone on uninterrupted in the preceding decades.

With the veto powers of the permanent members of the Council in mind, it is fair to ask whether any commentators truly believe that China is likely to allow a use of force against a North Korean cyber-only incident, or conversely that the United States would allow a decision to use force against Israel for cyber mischief? Would Russia approve a resolution allowing the use of force against Iran in response to a cyber action undertaken by the Republican Guard? Such scenarios are problematic, at best, and at the very least the involvement of real States would add to the timeline for determination by the Council. This increased period of waiting for resolution adds to a timetable which the victim State would likely already find untenable.

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<sup>168</sup> U.N. Charter art. 42.

<sup>169</sup> Nico Krisch, *Article 41*, in *THE CHARTER OF THE UNITED NATIONS: A COMMENTARY* 1305, 1311 (3d ed. 2012).

<sup>170</sup> J. EUGENE HARLEY, *DOCUMENTARY TEXTBOOK ON THE UNITED NATIONS* xiii (1947).

<sup>171</sup> *See generally* BAILEY & DAWS, *supra* note 159, at 22-45.

Add to these considerations of practical reality the fact that the Security Council will also have to apply, generally, the same international law relevant to the *ex post facto* examination of a State determination when taking the defensive self-help route, below. This arguably makes it wiser for the State to take the course of action they believe legal and appropriate, and then undergo ICJ litigation of the matter later.

## B. Use of Force in Self-Defense in Response to an Armed Attack

As discussed, in order for a State to use force in response to a malicious cyber incident, the cyber intrusion must raise to the level of an “armed attack.”<sup>172</sup> Whereas the Security Council route requires petitioning the Council for their decision regarding the potential attack and the authorization of force, the self-help/self-defense route will consist of using force as a self-defensive measure and then reporting to the Security Council the measures taken. Any potential legal repercussions, then, would come via a later analysis by an international tribunal such as the ICJ. Thus, one of the incentives for a State to take this approach to using force in response to a cyber intrusion is that it amounts to asking for forgiveness later, rather than making a mandatory request for permission now.

Despite the potential attraction of explaining away international actions rather than justifying them in advance, there are at least two fundamental hurdles that remain when choosing the retrospective, ICJ approach.

First is the problem that incredibly high ICJ standards for attribution of an armed attack will pose in the cyber domain. It is well-established that in the cyber domain, as a practical matter, “both act and actor attribution are difficult to prove with scientific certainty,” largely because “[c]omputer networks are not designed to facilitate attribution.”<sup>173</sup> Not only are networks not designed to facilitate attribution, they are also designed in large part to combat it.<sup>174</sup> With applications like TOR becoming ever more popular and accessible to the public, it is hard to believe that actor attribution could be proven to a scientific certainty if the bad actor had even the most marginal of skills at anonymizing.<sup>175</sup> However, the ICJ demands precisely this level of scientific certainty for attribution when it refers to moored mines with traceable serial numbers as “highly suggestive, but not conclusive.”<sup>176</sup>

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<sup>172</sup> U.N. Charter art. 51.

<sup>173</sup> Eric F. Mejia, *Act and Actor Attribution in Cyberspace: A Proposed Analytic Framework*, STRATEGIC STUD. Q. 114, 115, 121 (Spring 2014).

<sup>174</sup> Jonathan Zittrain, *Freedom and Anonymity: Keeping the Internet Open*, SCI. AM. (Feb. 15, 2011), <http://www.scientificamerican.com/article/freedom-and-anonymity/>.

<sup>175</sup> See generally TOR, <http://www.torproject.org> (last visited May 31, 2015).

<sup>176</sup> *Oil Platforms Case*, *supra* note 114, at 195 para. 71.

This problem of conclusive attribution is compounded in the cyber domain, as not only do bad actors have a vastly easier time remaining anonymous when compared with the physical world, but they also have the ability to fairly easily engage in “spoofing,” which amounts to forging a fake IP address. If successful, this will lead investigators to an incorrect source of attack.<sup>177</sup> This makes what would be the cyber version of “false flag attacks” relatively easy to carry out, and a variable that would logically cause the international community to argue for an even *higher* level of certainty for attribution in the cyber domain than in the physical world.

Yet another challenging aspect to attribution is that even if the IP address from which the attack has emanated can be discovered, *who* was behind that IP address directing the attack can be nearly impossible to conclude. To accomplish this very likely requires an ongoing intelligence effort before the attack is initiated, and/or presence on, and access to, the network from which it emanated.<sup>178</sup> This, “the most technologically challenging level of attribution,”<sup>179</sup> will be scrutinized heavily under any ICJ analysis. In fact, this is the exact issue examined in the *Congo* and *Nicaragua* cases with respect to who “sent,” within the meaning of the UN General Assembly Resolution 3314 “Definition of Aggression,” the alleged armed attackers.<sup>180</sup>

This very troubling aspect of cyber attribution has spawned considerations toward changing the international legal standards of attribution. Altering standards to make the State-linkage less important than finding the actor has been one proffered approach,<sup>181</sup> and even lessening the standards of attribution so as to impute state responsibility for conduct within its borders has been another.<sup>182</sup> None of the proposed methodologies, however, have supplanted the customary international law approach to attribution as applied by the ICJ, wherein the conduct must be “by[,] or on behalf of[,] a State.”<sup>183</sup>

For these reasons, authors in the operational field have stated that “attributing cyber attacks is untenable and because of this fact, deterrence by threat of response in the cyber domain is unrealistic.”<sup>184</sup>

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<sup>177</sup> Kerschischnig, *supra* note 53, at 123.

<sup>178</sup> See generally Eric M. Hutchins, Michael J. Cloppert & Rohan M. Amin, *Intelligence-Driven Computer Network Defense Informed by Analysis of Adversary Campaigns and Intrusion Kill Chains*, LOCKHEED MARTIN, available at <http://www.lockheedmartin.com/content/dam/lockheed/data/corporate/documents/LM-White-Paper-Intel-Driven-Defense.pdf> (last visited June 24, 2014).

<sup>179</sup> Erik M. Mudrinich, *Cyber 3.0: The Department of Defense Strategy for Operating in Cyberspace and the Attribution Problem*, 68 A.F. L. REV. 167, 200 (2012).

<sup>180</sup> *Congo Case*, *supra* note 101, at 223 para. 147; *Nicaragua Case*, *supra* note 88, at 103 para. 195.

<sup>181</sup> Nicholas Tsagourias, *Cyber Attacks, Self-Defence and the Problem of Attribution*, 17 J. CONFLICT & SEC. L. 7 (Summer 2012).

<sup>182</sup> David E. Graham, *Cyber Threats and the Law of War*, 4 J. NAT'L SEC. L. & POL'Y 87, 93 (2010).

<sup>183</sup> *Nicaragua Case*, *supra* note 88, at 103 para. 195.

<sup>184</sup> Mudrinich, *supra* note 179, at 194.

As if the near-impossibility of attribution were not enough, the second serious problem in potential ICJ review of a self-defensive response to a cyber intrusion will be the inherent difficulty with any malicious cyber-only activity rising to the level of an armed attack. As discussed above, over time the customary international law standard of an armed attack as only “the most grave forms of the use of force,” and in particular the way in which the ICJ has applied that requirement, has become an unreasonably high threshold, sometimes only short of all-out war.<sup>185</sup>

In the Congo case, the ICJ declined to definitively say that the killing or capture of 200 Ugandans by paramilitaries was enough to exceed the armed attack threshold.<sup>186</sup> In the Nicaragua case, it distinguished between armed attacks and “mere frontier incident[s],”<sup>187</sup> where apparently there some lesser, acceptable amount of shooting and killing occurred. In the Oil Platforms case, the Court decided that a missile strike, gunboat attacks, and minelaying, assuming proper attribution, would still not rise to the level of “armed attack.”<sup>188</sup> Given these actual examples from the ICJ, it is hard to imagine an incident stemming from a cyber-only capability that will result in an outcome tantamount to the gravest of attacks occurring when compared to bombardments, invasions, blockades, and military occupations.<sup>189</sup>

However, commentators seeking to predict a “cyber armed attack” often rely on two methods to bridge the obvious gulf between cyber-only capabilities and effects and the types of occurrences the ICJ considers an armed attack. The first is simply to expropriate the effects from some other physical method of destruction and label it as the outcome of a “cyber attack.” The second is to apply tests or characterizations to the armed attack standard in such a way as to “widen the legal loop,” which ultimately captures some cyber incidents that would likely not even be considered by the ICJ.

The first method is demonstrated by authors whose primary theoretical scenarios resemble the following: “the enemy hacks into your system and launches your own missiles at your capital,” or “the enemy electronically infiltrates your nuclear reactor controllers, intentionally causing a meltdown killing thousands,” or “the enemy uses computer intrusion to intentionally open a dam, killing thousands along the river.” These over-the-top scenarios are employed, it would appear, with the intent of establishing that this is clearly a “cyber attack” that results in being termed an “armed attack.” And, while it does certainly seem correct to say that these events, if done intentionally, would reach the threshold of constituting armed attack, what is common in many of these scenarios is that the cyber capability employed does not appear to be the important variable in the attack. That is to say,

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<sup>185</sup> *Nicaragua Case*, *supra* note 88, at 101 para. 191.

<sup>186</sup> *Congo Case*, *supra* note 101, at 222-23 para. 146.

<sup>187</sup> *Nicaragua Case*, *supra* note 88, at 103 para. 195.

<sup>188</sup> *Oil Platforms Case*, *supra* note 114, at 191-92 para. 64.

<sup>189</sup> *See generally* G.A. Res. 3314, *supra* note 130.

a single spy could be sent to infiltrate the launch facility, the nuclear reactor, or the dam in order to “flip the switch” and cause the same physical results; this change in delivery method does not change the legal characterization of the event, as it is neither the cyber capability nor the person involved that matters in the ultimate legal determination, but simply that a State has intentionally caused widespread destruction and death, with “scale and effects”<sup>190</sup> such that it amounts to an armed attack. So, it appears that the preceding examples stretch the bounds of semantics and pedantry when commentators demand they be acknowledged as “cyber attack amounting to an armed attack,” when instead they might more simply and accurately be considered a missile strike, a nuclear/radiological attack, etc. The cyber capability only amounts to the means of conveying the message, and not the infrastructure that causes the effects. This is why, when analyzing a so-called “cyber-only” capability, the argument of armed attack can virtually be rendered a *reductio ad absurdum* under current ICJ-interpreted international legal standards.

The second method used to avoid the reality of the international legal regime’s armed attack threshold is the employment of any academic analysis which seems to lower the threshold without regard for the actual law. The primary example of this is the oft-cited “effects test” originally proposed by Professor Michael N. Schmitt in the 1990s.<sup>191</sup> In his original article, Prof. Schmitt seeks to locate the “line of demarcation” between coercion and force, and in order to do so begins “by reflecting upon the underlying motivation for the instrument-based distinctions.”<sup>192</sup> Schmitt goes on to say that the following list are “among the most determinative” in examining factors that relate to consequences of a given method: severity, immediacy, directness, invasiveness, measurability, and presumptive legitimacy.<sup>193</sup> Again, Schmitt proposes these as factors to look at when deciding whether something looks more like political and economic coercion or armed force.<sup>194</sup>

What this list of considerations has meant for commentators who wish to see a cyber incident classified as an armed attack, however, is a quasi-legal “test” that can be used to arbitrarily assign numerical values to outcomes from cyber capabilities, and “determine[s] the overall level of forcefulness, which is either above or below the Article 2(4) threshold.”<sup>195</sup> The problem with this approach is that the “effects test,” or “Schmitt test” is *not* the controlling international law, nor any kind of actual legal test. The international law remains that the use of armed force which through its “scale and effects” rises to the level of one of the “most

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<sup>190</sup> *Nicaragua Case*, *supra* note 88, at 103 para. 195.

<sup>191</sup> See Michael N. Schmitt, *Computer Network and the Use of Force in International Law: Thoughts on a Normative Framework*, 37 COLUM. J. TRANSNAT’L L. 885, 914 (1999).

<sup>192</sup> *Id.*

<sup>193</sup> *Id.*

<sup>194</sup> See *id.* at 912-14.

<sup>195</sup> THOMAS WINGFIELD, *THE LAW OF INFORMATION CONFLICT: NATIONAL SECURITY LAW IN CYBERSPACE* 122 (2000).

grave forms of the use of force” crosses the threshold of armed attack. That is it. Even Prof. Schmitt himself, when incorporating his test into the commentary of the Tallinn Manual on the International Law Applicable to Cyber Warfare, notes that “[i]t must be emphasized that they are merely factors that influence States making use of force assessments; they are not formal legal criteria.”<sup>196</sup>

### C. Employment of Countermeasures

With practical and political roadblocks making Security Council authorization for a post-cyber incident response using force highly improbable, and the actual international law making ICJ determination that an employed cyber capability was an “armed attack” even more remote than that, it is necessary to turn to the third possible international legal avenue: the employment of countermeasures.

This possibility appears vastly more legally justifiable, at least in part, because of the practical reality involved. Ironically, Prof. Schmitt, whose “effects test” has become the lynchpin of success for those who advocate for the actuality of cyber armed attack, states that “preoccupation with cyber armed attacks is counter-experiential,” because “[f]ew, if any, cyber operations have crossed the armed attack threshold.”<sup>197</sup>

For those who do not agree with Prof. Schmitt, one must only re-examine an important issue before the ICJ when these issues arose: international State practice regarding what the victim States have to say at the time of the act. For instance, when later determining whether the Uganda incidents were armed attacks, the Court said that while Uganda claims “to have acted in self-defense, it did not ever claim that it had been subjected to an armed attack by the armed forces of the DRC.”<sup>198</sup> This is at issue because, in the Nicaragua case, the Court previously stated that “the absence of a report may be one of the factors indicating whether the State in question was itself convinced that it was acting in self-defense.”<sup>199</sup>

When transposed to the modern era, and in the context of cyber conflict, it is notable that no state has made a formal report claiming to be the victim of any cyber capability that “constitutes an “armed attack” giving rise to a right of self-defense under Article 51 of the U.N. Charter,” and not only this, but, “[n]or has any state argued that cyber-attacks generally constitute a prohibited use of force.”<sup>200</sup>

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<sup>196</sup> INTERNATIONAL GROUP OF EXPERTS, TALLINN MANUAL ON THE INTERNATIONAL LAW APPLICABLE TO CYBER WARFARE 48 (Michael N. Schmitt ed., 2013).

<sup>197</sup> Michael N. Schmitt, “*Below the Threshold*” *Cyber Operations: The Countermeasures Response Option and International Law*, 54 VA. J. INT’L L. 697, 698 (2014).

<sup>198</sup> *Congo Case*, *supra* note 101, at 222 para. 146.

<sup>199</sup> *Nicaragua Case*, *supra* note 88, at 105 para. 200.

<sup>200</sup> Hathaway et al., *supra* note 16, at 840.



If state practice has established that the international unfriendly cyber capabilities employed on an ongoing basis among States fall well below the existing thresholds of “use of force” and “armed attack,” these international wrongs can be dealt with through permissible countermeasures.<sup>201</sup> This proposition likely does not comfort those who seek to lower the notional threshold for cyber armed attack (and, thereby, expand the opportunity for Article 51-based self-defense). This is particularly so because, as embodied in Article 50 of the Articles on State Responsibility, the use of countermeasures does not give States the right to violate Article 2(4)’s prohibition against the threat or use of force.<sup>202</sup>

However, in this context it is again helpful to examine established and ongoing state practice. The ICJ did just this when determining whether incidents amounted to a use of force or armed attack, or were what the ICJ termed mere frontier incidents or interventions. State practice and the Security Council’s treatment of disputes indicate that as the threshold for armed attack has continually gotten higher, so too has the line between intervention (and resulting countermeasures) and the impermissible use of force. Iran’s complaint to the Security Council in 2012 provides an example of this trend. Iran characterized Israel’s countermeasures as impermissible intervention through “state-sponsored terrorism” in reference to Israel allegedly killing Iranian nuclear scientists in response to acts of terrorism imputed to Iran, but the Council did not sustain a claim of intervention, let alone characterize the activities as a use of force or armed attack.<sup>203</sup>

Similar examples also demonstrate this trend. After the ceasefire agreement de-escalating the 2008 five-day war between Russia and Georgia was signed, it was discovered that Russian forces continued to conduct small raids to destroy equipment and arms in Georgia.<sup>204</sup> These raids were intended (per Russia) to ensure “demilitarization of the Georgian armed forces” after there had been small cross-border incursions by said Georgian forces. There was no resultant Security Council decision or ICJ finding which concluded that these raids amounted to a use of force or armed attack.<sup>205</sup>

In 2014, after a Syrian missile crossed the border and killed one Israeli boy and wounded three other civilians, the Israeli Air Force launched a limited countermeasure strike the next day, destroying two tanks and seven army posts in Syria.<sup>206</sup>

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<sup>201</sup> *Responsibility of States*, *supra* note 135, at 272.

<sup>202</sup> *Id.* at 316.

<sup>203</sup> JerusalemPost.com Staff, *Iran protests to UN: Israel killing our scientists*, JERUSALEM POST (Feb. 23, 2012), <http://www.jpost.com/Iranian-Threat/News/Iran-protests-to-UN-Israel-killing-our-scientists>.

<sup>204</sup> Mikhail Barabanov, *The August War between Russia and Georgia*, MOSCOW DEFENSE BRIEF (Oct. 22, 2008), available at [http://www.defenceweb.co.za/index.php?option=com\\_content&view=article&id=540&catid=61%3Aeditor-column&Itemid=119](http://www.defenceweb.co.za/index.php?option=com_content&view=article&id=540&catid=61%3Aeditor-column&Itemid=119).

<sup>205</sup> *Id.*

<sup>206</sup> Gili Cohen, *Ten killed in Israeli strike on Syrian military targets*, HAARETZ (June 23, 2014),

While Syria decried the Israeli response as a “violation of its sovereignty”<sup>207</sup> (i.e., an intervention) neither side made petition to the Security Council or ICJ, or claimed the acts by one or the other were impermissible uses of force or armed attacks.

Finally, international legal commentators were nearly unanimous in declaring that the firing of 23 cruise missiles at Iraqi Intelligence headquarters by the United States in 1993 was unjustifiable on the basis of self-defense after the attempted assassination of the President.<sup>208</sup> However, the proffered United States justification that the limited strikes were “designed to damage the terrorist infrastructure and deter further acts” resulted in a majority of the members of the Security Council treating the strikes as a legally-justifiable countermeasure.<sup>209</sup>

It is fair to say that the treatment of these actions has certainly not reached a level of international legal consistency. However, the ICJ’s own distinction between prohibited armed force and “mere frontier incidents,” coupled with both the explicit and tacit approval by the UN Security Council of limited strikes and targeted killings as countermeasures, appear to provide a window for the use of conventional military capabilities as a countermeasure in certain scenarios.

#### IV. CONCLUSION

With the increasing fear that states will begin responding to cyber-only intrusions through traditional military means,<sup>210</sup> concerns abound. These concerns include the indeterminacy and inconsistency that plagues international legal regimes of traditional arms control,<sup>211</sup> to include nuclear and biological weapons, creeping into the new world of regulating mis-labeled “cyber weapons.” These concerns also envisage a downward spiral of hostile responses to cyber capabilities that become a disproportionate and dangerous, yet somehow legal, descent into unending and largely un-attributable retributive uses of force.

Judge Simma expressed his own opinion about the ambiguities in the use of force legal regime, observing in his separate opinion to the *Oil Platforms* case, “[w]e currently find ourselves at the outset of an extremely controversial debate on the further viability of the limits on unilateral military force established by the United Nations Charter.”<sup>212</sup> His primary concern was a practical one:

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<http://www.haaretz.com/news/middle-east/1.600486>.

<sup>207</sup> Jack Khoury, *Syria: Israeli strike flagrant violation of sovereignty*, HAARETZ (June 23, 2014), <http://www.haaretz.com/news/diplomacy-defense/1.600680> (internal quotation omitted).

<sup>208</sup> Randelzhofer & Nolte, *supra* note 79, at 1406.

<sup>209</sup> *Id.* See also Baker, *supra* note 50.

<sup>210</sup> Hathaway et al., *supra* note 16, at 840.

<sup>211</sup> See generally Jack M. Beard, *The Shortcomings of Indeterminacy in Arms Control Regimes: The Case of the Biological Weapons Convention*, 101 AM. J. INT’L L. 271 (2007).

<sup>212</sup> *Oil Platforms Case*, *supra* note 114, at 328 para 6. (Simma, J., separate opinion).

[O]utside the court-room . . . more and more, legal justification of use of force within the system of the United Nations Charter is discarded even as a fig leaf, while an increasing number of writers appear to prepare for the outright funeral of international legal limitations on the use of force.<sup>213</sup>

This concern, while possibly overdramatic, is not unfounded. Former General Counsel to the State Department Abraham Sofaer, retorted that the current majority legal view regarding the Security Council's "monopoly on the lawful use of force grows from a mix of arguments that have thus far won the day in international legal circles, even though they have no credibility among national security professionals."<sup>214</sup> Sofaer further stated, "[t]he ICJ, the learned societies, the bar association, committees, and most scholars assert, as irrefutable doctrine, positions that are neither mandated by the language or history of the Charter, nor supported to any significant degree in the practice of states."<sup>215</sup>

These opinions on the future of use of force concepts aside, the combination of law and politics makes it clear that in any likely scenario an authorization by the UN Security Council to use force against a cyber-only capability is dubious at best. There is also little chance that the ICJ would ever make a finding that a cyber intrusion was an "armed attack" based on its excessively-high thresholds for the "use of force" and "armed attack" as coupled with the unwillingness to attribute any hostile action to a State which does not openly declare ownership of said action. What these ever-taller international hurdles for the "use of force" and "armed attack" leave, however, is more room 'below the line' for incidents to be considered as interventions and countermeasures, and a strong *realpolitik* desire to use this expanding territory.

Many would argue that sanctioned violence on a large scale in response to cyber capability is unlikely because of the UN's "monopoly on the lawful use of force," as Sofaer puts it.<sup>216</sup> However, the overwhelmingly-negative outcomes from such a trend may provide just as strong reason to avoid such a scenario. A similar attitude is betrayed in a number of recently-released documents from the mid-1940s which capture an international dialogue between the allied powers debating whether they should attempt a series of strategic assassinations in concert with the D-Day invasion at Normandy.<sup>217</sup> The riveting back-and-forth dialogue consisting of typed

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<sup>213</sup> *Id.*

<sup>214</sup> Abraham D. Sofaer, *International Security and the Use of Force*, in *PROGRESS IN INTERNATIONAL LAW* 541, 549 (Russell Miller & Rebecca Bratspies eds., 2008).

<sup>215</sup> *Id.* at 550.

<sup>216</sup> *Id.* at 549.

<sup>217</sup> Mark Stout, (*W*)ARCHIVES: KILL HITLER? OH, I GUESS SO, *WAR ON THE ROCKS* (June 20, 2014), <http://warontherocks.com/2014/06/warchives-kill-hitler-oh-i-guess-so/> (referencing the release of Foreign Office file FO 1093/292, with the moniker "War: General; Assassination Priorities for OVERLORD.").

memos and handwritten notes covers everything from the most high-value of targets to the potential legal intricacies of assassinating otherwise-lawful targets right before or right after capture as a POW. In the midst of the discussion one official summed up his vote against the plan with a rather un-legalistic analysis in May of 1944:

I...dislik[e] this scheme, not out of squeamishness, as there are several people in this world whom I could kill with my own hands and with a feeling of pleasure and without that action in any way spoiling my appetite, but I think that it is the type of bright idea which in the end produces a good deal of trouble and does little good.<sup>218</sup>

This sentiment might capture the best reasons that national leaders have avoided launching missiles in response to a traffic light system being hacked, or the threat of a nuclear device in response to damage to SCADA systems. States retain the ability to operate ‘below the line,’ and thereby engage in limited, targeted military countermeasures as a way to combat (and potentially deter) the most damaging of offensive cyber capabilities. As long as this ability exists, the utility of large-scale military operations in response to a cyber-only scenario will continue to be outweighed by the dangerous precedents set and the likely international legal, economic, and diplomatic backlash that would be felt for decades to come.

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<sup>218</sup> *Id.* (alterations in original).

ONLY IN AMERICA! (AND ITS OUTLYING AREAS):  
 THE CONFLICT BETWEEN THE SBA REGULATIONS AND THE  
 FAR AND THE IMPORTANCE OF NOT BURDENING OVERSEAS  
 AND CONTINGENCY CONTRACTING AGENCIES WITH A  
 REQUIREMENT TO EXECUTE U.S. SMALL BUSINESS  
 SET-ASIDES.

*CAPTAIN MARC P. MALLONE\**

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\* Capt Marc Mallone is a Trial Attorney for the Air Force Legal Operations Agency’s Commercial Litigation Field Support Center at Joint Base Andrews, Maryland. He received a direct commission as an Air Force judge advocate in May 2008. Capt Mallone is admitted to practice law before the Supreme Court of the United States, the United States Court of Appeals for the Armed Forces, and the Supreme Court of Ohio. He received a B.A. in Political Science and Spanish from Ohio Northern University, a Juris Doctor from the University of Toledo College of Law, and LL.M. from the George Washington University Law School in Government Procurement.

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## I. INTRODUCTION

Congress has always recognized the importance of private enterprise and small businesses in the economic system of the United States. Private enterprise is the essence of that system, and successful small businesses are central to its “security and well-being.”<sup>1</sup> Full and open competition protects opportunities for growth and expansion for all businesses, including small businesses.<sup>2</sup> Participation in the federal government procurement system provides one such opportunity for growth.<sup>3</sup> To safeguard small businesses, Congress recognized that certain measures would be necessary to ensure they had sufficient access to federal government procurement dollars. Thus, Congress declared in the Small Business Act of 1958 that:

the Government should aid, counsel, assist, and protect, insofar as is possible, the interests of small-business concerns in order to preserve free competitive enterprise, to insure that a *fair proportion* of the total purchases and contracts for property and services for the Government...be placed with small business enterprises.”<sup>4</sup>

In order to meet the “fair proportion” mandate of the Small Business Act of 1958, agencies implementing the Small Business Act established procedures for setting aside, or reserving, certain procurements only for small businesses. The now-superseded Armed Services Procurement Regulation (ASPR) and Federal Procurement Regulations (FPR) both established such procedures.<sup>5</sup> The ASPR stated that, “Any individual procurement or class of procurements, or an appropriate part thereof, shall be set aside for the exclusive participation of small business concerns when such action is (a) jointly determined by an SBA representative and contracting officer, or (b) if no SBA representative is available, is unilaterally determined by the contracting officer to be in the interest...of assuring that a fair proportion of Government procurement is placed with small business concerns.”<sup>6</sup> The FPR contained identical language.<sup>7</sup> The analysis for conducting a total set-aside under both regulations was the same, as well. The regulations required a procurement to be set aside for “exclusive small business participation...where there is a reasonable expectation that bids or proposals will be obtained from a sufficient number

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<sup>1</sup> 15 U.S.C. § 631(a) 2013.

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> Small Business Act of 1958, Pub. L. 85-536 § 2, 72 Stat. 384 (1958) (emphasis added) (current version at 15 U.S.C. § 631(a) (2013)).

<sup>5</sup> Armed Services Procurement Regulation, 32 C.F.R. § 1.7 (1959) and Federal Procurement Regulations, 41 C.F.R. § 1-1.706-1(c) (1963).

<sup>6</sup> ASPR § 1.706-1.

<sup>7</sup> FPR §§ 1-1.706-1(c).



of responsible small business concerns so that awards will be made at reasonable prices.”<sup>8</sup> This requirement is the precursor to the “Rule of Two.”<sup>9</sup>

As the law evolved, two separate provisions incorporating these principles emerged from the statutes and regulations: the “automatic reservation” and what is generally known as the “Rule of Two.” Both provisions require at least two offers from small business concerns and that those offers be at reasonable prices. The difference is that the automatic reservation requires procurements above \$2,500 and below \$100,00 to be set aside *unless* the contracting officer cannot obtain two or more offers that are competitive in price and quality.<sup>10</sup> The “Rule of Two” is not automatic, but requires an agency to set-aside any contract valued at over \$150,000, *so long as* the contracting officer reasonably expects (1) to receive offers from at least two responsible small businesses and (2) the offer to be at a fair market price.<sup>11</sup>

The other difference between the two provisions is their creation in the law. The automatic reservation was statutorily created by the Small Business Act Amendments of 1978.<sup>12</sup> The “Rule of Two” was a regulatory requirement created through cooperation between the SBA and government agencies and appeared in the initial version of the Federal Acquisition Regulation (FAR) in 1984.<sup>13</sup> The goal of the Rule of Two was the same as that of the provisions in the ASPR and FPR: to satisfy Congress’ policy of ensuring a fair proportion of federal government procurements for small businesses.<sup>14</sup>

Although the Rule of Two was not a new concept, its implementation in the first version of the FAR did cause some controversy because it adopted the language of the Defense Acquisition Regulation (DAR) and not the FPR.<sup>15</sup> The Rule of Two was adopted after the language from the FPR regarding a “sufficient number” of offerors and the language of the DAR and the NASA Procurement Regulation language referring to “at least two” responsible offerors were provided during the

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<sup>8</sup> ASPR § 1.706-5(a); FPR § 1-1.706-5(a).

<sup>9</sup> 49 Fed. Reg. 40135 (Oct. 12, 1984) (codified at 48 C.F.R. §§ 19.502-2).

<sup>10</sup> 15 U.S.C. § 644(j). *See also* Federal Acquisition Regulation, 48 C.F.R. §§ 19.502-2(a), 48 C.F.R. § 2.101, and 48 C.F.R. § 13.003 (2011) (current lower and upper thresholds are \$3,000 and \$150,000, respectively).

<sup>11</sup> FAR 48 C.F.R. §§ 19.502-2(b) (2011).

<sup>12</sup> Small Business Act Amendments of 1978, Pub. L. 95-507 § 221(j) 92 Stat. 1771 (1978) (current edition at 15 U.S.C. § 644(j)).

<sup>13</sup> *See* Establishing the Federal Acquisition Regulation, 48 Fed. Reg. 42102-01-C (September 19, 1983). *See also* 49 Fed. Reg. 40135-01 (October 12, 1984) and John Cibinic, Jr., Ralph C. Nash, Jr., and James F. Nagle, Administration of Government Contracts 1592 (4th ed. 2006).

<sup>14</sup> *See Matter of: Delex Systems, Inc.*, Comp. Gen. B-400403 2008 CPD ¶ 181 at 5. (the “Rule of Two” is designed to implement the Small Business Act’s requirement that a small businesses receive a “fair proportion of the total purchases and contracts for property and services for the Government). *See also* Cibinic, et. al. at 1589.

<sup>15</sup> 49 Fed. Reg. 40135-01 (October 12, 1984).

notice and comment period of the FAR.<sup>16</sup> The Office of Management and Budget (OMB), ultimately responsible for the promulgation of the FAR, after notice and comment, decided to use the more specific “at least two” language.<sup>17</sup> The automatic reservation and Rule of Two are currently codified in FAR Part 19 (48 C.F.R. § 19).

The same policy that brought about the “automatic reservation” and the Rule of Two still applies today, but there are differing opinions on how to best implement this policy. Further, there is a question as to which agency is ultimately responsible for creating the rules and regulations governing small businesses involved in federal government procurements. The two main rule-making agencies for small business programs are the Small Business Administration (SBA) and the Office of Federal Procurement Policy (OFPP), which is under OMB. The two agencies agree on the procedures for executing small business set-asides under the FAR and the SBA’s regulations, but there is a conflict with regard to the applicability of the provisions of FAR Part 19 to procurements to be performed outside of the United States or its outlying areas. The Small Business Act is silent on the extraterritorial applicability of set-aside procedures, and until December 31, 2013, the SBA regulations were silent on the issue of extraterritorial applicability as well. On the other hand, the FAR explicitly exempts from FAR Part 19 any contracts to be performed outside the United States or its outlying areas.<sup>18</sup> FAR Part 19 has only one exception to the extraterritorial limitation: FAR Part 19.6, which concerns the Certificate of Competency Program.<sup>19</sup> All other small business preference procedures do not apply extraterritorially. Thus, a conflict has arisen between the long-standing FAR provisions and the new SBA regulations.

The conflicting regulations have come about because the SBA implemented regulatory changes attempting to establish the worldwide applicability of these provisions.<sup>20</sup> The SBA regulations, which went into effect on December 31, 2013, inserted language stating that the regulations apply “regardless of the place of performance” of the contract. The new language directly contradicts the FAR and purportedly establishes worldwide applicability of small business set-aside procedures.

With the increased global reach of U.S. small businesses, a conflict between the FAR and the SBA Regulations presents the possibility for future disputes and litigation. Prior to the effective date of the new SBA regulations, a U.S. small

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<sup>16</sup> *Id.*

<sup>17</sup> *Id.* (citing the preference of several agencies to use the more specific “at least two” language).

<sup>18</sup> 48 C.F.R. § 19.000(b). *See also* 48 C.F.R. § 2.101 (defining the outlying areas as (1) *Commonwealths*: (i) Puerto Rico (ii) The Northern Mariana Islands; (2) *Territories*: (i) American Samoa (ii) Guam (iii) U.S. Virgin Islands; and (3) *Minor outlying islands* (i) Baker Island (ii) Howland Island (iii) Jarvis Island (iv) Johnston Atoll (v) Kingman Reef (vi) Midway Islands (vii) Navassa Island (viii) Palmyra Atoll (ix) Wake Atoll).

<sup>19</sup> 48 C.F.R. § 19.000(b). *See also Matter Of: Eastern Marine, Inc.*, 63 Comp. Gen 551 B-212444, 1984, 84-2 CPD ¶ 232.

<sup>20</sup> 13 C.F.R. § 125.2(a) (2013).

business protested an overseas procurement to the Government Accountability Office (GAO), arguing that FAR Part 19 should apply outside the United States or its outlying areas.<sup>21</sup> The protester's position was supported by the SBA, who submitted comments to GAO.<sup>22</sup> The case highlighted the difference between the SBA view of set-aside applicability overseas and the current FAR language that does not require the use of set-aside procedures for extraterritorial procurements.<sup>23</sup> The case, discussed in greater detail below, involved the utilization of small business set-asides for a contract in Oman.<sup>24</sup> At issue was the "automatic reservation" for small businesses of any procurement valued over \$2,500, and below 100,000.<sup>25</sup> The GAO, applying the principles stated in *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*<sup>26</sup> to address the interpretation of the Small Business Act and the deference to be granted to the SBA or OFPP, ultimately decided that the specific language of the FAR controlled over the absence of any language in the Small Business Act or the SBA regulations.

The recent GAO decision relied on the language in the FAR, so GAO did not resolve the question regarding which agency has the authority to implement government-wide, small business procurement regulations. With the change in the SBA's regulations, this question could be litigated at GAO through another bid protest in the near future. Also, the Court of Federal Claims, in addition to GAO, has jurisdiction over bid protests,<sup>27</sup> so the conflicting regulations could become an issue before either tribunal. Thus, both bodies' treatment in *Chevron* deference and statutory interpretation cases is essential to determining a resolution to the conflicting FAR and the SBA regulations. Congress has not acted in the past address the overseas applicability of set-aside procedures. Without action from Congress to explicitly address the issue, a decision from GAO or COFC, or both, could be the controlling precedent for the foreseeable future.

This article will discuss the appropriateness of applying set-aside procedures, specifically the automatic reservation and the Rule of Two, to extraterritorial procurements by addressing recent GAO cases, as well as COFC's *Chevron* analysis. Also, the discussion will cover the delegation of rule-making authority by Congress to the SBA and OFPP for the purpose of establishing procurement policies and regulations governing small business concerns, and which agency's interpretation should control. Additionally, the legislative history of the Small Business Act and the OFPP Act, as well as other relevant statutes, will illustrate the reasonableness of

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<sup>21</sup> *In the Matter of: Latvian Connection, LLC*, Comp. Gen. B-408633, 2013 CPD ¶ 224.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> 15 U.S.C. § 644(j) See also FAR, 48 C.F.R. §§ 2.101, 13.003, and 19.502-2(a) (raising micro-purchase threshold to \$3,000 and simplified acquisition threshold to \$150,000).

<sup>26</sup> 46 U.S. 837 (1984).

<sup>27</sup> 28 U.S.C. § 1491;

excluding extraterritorial procurements from small business set-aside procedures. The implication of the overseas applications of these procedures and their potential conflict with current international agreements will also be covered. Finally, the paper will examine other policy considerations and motivations behind changing the current version of the FAR, and will conclude that the foreign exclusion should remain in the FAR and that OFPP and the FAR Council's decision deserves deference in the creation of government-wide procurement rules.

## II. GAO'S RECENT DECISION IN *LATVIAN CONNECTION* DIRECTLY ADDRESSED THE ISSUE OF EXTRATERRITORIAL APPLICATION OF SMALL BUSINESS SET-ASIDE PROCEDURES AND AFFIRMED OFPP'S INTERPRETATION OF THE SMALL BUSINESS ACT BASED UPON THE ABSENCE OF CLEAR CONGRESSIONAL INTENT TO THE CONTRARY

The GAO issued a decision addressing the applicability of the set-aside provisions to overseas locations in the *Matter of: Latvian Connection General Trading and Construction, LLC* (Latvian Connection).<sup>28</sup> In the case, Latvian Connection, a veteran-owned small business based in Kuwait City, Kuwait, protested a procurement conducted by the United States Air Force (Air Force) in Oman.<sup>29</sup> Latvian Connection argued that the Small Business Act, specifically the automatic reservation stated in 15 U.S.C. § 644(j), applies to contracts to be performed outside the United States or its outlying areas.<sup>30</sup> The Small Business Administration also provided comments in the case, siding with Latvian Connection, and advocating that the set-aside provisions described in the Small Business Act, the SBA Regulations, and the FAR should apply worldwide.<sup>31</sup>

The issues highlighted in the case were ones of statutory interpretation and deference in administrative rule-making. In determining whether the Small Business Act's provisions should apply overseas, GAO analyzed the language of the Small Business Act.<sup>32</sup> GAO determined, and the SBA conceded, that the Small Business Act, and at that time, the SBA's own regulations were silent with regard to the extraterritorial applicability of set-aside provisions.<sup>33</sup> The Air Force argued that the silence of the Small Business Act indicated that Congress did not intend for set-asides to apply worldwide.<sup>34</sup> GAO then turned to OFPP's interpretation of the Small Business Act as promulgated in the FAR.<sup>35</sup> The Air Force pointed to the FAR exemption for procurements conducted outside the United States or its outlying

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<sup>28</sup> Comp. Gen. B-408633, 2013 CPD ¶ 224.

<sup>29</sup> *Id.*

<sup>30</sup> *Id.* at 2.

<sup>31</sup> *Id.* at 3 (citing SBA Comments on Protest of Latvian Connection LLC at 3).

<sup>32</sup> *Id.* at 3-5.

<sup>33</sup> *Id.* at 4.

<sup>34</sup> *Id.* at 3.

<sup>35</sup> *Id.* at 5.

areas as a reasonable interpretation of the Small Business Act; therefore, OFPP's promulgation of the regulation deserved deference.<sup>36</sup> Additionally, the Air Force argued that in situations where the FAR and the SBA regulations conflict, the FAR controls.<sup>37</sup> To support its position, the Air Force provided a lengthy analysis based on *Chevron*, which will be discussed in more detail below.

The main argument put forth by the SBA was that FAR Part 19 should apply worldwide because the statute contains no explicit restriction to the United States or its outlying areas.<sup>38</sup> Although acknowledging that the statute is silent on the issue, the SBA insisted that the silence indicated that the provisions *do* apply worldwide.<sup>39</sup> To illustrate its point, the SBA cited other sections of the Small Business Act<sup>40</sup> where Congress specifically stated that the provisions did not apply overseas.<sup>41</sup> According to the SBA, if Congress wanted to exempt overseas procurements, they would have done so, just like in these other sections of the Small Business Act.<sup>42</sup> Further, they argued that FAR § 19.000(b) was an improper implementation of Small Business Act requirements and that the SBA, not OFPP, should be granted deference in implementing the provisions of the Small Business Act.<sup>43</sup>

In deciding the case, GAO did not address which agency, the SBA or OFPP, would receive deference if their interpretations of the Small Business Act conflict. GAO simply concluded that the Small Business Act was silent, so an interpretation was needed.<sup>44</sup> The SBA regulations were also silent, but FAR Part 19.000(b) spoke directly to the issue of overseas applicability of set-asides and has been in effect for 30 years.<sup>45</sup> Thus, GAO determined that OFPP's interpretation deserved deference under *Chevron*, and the protest was denied.

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<sup>36</sup> *Id.* at 3.

<sup>37</sup> Air Force Brief in Response to the Comments to the Small Business Administration (Sep 5, 2013) (copy on file with Author).

<sup>38</sup> *Id.* at 3.

<sup>39</sup> *Id.* at 3.

<sup>40</sup> *Id.* at 3 (citing SBA Comments at 3, citing 15 U.S.C. § 637(d)(2)(B)).

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> *Id.* at 3 (citing SBA Comments at 2).

<sup>44</sup> *Latvian Connection, LLC* Comp. Gen. B-408633, 2013 CPD ¶ 224.

<sup>45</sup> *Id.* at 5.

### III. THE SBA'S NEW REGULATIONS CREATE A DIRECT CONFLICT WITH THE FAR WITH REGARD TO APPLYING SMALL BUSINESS SET-ASIDE PROCEDURES TO EXTRATERRITORIAL PROCUREMENTS, WHICH MAY LEAD TO INCREASED LITIGATION

#### A. The SBA'S New Regulations Purport to Establish a Worldwide Requirement to Utilize Small Business Set-Aside Procedures in Response to the Decision in *Latvian Connection*

The Small Business Administration promulgated final regulations on October 2, 2013, with an effective date of December 31, 2013, to establish worldwide applicability of small business set-aside procedures through a slight change in the regulatory language. The change is the addition to 13 C.F.R. § 125.2 of language stating that “Small business concerns must receive any award...or contract, part of any such award or contract, and any contract for the sale of Government property, *regardless of the place of performance.*”<sup>46</sup> The addition of this language is the SBA's attempt to impose small business set-aside requirements worldwide,<sup>47</sup> but the SBA qualifies the requirement and, arguably, limits the impact of the change.

The addition of “regardless of the place of performance” is not an effective method for establishing a requirement to use set-aside procedures overseas because the new regulation still requires the SBA and the procuring or disposal agency to determine that the set-aside is in the best interest of:

- (1) Maintaining or mobilizing the Nation's full productive capacity
- (2) War or national defense programs;
- (3) Assuring that a fair proportion of the total purchases and contracts for property, services and construction for the Government in each industry category are placed with small business concerns; or
- (4) Assuring that a fair proportion of the total sales of Government property is made to small business concerns.<sup>48</sup>

If the agency and the SBA fail to agree regarding these four criteria, the matter is referred to the head of the procuring department or agency for a final decision. The final say does *not* belong to the SBA. In other words, even if the new SBA regulation supersedes the authority of the FAR, if an agency determines that none of the

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<sup>46</sup> 13 C.F.R. § 125.2(a) (2013) (emphasis added).

<sup>47</sup> Small Business Administration Comments, *In the Matter of: Latvian Connection, LLC*, Comp. Gen. B-410081 (on file with author).

<sup>48</sup> 13 C.F.R. § 125.2(a) (2013).

four criteria are met and chooses not to adhere to the set-aside requirement, then the ultimate decision to conduct a set-aside will rest with the head of that agency, not the SBA.

Further, the new SBA regulations cannot be a direct response to the decision in *Latvian Connection*, as the SBA has asserted.<sup>49</sup> The *Latvian Connection* decision was issued on September 18, 2013. The SBA's new regulations were proposed in May 2012 for notice and comment.<sup>50</sup> Although the timing of the publishing of the final rule was serendipitously close in time to the *Latvian Connection* decision, the new language of the regulations was drafted well before the *Latvian Connection* protest was even filed. Thus, the SBA likely had other motivations for proposing the changes to its regulations, which will be discussed below.

#### B. FAR Subpart 19.000(b) is a Long-Standing, Explicit Exemption from the Small Business Set-Aside Procedures Set Forth in FAR Part 19 for Procurements to be Performed Outside the United State or its Outlying Areas

In the FAR, the limitation on the applicability of the small business reservation and the Rule of Two were stated in the initial version of the FAR in 1984.<sup>51</sup> With regard to small-business provisions of the FAR, Subpart 19.000(b) states that “this part, except for Subpart 19.6, applies only in the United States or its outlying areas. Subpart 19.6 applies worldwide.” In 30 years, the only change to the language of the foreign exception was made in 2003, which converted the geographical language of the exception from the United States and “its territories and possessions, Puerto Rico, the Trust Territory of the Pacific Islands, and the District of Columbia,” to the United States and its “outlying areas.”<sup>52</sup> Restricting the application of FAR Part 19 procedures to the United States and its territories or outlying areas is a long-standing provision of government-wide federal procurement law.

#### C. The SBA's Interpretation of the Small Business Act, As Stated in 13 C.F.R. § 125.2, Conflicts with OFPP's Interpretation of the Small Business Act, As Stated in FAR 19.000(b)

The SBA's new regulations create a direct conflict between 13 C.F.R. § 125.2(a) and FAR 19.000(b). These regulations represent the interpretation and implementation of the Small Business Act by the SBA and OFPP, respectively. The SBA proposes that small business set-asides should apply to federal procurements “regardless of the place of performance.” OFPP does not appear to support a change, but continues to support the interpretation contained within Part 19 of

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<sup>49</sup> Small Business Administration Comments, *Latvian Connection, LLC*, B-410081 (on file with author).

<sup>50</sup> 77 Fed. Reg. 29154 (May 16, 2012).

<sup>51</sup> 48 Fed. Reg. 42,102-01-C, at 42,241 (Sept. 19, 1983).

<sup>52</sup> Federal Acquisition Circular 2001-14, 68 Fed. Reg. 28, 079, at 28080 (May 22, 2003).

the FAR that the small business set-aside procedures should only apply “within the United States or its outlying areas.” For procurement professionals, (e.g., contracting officers and attorneys), this conflict could raise questions regarding the proper way to proceed in a procurement outside of the United States and its outlying areas. At this time, contracting officers likely will follow the FAR provisions; thus the new SBA regulations essentially have no effect. However, the SBA may well initiate a FAR case seeking to change the language of the FAR. A change in the FAR that removes the foreign exemption for set-asides would resolve the current conflict between regulations. The SBA previously approached the FAR Council to remove the foreign exception from FAR Part 19, but the FAR Council rejected the request unanimously.<sup>53</sup> Assuming the FAR Council again rejects the SBA’s request, then the two regulations will remain in conflict.

#### D. Absent a Change to the FAR, the SBA Regulations and the FAR Will Present Conflicting Guidance and Likely Will Lead to Additional Litigation.

With two competing regulations in place, there is an increased likelihood of additional bid protests when an otherwise qualifying overseas procurement is not set-aside. In the case of another protest, GAO or COFC would have to answer the question that GAO did not have to resolve in *Latvian Connection*: between the SBA and OFPP, which agency receives rule-making deference on the issue of applying small-business set-aside procedures to extraterritorial procurements? The outcome of a GAO or COFC case will set the precedent for these types of protests, and will control, unless and until Congress takes any action.

GAO and COFC should reach the same outcome in resolving the question of whether small business set-asides must be applied to overseas procurements. With litigation as the most likely outcome, GAO’s decision in *Latvian Connection* provides an indication of where GAO will go on the issue of resolving the conflict between the SBA regulations and the FAR. If the case is brought before COFC, the Court’s previous decisions in *Chevron* cases indicate that the Court will likely apply the same analysis as GAO, and the outcome should be the same in both forums.

#### IV. GAO AND COFC WILL APPLY A *CHEVRON* ANALYSIS TO INTERPRET THE SMALL BUSINESS ACT AND DETERMINE WHICH AGENCY’S INTERPRETATION OF THE ACT WILL RECEIVE DEFERENCE

GAO and COFC will employ a *Chevron* analysis to resolve an issue involving statutory interpretation and agency deference. *Chevron* requires a two-step analysis: (1) a determination of whether the statute is silent on the issue and (2) a determination of whether the agency’s interpretation deserves deference as a

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<sup>53</sup> See Small Business Administration Inspector General Report No. 12-04, Nov. 2, 2011, at 7 (SBA comments indicating that the SBA’s previous request to remove the language limiting the applicability of FAR Part 19 only to the United States and its outlying areas was rejected unanimously by the FAR Council).



reasonable interpretation of the statute.<sup>54</sup> GAO and COFC will give deference to an agency interpretation, as long as it is reasonable, and does not conflict with the direct intent of the statute.<sup>55</sup> Further, “an agency’s interpretation of a particular statutory provision qualifies for *Chevron* deference when that interpretation is reached through formal proceedings, such as by an agency’s power to engage in notice-and-comment rulemaking.”<sup>56</sup> Before any deference can be given to an agency, though, the Court or GAO must make a proper determination as to which agency it will give the deference. The SBA and OFPP have interpreted the Small Business Act and promulgated what appear to be reasonable interpretations of that Act. Thus, in order to determine the enforceable interpretation, the matter turns on a step in-between *Chevron* Step 1 and Step 2, what the Air Force brief called “*Chevron* 1.5.”<sup>57</sup>

Under a *Chevron* 1.5 analysis, OFPP should receive deference and FAR Part 19 should control over the SBA regulations on the issue of applying small business set-asides to procurements outside the United States or its outlying areas. Decisions from both GAO and COFC, as well as the legislative history of the Small Business Act and other statutes, support the conclusion that OFPP is appropriate agency to implement the Small Business Act with regard to deciding the appropriateness of requiring small business set-asides for overseas procurements. OFPP’s implementation of the Small Business Act in FAR Part 19 is a reasonable interpretation of the Small Business Act, so deference is appropriate.

#### A. In *Latvian Connection*, GAO Conducted a *Chevron* Analysis of the Small Business Act, Including a Determination that the Small Business Act is Silent Regarding its Applicability to Procurements to be Performed Outside the United States or Its Outlying Areas—*Chevron* Step 1

In the *Latvian Connection* case, GAO provides a *Chevron* analysis of the implementation of the statutory language of the Small Business Act. The first step in the analysis is whether the “language provides an unambiguous expression of the intent of Congress.”<sup>58</sup> If the expression by Congress is unambiguous, then

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<sup>54</sup> *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 46 U.S. 837, 842-845 (1984).

<sup>55</sup> *Kingdomware Technologies, Inc. v. United States*, 107 Fed.Cl. 226 (2012) (citing *Chevron*. See also *Nat’l R.R. Passenger Corp. v. Boston and Me. Corp.*, 503 U.S. 407, 417, 112 S.Ct. 1394, 118 L.Ed.2d 52 (1992) (“If the agency interpretation is not in conflict with the plain language of the statute, deference is due.”); *Japan Whaling Ass’n v. Am. Cetacean Soc’y*, 478 U.S. 221, 233, 106 S.Ct. 2860, 92 L.Ed.2d 166 (1986); *Chem. Mfrs. Ass’n v. NRDC, Inc.*, 470 U.S. 116, 126, 105 S.Ct. 1102, 84 L.Ed.2d 90 (1985) (“We should defer to [the agency’s] view unless the legislative history or the purpose and structure of the statute clearly reveal a contrary intent on the part of Congress.”).

<sup>56</sup> *Kingdomware*, citing *United States v. Mead Corp.*, 533 U.S. 218, 229, 121 S.Ct. 2164, 150 L.Ed.2d 292 (2001); *Wheatland Tube Co. v. United States*, 495 F.3d 1355, 1360 (Fed.Cir. 2007).

<sup>57</sup> Air Force Brief in Response to the Comments to the Small Business Administration (Sep 5, 2013) (copy on file with Author).

<sup>58</sup> *Matter of: Latvian Connection, LLC Comp. Gen. B-408633*, 2013 CPD ¶ 224. citing *Chevron U.S.A. Inc., v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-843(1984); *International Program Group, Inc.*, B-400278, B-400308, Sept. 19, 2008, 2008 CPD ¶172 at 5.

the analysis ends and that expression of Congress controls.<sup>59</sup> If the language is ambiguous or the statute is completely silent, then, depending on the circumstances, deference will be given to an administering agency.<sup>60</sup> “Where an agency interprets an ambiguous provision of a statute through a process of *rulemaking or adjudication*, deference will be given to the agency’s interpretation, unless the resulting regulation or ruling is procedurally defective, arbitrary, or capricious in substance, or manifestly contrary to the statute.”<sup>61</sup>

As the *Latvian Connection* case highlighted, GAO found, and the SBA conceded, that the Small Business Act, as stated in 15 U.S.C. § 644(j) is silent on the issue of extraterritorial applicability.<sup>62</sup> No changes have been made to 15 U.S.C. § 644(j) since that decision. Therefore, an agency interpretation of the statute remains necessary. At the time of the *Latvian Connection* decision, the SBA’s new rules were not in effect. Thus, the only regulation that spoke directly to the issue was FAR 19.000(b), which was the regulation examined in the case under *Chevron*. Step 1 of *Chevron* is satisfied because both sides agree that Congress has not explicitly addressed the applicability of set-aside procedures to extraterritorial procurements.

#### 1. In Addition to GAO, COFC Precedent Supports the Proposition that COFC Will Make the Same Determination as GAO With Regard to a *Chevron* Analysis of the Small Business Act and FAR Part 19

The Court of Federal Claims also utilizes a *Chevron* analysis in resolving issues of statutory interpretation and deference. Much like GAO, there are several cases in which COFC walks through the analysis required to determine the deference to be given to and reasonableness of an agency’s interpretation of a statute. In *Kingdomware Technologies, Inc. v. United States*, a service-disabled veteran-owned small business (SDVOSB) protested a procurement of the Department of Veteran’s Affairs (VA) in which the VA did not set aside the procurement for a SDVOSB or other small business, but instead used the Federal Supply Schedule (FSS).<sup>63</sup> The Court found, and the parties agreed, that the case turned entirely on the interpretation by the VA of the Veterans Benefits, Health Care, and Information Technology Act of 2006.<sup>64</sup> The VA, despite multiple recommendations from the GAO, interpreted the 2006 Act to allow the VA to utilize the FSS, and thus be outside of FAR Part 19 procedures, for appropriate procurements.<sup>65</sup> The protester argued that the VA had

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<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> *Id.* at 4, citing *Mead*, 533 U.S. 218, at 227-37; *Chevron*, 467 U.S. 837, at 843-44.

<sup>62</sup> *Id.* at 3.

<sup>63</sup> *Kingdomware Tech., Inc. v. U.S.*, 107 Fed. Cl. 226 (2012) (affirmed by the United States Court of Appeals for the Federal Circuit, 754 F.3d 923 (2014), rehearing *en banc* denied September 10, 2014).

<sup>64</sup> *Id.* at 237.

<sup>65</sup> *Id.* at 235.

to first utilize SDVOSB, Veteran-owned small businesses (VOSB), or other small business concerns before using the FSS.<sup>66</sup>

The Court held that it must first determine “whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.”<sup>67</sup> “To determine the intent of Congress, the court looks to the language of the statute itself.”<sup>68</sup> The Court also stated that there are other sources, beyond the statute, for determining the intent of Congress, “including the statute’s structure, canons of statutory construction, and legislative history.”<sup>69</sup> If the Court can determine the intent of Congress on the precise issue, then that intent will be given effect. However, “if the statute is silent or ambiguous with respect to the specific issue,” a court must proceed to the second step of *Chevron*, which is to ask whether the implementing agency’s interpretation of the statute is reasonable.”<sup>70</sup>

#### B. Outside the Small Business Act, Congress Clearly Delegated Authority to Promulgate Government-Wide Procurement Regulations to OFPP, Not the SBA, and Deference Should Be Given to OFPP’s Interpretation of the Small Business Act—*Chevron* Step 1.5

In this matter, the main issue is not whether the agency’s interpretation is reasonable, but *which* agency’s decision is applied. Thus, before moving to *Chevron* Step 2, GAO and the Court must determine the appropriate agency to receive the benefit of deference. The Supreme Court has held that, “a precondition to deference under *Chevron* is a Congressional delegation of administrative authority.”<sup>71</sup> In *Gonzalez v Oregon*, the Supreme Court held that Congress at times “divides interpretive authority among various executive actors” for implementation of that statutory scheme.<sup>72</sup> In order to receive *Chevron* deference, the particular “agency must have received congressional authority to determine the particular matter at issue in the particular manner adopted.”<sup>73</sup> The “*Chevron* deference... is not accorded merely because the statute is ambiguous and an administrative official is involved... [T]he rule must be promulgated pursuant to authority Congress has delegated to the official.”<sup>74</sup> If the authority to promulgate rules does not rest with just one

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<sup>66</sup> *Id.* at 236.

<sup>67</sup> *Id.* at 237, citing *Chevron*.

<sup>68</sup> *Id.* (citing *Delverde, SrL v. United States*, 202 F.3d 1360, 1363 (Fed.Cir.2000)).

<sup>69</sup> *Id.* See also *Heino v. Shinseki*, 683 F.3d 1372, 1378 (Fed.Cir.2012).

<sup>70</sup> *Id.* (citing *Chevron* at 843; See also *Ad Hoc Shrimp Trade Action Comm. v. United States*, 596 F.3d 1365, 1369 (Fed.Cir.2010).

<sup>71</sup> *Adams Fruit Co. v. Barrett*, 494 U.S. 638, 649 (1990).

<sup>72</sup> *Gonzalez v. Oregon* 546 U.S. 243 at 259, 263.

<sup>73</sup> *City of Arlington v. FCC*, 133 S. Ct. 1863, at 1874.

<sup>74</sup> *Gonzalez* at 258.

agency, then it is up to the courts to ascertain which agency has the authority over a particular issue.<sup>75</sup>

The courts must look to the language of the provisions outlining the delegation to determine which agency will receive deference.<sup>76</sup> Congress has delegated authority to both the SBA and OFPP through the Small Business Act. The current Small Business Act grants rule-making authority to the SBA, but requires coordination with OFPP in certain circumstances.<sup>77</sup> However, in the Small Business Act Amendments of 1978, Congress incorporated the original OFPP Act and authorized and directed OFPP “to promulgate a single, simplified, uniform Federal procurement regulation and establish procedures for insuring compliance with such provisions by all Federal agencies.”<sup>78</sup> Thus, the exclusive administrative authority for implementing certain provisions of the Small Business Act are granted to SBA, but the authority to require the world-wide applicability of small-business set-aside procedures is solely within the Authority of OFPP. Thus, as discussed in *Gonzalez*, two agencies have been given authority to act under the applicable statute. In determining the specific authority granted for specific provisions of the Small Business Act, the broader authority appears to be granted to OFPP, while the SBA’s authority seems limited to issues narrower in scope.

### 1. The Small Business Act of 1958, as Amended, Grants Limited Exclusive Rule-Making Authority to the SBA Administrator

The original Small Business Act established the Small Business Administration to carry out the policies set forth in the Small Business Act.<sup>79</sup> The Small Business Act also created the position of the Administrator, who is charged with management of the SBA.<sup>80</sup> The Administrator has the authority “to make such rules and regulations as he deems necessary to carry out the authority vested in him by or pursuant to” the Small Business Act.<sup>81</sup> For instance, the SBA Administrator has the authority to establish branch and regional offices around the world.<sup>82</sup> The Administrator is also charged with the maintenance of an “external small business economic data base” to be used in providing information to Congress and the SBA on the economic condition of the small business sector.<sup>83</sup> The Administrator

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<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> *See* 15 U.S.C. § 644 (2013).

<sup>78</sup> Small Business Act Amendments of 1978, Pub. L. No. 95-507 § 222, 92 Stat. 1771 (1978) (referring to the authority conferred upon OFFP in the Office Federal Procurement Policy Act, Pub. L. No. 93-400, 88 Stat. 796 (1974)).

<sup>79</sup> Small Business Act, Pub. L. No. 85-536, 72 Stat. 384 (1958).

<sup>80</sup> *Id.* at § 4(b).

<sup>81</sup> *Id.* at § 5(b)(6).

<sup>82</sup> 15 U.S.C. § 4(a) (2013).

<sup>83</sup> *Id.* at § 4(b)(2)(a).

is also responsible for using the data gathered to publish an annual report giving a “comparative analysis and interpretation” of trends within the small business sector.<sup>84</sup> The specific and exclusive authority for certain information gathering and sharing appears to be the exclusive authority of the SBA Administrator. Also, the SBA Administrator may “under regulations prescribed by him, assign and sell “any evidence of debt, contract, claim, personal property, or security” accrued or obtained under the Small Business Act.<sup>85</sup>

The SBA’s authority to promulgate rules and regulations under the Small Business Act grants power to require compliance with reporting requirements and to demand accountability with regard to the inclusion of small businesses in federal government procurements, but does not provide broad rule-making authority over every aspect of small business procurements. Mainly, the SBA Administrator has the exclusive authority to oversee programs regarding the participation of small business entities and to require agencies to provide information in a certain manner as part of that oversight.<sup>86</sup> However, the delegation of authority should not be construed to grant broad government-wide rule making authority to the SBA Administrator.

## 2. Congress Requires the SBA to Coordinate with Other Agencies on the Implementation of Certain Provisions of the Small Business Act, which Indicates that the SBA Does Not Have Exclusive Rule-Making Authority for Government-Wide Small Business Procurement Procedures

The language of the Small Business Act does not support a grant of authority in the SBA Administrator to create Government-wide procurement policy, regulations, and rules, for every issue relating to small businesses. Undercutting the SBA’s authority, at least in relation to OFPP, to promulgate Government-wide regulations, is the requirement by Congress that SBA coordinate with other agencies on certain matters and refer certain disagreements to another agency for final disposition. In reviewing Section 15 of the Small Business Act, the SBA is regularly required to work in cooperation with procuring agencies to determine procurement policy and regulations. Section 15 states that “small business concerns...shall receive any award or contract...as to which it is determined by the [Small Business] Administration and the procuring or disposal agency” that the same four criteria incorporated into SBA regulations, discussed above, are met.<sup>87</sup> If the Administration and the procuring agency cannot agree, the head of the procuring agency, not the SBA will make the

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<sup>84</sup> *Id.* at § 4(b)(2)(b).

<sup>85</sup> *Id.* at § 5.

<sup>86</sup> *Id.* at § 15(c)(1)(c)(3).

<sup>87</sup> *Id.* at § 15(a) ((1) Maintaining or mobilizing the Nation’s full productive capacity; (2) War or national defense programs; (3) Assuring that a fair proportion of the total purchases and contracts for property, services and construction for the Government in each industry category are placed with small business concerns; or (4) Assuring that a fair proportion of the total sales of Government property is made to small business concerns.

final determination.<sup>88</sup> The SBA alone does not have the authority to compel other agencies to utilize small businesses set-aside procedures.

The SBA also is required to coordinate with other agencies to determine the proper policy or regulations with regard to Government-wide goals for participation by small business concerns in the federal procurement system. Each federal agency *in consultation with* the SBA, shall establish the goals for participation, but if a dispute exists, the OFPP Administrator will make the final determination.<sup>89</sup> Finally, for multiple award contracts, the SBA Administrator is required to coordinate with the OFPP Administrator and the Administrator of General Services Administration (GSA) to establish guidance for the federal agencies.<sup>90</sup> Nowhere does the statute give exclusive authority to the SBA to set forth policy and regulations for the process of participating in the federal procurement system.

### 3. Congress Delegated Authority to OFPP to Create and Enforce Government-Wide Procurement Regulations

#### (a) *The Current OFPP Act Establishes OFPP's Broad Rule-Making Authority, and the Authority to Rescind Any Conflicting Rules Promulgated by Other Agencies*

In examining the authority granted in the Small Business Act, GAO or COFC will look to language of the Small Business Act, as well as historical information that can assist in determining the intent of Congress. However, to examine the larger policy issue, it is appropriate to examine the OFPP Act for two reasons: (1) it is referenced in the Small Business Act Amendments of 1978 and (2) it provides greater context to the authority Congress granted to OFPP. As the Small Business Act outlines much of the SBA's exclusive authority, the authority of OFPP is covered in both the Small Business Act and the OFPP Act. The additional authority conferred in the OFPP Act establishes that deference should be given to OFPP on the question of applying set-asides to overseas procurements, as well as the authority to create other broad, Government-wide procurement policies and regulations regarding small business concerns.

In establishing OFPP, Congress intended that the authority of "executive agencies to prescribe policies, regulations, procedures, and forms" would be *subject to the authority of OFPP*.<sup>91</sup> The purpose of OFPP is to "(1) provide overall direction of Government-wide procurement policies, regulations, procedures, and forms for executive agencies; and (2) promote economy, efficiency, and effectiveness in the procurement of property and services by the executive branch of the

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<sup>88</sup> *Id.*

<sup>89</sup> *Id.* at § 15(g)(2)(A).

<sup>90</sup> *Id.* at § 15(r).

<sup>91</sup> House Rep. No. 93-1269 at 4628 (1974) (emphasis added).

Federal Government.”<sup>92</sup> Even clearer is the authority established under 41 U.S.C. § 1121. The Administrator of OFPP is directed to provide the “overall direction of procurement policy and leadership in the development of procurement systems of the executive agencies.”<sup>93</sup> The OFPP Administrator “may prescribe Government-wide procurement policies,” and those policies are to be implemented in the FAR, a “single Government-wide procurement regulation.”<sup>94</sup>

The policies established by OFPP are to be followed by executive agencies, including the Department of Defense and the SBA, in the procurement of “(A) property other than real property in being; (B) services, including research and development; and (C) construction, alteration, repair, or maintenance of real property.”<sup>95</sup> The OFPP Administrator is also responsible for establishing procedures to ensure that the other executive agencies comply with the FAR.<sup>96</sup> Therefore, the authority of other agencies, such as the SBA, under another law, i.e., the Small Business Act, to “prescribe policies, regulations, procedures, and forms for procurements,” are subject to the rules and regulations of OFPP.<sup>97</sup>

To maintain consistency, OFPP provides oversight and final determination in cases where other executive agencies cannot agree on or fail to act in issuing Government-wide procurement regulations, procedures and forms in a timely manner, including those regulations, procedures, and forms required to give effect to actions initiated by OFPP under its authority.<sup>98</sup> For instance, when there is disagreement between DoD, NASA, and GSA, the OFPP Administrator has the authority to make the final determination.<sup>99</sup> Also, under Executive Order 12688, the Office of Management and Budget (OMB), which includes OFPP, is responsible for ensuring that “decisions made by one agency do not conflict with the policies or actions taken or planned by another agency.”<sup>100</sup> If a regulation is inconsistent with existing policy, the OFPP Administrator has the authority to *deny* the promulgation of or *rescind* any Government-wide regulation or final rule or regulation.<sup>101</sup> The Administrator of OFPP must have the concurrence of the OMB Director, and will consult the head of the agency concerned, but the authority is vested in the Administrator to eliminate conflicting guidance if he or she determines that the “rule or regulation is inconsistent with any policies, regulations, or procedures issued pursuant to subsection [§ 1121]

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<sup>92</sup> 41 U.S.C. § 1101(b)(1), (2) (2011).

<sup>93</sup> *Id.* at § 1121(a).

<sup>94</sup> *Id.* at § 1121(b).

<sup>95</sup> *Id.* at § 1121((c)(1).

<sup>96</sup> *Id.* at § 1121(c)(2).

<sup>97</sup> *Id.* at § 1121(c)(3).

<sup>98</sup> *Id.* at § 1121(d).

<sup>99</sup> *Id.*

<sup>100</sup> Executive Order No. 12688, 58 Fed Reg 51,735 (Oct. 4, 1993).

<sup>101</sup> 41 U.S.C. § 1121(e).

b,” including the FAR.<sup>102</sup> Although this authority rests with the OFPP Administrator, there is not a recent example of the Administrator invoking this authority. Any conflict that could prove fatal to a regulation is more likely to be resolved during the review process under EO 12688, discussed above. In examining the different authorities delegated to the SBA and OFPP within the Small Business Act and the OFPP Act, including the rescission authority, the clear intent of Congress was to grant broader authority to OFPP.

(b) *The Legislative History of the OFPP Act Further Supports the Delegation of Government-Wide Rule-Making Authority to OFPP*

Congress passed The Office of Federal Procurement Policy Act in 1974, to establish the OFPP for the purpose of providing “overall direction of procurement policies, regulations, procedures, and forms for executive agencies in accordance with applicable laws.”<sup>103</sup> In addition to creating OFFP, the Office of Federal Procurement Policy Act gave the Administrator’s position the authority to direct procurement policy.<sup>104</sup> A function of the Administrator was to establish coordinated, and where possible, uniform procurement regulations for executive agencies.<sup>105</sup> However, in creating these policies, the Administrator of OFPP was required to consult with the executive agencies, including the SBA.<sup>106</sup> Two additional key provisions from the original OFPP Act established the broad authority of the OFPP Administrator. First, an executive agency’s authority to “prescribe policies, regulations, procedures, and forms” for government procurement was subject to the Administrator’s authority, as stated above.<sup>107</sup> Second, any existing policies, regulations, procedures, or forms remained in effect until changed or eliminated by action of the Administrator.<sup>108</sup>

In the first significant amendments to the OFPP Act in 1979, the Office of Management and Budget (OMB), which oversees OFPP, was granted authority to issue policy directives for the purpose of promoting the policies set forth in the OFPP Act.<sup>109</sup> Another amendment added language regarding the implementation of a uniform procurement regulation.<sup>110</sup> Further, until the implementation of a uniform procurement regulation, Congress gave the Director of OMB the authority to issue policy directives for the purpose of promoting the policies set forth in the OFPP

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<sup>102</sup> *Id.*

<sup>103</sup> Office of Federal Procurement Policy Act, Pub. L. No. 93-400, 88 Stat. 796 (1974) (current version at 41 U.S.C. § 1121 (2011)).

<sup>104</sup> *Id.* at § 6(a).

<sup>105</sup> *Id.* at § 6(d).

<sup>106</sup> *Id.* at § 6(e).

<sup>107</sup> *Id.* at § 9.

<sup>108</sup> *Id.* at § 10.

<sup>109</sup> *Id.* at § 6 (h).

<sup>110</sup> Office of Federal Procurement Policy Act Amendments of 1979, Pub. L. No. 96-83 § 4(c), 93 Stat. 648 (1979) (amending Pub. L. No. 93-400 § 6(d)).



Act.<sup>111</sup> For any such policy issued by the Director of OMB, executive agencies were required to implement regulations in accordance with the policy.<sup>112</sup>

The 1983 amendments to the OFPP Act discuss in greater detail the “single Government-wide regulations, i.e., the FAR, but also maintained the authority of OMB and OFPP to establish government-wide policies, procedures, and regulations.<sup>113</sup> This version of the OFPP Act re-states the role of the OFPP Administrator as the one who will prescribe the Government-wide regulations when a disagreement exists among the Department of Defense (DoD), NASA, and GSA.<sup>114</sup> Also, the amendments maintained the ability of the Director of OMB to rescind any Government-wide regulation or final rule of any executive agency relating to procurement if the Administrator determines “that such rule or regulation is inconsistent with the policies set forth in the OFPP Act.<sup>115</sup>

The Amendments in 1988 exhibit the changes to the law that are largely still present today, including the establishment of the FAR and the Federal Acquisition Regulatory (FAR) Council. The law referred specifically to the FAR as the vehicle for “Government-wide procurement regulations.”<sup>116</sup> The FAR Council composition has not changed since its inception and consists of the OFPP Administrator, the Secretary of Defense, the NASA Administrator, and the Administrator of GSA.<sup>117</sup> However, a provision in the current draft of the FY 2016 NDAA would add the SBA as a signatory member on the FAR Council.<sup>118</sup> The functions of the FAR Council include direction from Congress to jointly issue and maintain the FAR.<sup>119</sup> Currently, the FAR Council is still responsible for maintaining the FAR, and is the body through which changes to the FAR are made.

The maintenance and implementation of the FAR requires coordination between the OFPP Administrator and the FAR Council. The 1988 OFPP Act stated that “any other regulations relating to procurement issued by an executive agency shall be limited to (A) regulations essential to implement Government-wide policies and procedures within the agency, and (B) additional policies and procedures required to satisfy the specific and unique needs of the agency.”<sup>120</sup> However, the

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<sup>111</sup> *Id.* at § 4(e) (1979) (amending Pub. L. No. 93-400 § 6 (h)).

<sup>112</sup> *Id.*

<sup>113</sup> Office of Federal Procurement Policy Act Amendments of 1983, Pub. L. 98-191, § 3(4), 97 Stat. 1326 (1983).

<sup>114</sup> *Id.* at § 6(b).

<sup>115</sup> *Id.* at § 6(f).

<sup>116</sup> Office of Federal Procurement Policy Act Amendments of 1988, Pub. L. No. 100-679 § 3(a)(1), 102 Stat. 4055 (1988).

<sup>117</sup> *Id.* at § 25(b).

<sup>118</sup> [http://smallbusiness.house.gov/uploadedfiles/chabot\\_written\\_statement\\_fy\\_16\\_ndaa.pdf](http://smallbusiness.house.gov/uploadedfiles/chabot_written_statement_fy_16_ndaa.pdf), § 704.

<sup>119</sup> *Id.* at § 25(c).

<sup>120</sup> *Id.* at § 25(c)(2).

OFPP Administrator and the FAR Council must also ensure that the procurement regulations “promulgated by executive agencies *are consistent* with the FAR.”<sup>121</sup> The Administrator may, at the request of another person, review any regulations that may be inconsistent with the FAR.<sup>122</sup> As discussed above, if the OFPP Administrator finds a regulation to be inconsistent with the FAR, then *he shall rescind or deny promulgation* of the regulation or take other action authorized within the OFPP Act “as may be necessary to remove the inconsistency.”<sup>123</sup>

The OFPP Administrator was granted additional authority under the Federal Acquisition Streamlining Act (FASA), which amended portions of the OFPP Act.<sup>124</sup> FASA gave OFPP the authority to work with the SBA Administrator to ensure that small businesses are provided with the “maximum practicable opportunities to participate in procurements that are conducted for amounts below the simplified acquisition threshold.”<sup>125</sup> Additionally, OFPP must work with the SBA Administrator to develop policies that promote the achievement of the participation goals for small businesses.<sup>126</sup>

Congress clearly chose to delegate the authority for the overall direction of federal procurement policy to OFPP. What is also clear is that although the language of the Small Business Act gives the SBA Administrator authority to promulgate rules and regulations, that authority is delegated either for certain specific circumstances, or is to be executed in coordination with OFPP. The responsibility and authority to create a uniform procurement scheme has been delegated to OFPP by Congress. If that authority is limited in any way, it is only limited by requiring OFPP to consult with various other executive agencies, including the SBA, in setting policy, procedures and regulations. Even in light of the required coordination, the broader, or higher, authority belongs to OFPP. Therefore, OFPP’s interpretation of the Small Business Act, and its subsequent implementation of FAR Part 19 provisions to limit the applicability of set-asides only to procurements within the United States or its outlying areas, is appropriately within the scope of OFPP’s authority as intended by Congress.

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<sup>121</sup> *Id.* at § 25(c)(3) (emphasis added).

<sup>122</sup> *Id.* at § 25(c)(4).

<sup>123</sup> *Id.* at § 25(c)(5) (emphasis added).

<sup>124</sup> Federal Acquisition Streamlining Act of 1994, Pub. L. 105-355 § 7108(a), 108 Stat 3243 (amending 41 U.S.C. § 405(d) (current version at 41 U.S.C. § 1122(a) (2011)).

<sup>125</sup> Federal Acquisition Streamlining Act of 1994, § 7108(a)(10) (current version at 41 U.S.C. § 1122(a)(11) (2011)) (using similar language to that used in S. Rep 95-1070, at 20 (1978)).

<sup>126</sup> Federal Acquisition Streamlining Act, § (a)(11) (1994).

### C. OFPP's Interpretation and Implementation of the Small Business Act is Reasonable and Should Be Granted Deference—*Chevron* Step 2

Once GAO or COFC has determined that the statute is unclear, and that the agency was granted rule-making authority, the next step in the *Chevron* analysis is an evaluation of the reasonableness of the agency's interpretation. Although not dispositive of the issue, both GAO and COFC will look to the legislative history for any language that is directly contradictory to the interpretation of the agency.<sup>127</sup> The legislative history of the Small Business Act does not explicitly state that the "automatic reservation" or the Rule of Two applies overseas, nor does it contain any provisions that would directly conflict with the provisions of the FAR. However, a congressional report created while drafting the Small Business Act Amendments of 1978, provides support for the reasonableness of OFPP's interpretation of the Small Business Act.

The mention of a geographical limitation, whether in the statute or in the Committee report, could support both sides of this dispute. For instance, proponents of the limitation can point to the presence of the limiting language in the Committee report as support for the proposition that the matter was discussed and it was the intent of Congress to limit the applicability of these provisions. On the other hand, those advocating for worldwide application can point to the limitation and argue that if Congress intended for the scope to be limited, then Congress would have included the language in the statute. As discussed, this was the exact argument made by the SBA in their submission to GAO in the *Latvian Connection* case.<sup>128</sup> However, the legislative background of the Small Business Act and the historical implementation of the Small Business Act provide a strong basis for determining that small business set-aside procedures should only apply to contracts to be performed within the United States or its outlying areas.

#### 1. A Historical Review of the Implementation of the Small Business Act Substantiates a Limitation of the Set-Aside Provisions to the United States and Its Outlying Areas

The Small Business Act, first passed as its own distinct legislation in 1958, established the policy that eventually led to the implementation of the Rule of Two, and created the SBA Administrator's position.<sup>129</sup> The initial version of the Small Business Act was very short and used very broad language. It established the policy of Congress to aid and assist U.S. small businesses because they play a vital role in

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<sup>127</sup> *Matter of: Latvian Connection General Trading and Construction, LLC*, Comp. Gen. B-408633, 2013 CPD ¶ 224; *Kingdomware Technologies, Inc. v. United States*, 107 Fed.Cl. 226 (2012).

<sup>128</sup> SBA Comments on Protest of Latvian Connection, LLC (B-408633) (August 29, 2013).

<sup>129</sup> Small Business Act, Pub. L. No. 85-536, 72 Stat. 384 (1958) (creating a separate act from the Small Business Act of 1953).

the economy and security of the United States.<sup>130</sup> It also established the authority of the SBA Administrator to “make such rules and regulations as he deems necessary to carry out the authority vested in him by or pursuant to this Act.”<sup>131</sup>

Implementation of the policy to ensure a “fair proportion” of federal government procurements dollars went to small businesses occurred within about a year of the Small Business Act passing into law.<sup>132</sup> The importance of this policy is exhibited by its the implementation through the ASPR in 1959. However, as discussed below, the ASPR did not apply the Small Business Act policy to extraterritorial procurements.<sup>133</sup>

The Small Business Act Amendments of 1978 established the “automatic reservation” for small businesses and incorporated the authority of OFPP, as stated in the OFPP Act of 1974. In fact, the 1978 version of the Small Business Act makes mention of OFPP in two notable places. First, with regard to the establishment of goals for participation by small businesses in procurement contracts, OFPP is appointed as the final arbiter of disputes.<sup>134</sup> Second, the Administrator of OFPP is authorized and directed to create a “single, simplified, uniform Federal procurement regulation” and to create procedures to ensure compliance.<sup>135</sup> This “uniform regulation” would ultimately be the FAR.

In addition to recognizing the authority of OFPP, the 1978 Small Business Act established the automatic reservation of certain procurements for small business concerns.<sup>136</sup> The statute required:

Each contract for the procurement of goods and services which has an anticipated value of less than \$10,000 and which is subject to small purchase procedures shall be reserved exclusively for small business concerns unless the contracting officer is unable to obtain offers from two or more small business concerns that are competitive with market prices and in terms of quality and delivery of the good or services being purchased.<sup>137</sup>

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<sup>130</sup> Small Business Act, § 2 (1958), *See also* 49 FR 40135-01 (May 12, 1984).

<sup>131</sup> Small Business Act, § 6 (1958).

<sup>132</sup> Armed Services Procurement Regulation, 32 C.F.R. § 1.700 (1959).

<sup>133</sup> *Id.*

<sup>134</sup> Small Business Act, Pub. L. No. 95-507, § 221(g), 92 Stat. 1757, 1770 (1978) (amending Pub. L. No. 85-536, § 15 (1958) (current version at 15 U.S.C. § 644(g) (2013)).

<sup>135</sup> Small Business Act § 222 (1978) (current version at 15 U.S.C. §§ 631-657 does not contain this language). *But see* 41 U.S.C. § 1122 (2011) (outlining the functions of the Office of Federal Procurement Policy Administrator).

<sup>136</sup> *Id.* *See also* S. Rep 95-1070, at 17 (1978).

<sup>137</sup> Small Business Act § 221 (1978) (current version at 15 U.S.C. § 644(j) (2013)).

Although Congress created a statutory requirement to assist small businesses in garnering more federal procurement dollars, Congress did not explicitly state whether these requirements applied extraterritorially.

## 2. The Senate Report on the Small Business Act Amendments of 1978, from the Senate Small Business Committee, Supports the Conclusion that Congress Did Not Intend to Apply Small Business Set-Aside Requirements to Overseas Procurements

The Senate report noted concern over the lack of ease with which small businesses were being awarded federal procurement contracts. The Senate report indicates that the SB Committee believed that the growth of small businesses participating in federal government procurement was too slow, so changes to participation goal-setting were implemented.<sup>138</sup> The SB Committee cited as an issue the agency's ability to set goals for participation by small businesses without "appreciable" input from the SBA.<sup>139</sup> The committee noted that there was "no method beyond persuasion" at the disposal of SBA to influence small business participation goals.<sup>140</sup> The SB Committee believed that a more active role by the SBA in the goal-setting process was necessary to create more ambitious procurement goals.<sup>141</sup> The amendment directed the head of each Federal agency, in cooperation with the SBA Administrator, to establish goals for the participation of small business in the federal procurement process.<sup>142</sup> The joint creation of the participation goal by the SBA and the agency was intended to result in a goal that "realistically reflect[s]" the potential of all small business concerns to perform contracts and sub-contracts in the federal procurement system.<sup>143</sup> Any disagreement between the agency and the SBA was to be submitted to the Administrator of OFPP for final determination.<sup>144</sup>

The SB Committee, in addition to improving participation goals, also discussed the automatic reservation.<sup>145</sup> Although the SB Committee did not intend to unnecessarily burden agencies and their contracting professionals, the SB Committee expressed an expectation that each agency would diligently implement the set-aside procedures.<sup>146</sup> The SB Committee also did not want to unduly burden small businesses in their attempts to sell to the federal government, so they directed OFPP to promulgate a "single, simplified, uniform procurement regulation," and

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<sup>138</sup> S. Rep 95-1070, at 17 (1978).

<sup>139</sup> *Id.*

<sup>140</sup> *Id.*

<sup>141</sup> *Id.*

<sup>142</sup> Small Business Act, § 221 (1978) (current version at 15 U.S.C. § 644(j) (2013)).

<sup>143</sup> *Id.*

<sup>144</sup> *Id.*

<sup>145</sup> *Id.* See also S. Rep 95-1070, at 17 (1978).

<sup>146</sup> S. Rep 95-1070, at 18 (1978).

to work with the SBA in assessing the effects on small businesses of the set-asides and other provisions.

Although not explicitly applying set-aside provisions to extraterritorial procurements, the SB Committee did discuss a geographical limitation regarding the requirement that each agency provide procurement information to small business concerns, upon request.<sup>147</sup> The goal of providing such information is to simplify acquisition procedures for small businesses.<sup>148</sup> The statute did not require the agency to provide the information if the contract or any subcontract under the contract were to be performed outside the United States, District of Columbia or the Commonwealth of Puerto Rico.<sup>149</sup>

### 3. A Geographic Limitation to the United States or Its Territories of the Requirement to Conduct Small Business Set-Asides Has Been in Effect Since the Earliest Implementation of the Small Business Act and Has Been Present in the FAR Since Its Inception

The Department of Defense implementation of the Small Business Act has always applied only to the “United States, its Territories, its possessions, and Puerto Rico.”<sup>150</sup> Section 1.700 of the ASPR was written to implement the Small Business Act.<sup>151</sup> In describing the scope of the subpart, § 1.700 sets forth

(a) policy reference to small business concerns, (b) policy governing relationship with the Small Business Administration, (c) small business set-aside procedures, and (d) the Defense Small Business Subcontracting program. This subpart applies *only in the United States, its Territories, its possessions, and Puerto Rico*.<sup>152</sup>

The FPR also contained a geographical limitation on the applicability of its small business set-aside procedures.<sup>153</sup>

The FPR was one of the precursors to the FAR, and similar to the Rule of Two implementation, the geographical limitation on the applicability of set-aside procedures likely was purposefully adopted and written into the FAR.<sup>154</sup> The very

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<sup>147</sup> S. Rep 95-1070, at § 21 (1978).

<sup>148</sup> *Id.*

<sup>149</sup> Small Business Act § 22 (1978).

<sup>150</sup> Armed Services Procurement Regulation § 1.700, 24 Fed. Reg. 3,584 (May 5, 1959).

<sup>151</sup> *Id.*

<sup>152</sup> *Id.* (emphasis added).

<sup>153</sup> 41 C.F.R. § 1-1.700(b) (1963) (applying only to the United States, its possessions, and Puerto Rico).

<sup>154</sup> 49 Fed. Reg. 40135-01 (Oct. 12, 1984).

first version of the FAR in was implemented in 1984.<sup>155</sup> Originally, FAR Part 19 applied “only inside the United States, its territories and possessions, Puerto Rico, the Trust Territory of the Pacific Islands, and the District of Columbia.”<sup>156</sup> The current language first appeared in FAR Part 19 in 2003. The language was changed to “the United States or its outlying areas.”<sup>157</sup> Outlying areas is defined as:

- (1) *Commonwealths*.
  - (i) Puerto Rico.
  - (ii) The Northern Mariana Islands;
  
- (2) *Territories*.
  - (i) American Samoa.
  - (ii) Guam.
  - (iii) U.S. Virgin Islands; and
  
- (3) *Minor outlying islands*.
  - (i) Baker Island.
  - (ii) Howland Island.
  - (iii) Jarvis Island.
  - (iv) Johnston Atoll.
  - (v) Kingman Reef.
  - (vi) Midway Islands.
  - (vii) Navassa Island.
  - (viii) Palmyra Atoll.
  - (ix) Wake Atoll.<sup>158</sup>

In addition to the long-standing exception in the FAR and the ASPR, the propensity to enforce small business preferences only in the United States or its outlying areas is evidenced in other legislation. The Small Business Act creates an exemption for contracts that “will be performed entirely outside any State, territory, or possession of the United States, the District of Columbia, or the Commonwealth of Puerto Rico” with regard to requests for information.<sup>159</sup> The section requires certain information about any contract let by any Federal agency to be provided to a small business concern upon request, but extraterritorial contracts are exempt.<sup>160</sup> Another exclusion in the Small Business Act states that a certain clause is not required for contracts “including all subcontracts under such contracts...performed entirely outside of any State, territory, or possession of the United States, the District of

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<sup>155</sup> 48 Fed. Reg. 42,102-01-C, at 42,241 (Sept. 19, 1983).

<sup>156</sup> *Id.*

<sup>157</sup> Federal Acquisition Circular 2001-14, 68 Fed. Reg. 28,079 at 28,080 (May 22, 2003) (codified at 48 C.F.R. § 2.101).

<sup>158</sup> *Id.*

<sup>159</sup> 15 U.S.C. § 637b (2013).

<sup>160</sup> *Id.*

Columbia, or the Commonwealth of Puerto Rico.”<sup>161</sup> As discussed, the SBA has argued that this language exemplifies the intent of Congress to create a territorial limitation only when one is written into the statute, but the language also supports the assertion that Congress intended to limit the application of set-aside requirements to the United States.<sup>162</sup>

#### 4. Courts Will Grant Deference to Long-Standing Interpretations that are Promulgated Through a Public Notice and Comment Period

In looking at the amount of time from the first implementation of a geographical limitation for small business set-aside procedures to the present, Congress has had ample opportunity to change the law, if it wished to do so. In *Kingdomware*, COFC held that “the court cannot ignore the well-settled principle that Congress ‘can be presumed [to be] . . . knowledgeable about existing law pertinent to legislation it enacts.’”<sup>163</sup> The Small Business Act was passed in 1958, establishing a policy to create opportunities for small business concerns. Then, in 1959, the ASPR was promulgated with a section implementing the Small Business Act for the armed forces, but clearly stating that the provisions only apply to the United States, its territories, its possessions, and Puerto Rico. In other words, one of the first regulations to implement a foreign exclusion for small business set-asides was promulgated *55 years ago*.

In looking at the first significant amendments to the Small Business Act in 1978, it seems clear that Congress did not find it necessary to clarify any confusion over the applicability of set-aside provisions overseas. At that time, Congress would have had almost 20 years from the implementation of the ASPR, and 15 years from the implementation of the FPR, to evaluate and correct any errors in the implementation of the Small Business Act of 1958. Even if one could argue that the automatic reservation did not come exist until 1978, that was still over 35 years ago, and Congress still has not provided any clarification by statute. The Small Business Act was amended as recently as January 2013, but Congress did nothing address the applicability of the automatic reservation.<sup>164</sup>

Also, the policy decision to limit set-asides to the United States and its outlying areas was expressed in the first version of the FAR in 1984.<sup>165</sup> In order to have a uniform set of procurement policies and guidelines, Congress directed OFPP to promulgate the FAR. If the FAR, from its initial publication in 1984, contained

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<sup>161</sup> 15 U.S.C. § 637(d)(2)(b) (2013).

<sup>162</sup> SBA Comments to Protest of Latvian Connection, LLC at 3 (copy on file with author).

<sup>163</sup> *Kingdomware Technologies, Inc. v. United States*, 107 Fed.Cl. 226, 241 (2012) (citing *VE Holding Corp. v. Johnson Gas Appliance Co.*, 917 F.2d 1574, 1581 (Fed.Cir.1990) (citing *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 184–85, 108 S.Ct. 1704, 100 L.Ed.2d 158 (1988)).

<sup>164</sup> Small Business Act, Pub. L. 112-239, § 15(j) (2013) (contains no discussion or direction on the applicability of the 15(j) to extraterritorial procurements).

<sup>165</sup> 49 Fed. Reg. 40135 (October 12, 1984).



a provision that conflicted with the intent of Congress, then Congress would have acted to clarify or correct any mistakes in the interpretation of the Small Business Act. The long-standing nature of the geographical limitation of the application of small business set-asides to the United States and its outlying areas indicates that Congress has accepted OFPP's interpretation and it deserves significant deference from either GAO or COFC.

#### V. AN EXPANSION OF SMALL BUSINESS SET-ASIDE REQUIREMENTS TO EXTRATERRITORIAL PROCUREMENTS NOT ONLY CONFLICTS WITH THE FAR, BUT ALSO WITH OTHER U.S. STATUTES AND INTERNATIONAL AGREEMENTS

Due to multiple laws and agreements governing a given area of foreign operations, the application of either the SBA regulations or FAR Part 19 in overseas and contingency environments presents myriad questions as to which law will apply. In certain locations, both U.S. statutes and other types of international agreements dictate the way in which procurements will be conducted. For instance, Department of Defense agencies in certain areas of operations are statutorily exempted from participating in full and open competition.<sup>166</sup> In addition to statutes that apply to U.S. operations overseas, the United States enters into international agreements, such as treaties and executive agreements, to cover other overseas combat and non-combat locations. With all of the competing legal and policy interests, the addition of another domestic requirement to conducting extraterritorial procurements will create confusion and limit efficiency.

The presence of, and potential conflict with, statutory requirements and international agreements is the most likely reason for the FAR Council's unanimous rejection of the SBA's request to change the language in FAR 19.000(b). The FAR Council's position on this issue seems based upon the potential complications caused by a worldwide application of the set-aside procedures. The confusion caused by preferences for U.S. companies in overseas locations could slow the procurement process, or open up the agency to litigation or other risk.

#### A. U.S. Statutes and Treaties Should Control Over the Regulatory Interpretation of the Small Business Act

Statutes and ratified treaties entered into by the United States carry equal force.<sup>167</sup> An agency interpretation will control, as long as it does not conflict directly with a statute.<sup>168</sup> Thus, just as an administrative interpretation cannot contradict the clear language of a statute, such an interpretation should not be able to contradict

<sup>166</sup> 10 U.S.C. § 2304(c)(4) (2011).

<sup>167</sup> US CONST. Art 6, cl. 2 (Establishing that the laws of the United States and Treaties made are the Supreme Law of the Land).

<sup>168</sup> *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 46 U.S. 837.

the clear language of a treaty. Therefore, in any country where we have statutory or treaty obligations to use certain procedures for the benefit of local contractors and small businesses, the SBA regulations requiring set-asides worldwide likely have no effect. Imposing a regulatory requirement that has limited or no effect only creates confusion and does not enhance the policy goal originally used to establish the Rule of Two. Agencies in overseas locations, especially those where the armed forces are engaged in operations, should not be burdened with an additional regulatory requirement, even if it will not apply, because the analysis determining its applicability is still required and may cause a delay in accomplishing the acquisition.

## B. A Worldwide Application of Small Business Set-Asides Will Conflict with Statutes and Agreements Governing the Presence of U.S. Armed Forces in Other Countries

In the armed forces, the head of agency may use “other than competitive contracting procedures when...the terms of an international agreement or a treaty between the United States and a foreign government or international organization, or the written directions of a foreign government reimbursing the agency for the cost of the procurement of the property or services for such government, have the *effect of requiring* the use of procedures other than competitive procedures.”<sup>169</sup> The use of federal procurement dollars in support of local contractors for the benefit of the United States probably is most evident in areas where the armed forces are conducting combat operations. The statute provides that “[t]he head of an agency may use procedures other than competitive procedures only when...the terms of an international agreement or a treaty between the United States and a foreign government or international organization, or the written directions of a foreign government reimbursing the agency for the cost of procurement of the property or services for such government, have the effect of requiring the use of procedures other than competitive procedures.”<sup>170</sup> In situations where 10 U.S.C. § 2304 applies, the direct statutory authority granted to the procuring agency within the Department of Defense (DoD) to use other than competitive procedures in awarding federal contracts to host nation contractors likely will govern over the SBA’s regulations.<sup>171</sup>

For example, the security agreement entered into between the United States and Iraq concerning the withdrawal of U.S. troops included a requirement that “United States Forces shall contract with Iraqi suppliers of materials and services to the extent feasible when their bids are competitive and constitute best value.”<sup>172</sup> Although this agreement expired in 2011, it is illustrative of the requirement that if an Iraqi contractor’s offer or bid was competitive and did represent a best value,

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<sup>169</sup> 10 U.S.C. § 2304(c)(4) (2011). (emphasis added).

<sup>170</sup> *Id.*

<sup>171</sup> *Id.*

<sup>172</sup> AF Brief (citing the Iraqi Security Agreement, Article 10).

then the procuring agency would have to contract with that Iraqi business and not a U.S. small business concern.

In addition to the Iraqi agreement, there are several provisions and programs established and reinforced through multiple National Defense Authorization Acts (NDAAs) that require procurements to support host-nation businesses. One program that is prevalent in deployed environments is the Commanders' Emergency Response Program (CERP). Established in 2003, CERP was created for the "purpose of enabling military commanders in Iraq to respond to urgent humanitarian relief and reconstruction requirements within their areas of responsibility by carrying out programs that will immediately assist the Iraqi people."<sup>173</sup> Since its creation, multiple NDAAs have expanded authorization of the use of CERP funds to benefit the local population and to be paid to contractors in Iraq and Afghanistan.<sup>174</sup> The laws governing the use of CERP funds are going to allow a contracting agency to use other U.S. laws to side-step the SBA regulatory requirement to conduct a small business set-aside.

While CERP is a program intended to fulfill a specific purpose in Afghanistan a more general requirement exists for DoD agencies in Afghanistan. The *Afghan First* policy is a program that limits the competition to products or services in Afghanistan.<sup>175</sup> Such programs were first established as a counterinsurgency tool.<sup>176</sup> In 2008, the programs were written into statute and codified in the FAR.<sup>177</sup> The 2008 NDAA stated:

(a) IN GENERAL—In the case of a product or service to be acquired in support of military operations or stability operations in Iraq or Afghanistan (including security, transition, reconstruction, and humanitarian relief activities) for which the Secretary of Defense

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<sup>173</sup> Emergency Supplemental Appropriations Act for Defense and for the Reconstruction of Iraq and Afghanistan, Pub. L. 108-106, 117 Stat. 1209 (2003).

<sup>174</sup> AF Brief pg. 31, citing Department of Defense Appropriations Act, 2010, Pub. L. No. 111-118 § 9005, 123 Stat. 3409, (2009) (HR 3326); Duncan Hunter National Defense Authorization Act for Fiscal Year 2009, Pub. L. No. 110-417 § 1214, 122 Stat. 4356, 4630 (2008); National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181 § 1205, 122 Stat. 3, 366 (Jan. 28, 2008); Department of Defense Appropriations Act for Fiscal Year 2007, Pub. L. No. 109-289, 120 Stat. 1257 § 9006 (2006); National Defense Authorization Act for Fiscal Year 2006, Pub. L. No. 109-163 § 1202, 119 Stat. 3136, 3455 (2006); Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief, 2005, Pub. L. No. 109-13, 119 Stat. 231 § 1006 (2005); Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 108-375, 118 Stat. 1811 § 1201 (2004); Department of Defense Appropriations Act for Fiscal Year 2005, Pub. L. No. 108-287, 118 Stat. 951 § 907 (2004); Emergency Supplemental Appropriations Act for Defense and for the Reconstruction of Iraq and Afghanistan, Pub. L. No. 108-106 § 1110, 117 Stat. 1209, 1215 (2003).

<sup>175</sup> See DFARS, 48 C.F.R. § 225.7703.

<sup>176</sup> Darren W. Rhyne, Major, USAF, *Afghan First: Building A Stable Economy Through Strategic Acquisitions*, Defense AT&L Magazine (May-June 2011).

<sup>177</sup> Pub. L. 110-181, 131 Stat. 735, § 886, (2008). See also DFARS, § 225.77 and Rhyne at 6.

makes a determination described in subsection (b), the Secretary may conduct a procurement in which—

(1) competition is limited to products or services that are from Iraq or Afghanistan;

(2) procedures other than competitive procedures are used to award a contract to a particular source or sources from Iraq or Afghanistan; or

(3) a preference is provided for products or services that are from Iraq or Afghanistan.

Implementation of the *Afghan First* policy began in earnest in 2009. The main goals of the *Afghan First*, policy were to: (1) keep money in Afghanistan, (2) increase domestic production, (3) emphasize quality and pride in domestic Afghan products, and (4) teach businesses to compete in commercial and international markets.<sup>178</sup>

Recently, a new policy memorandum was issued that created a class deviation allowing contracting officers to use less than competitive procedures to acquire goods and services for Afghan military and stability operations.<sup>179</sup> The memorandum directs contracting officers to “limit competition or provide a preference” for products that are “mined, produced, or manufactured in, or services from” several Southern Asian countries surrounding Afghanistan, over other states such as Pakistan or the South Caucasus.<sup>180</sup> The guidance was issued on April 4, 2014, and in accordance with the 2014 NDAA, extended the deadline for the use of these procedures to December 31, 2015.<sup>181</sup> The codification of these policies and procedures in a statute indicates that these goals are superior to the goals of small business set-asides.

The United States also enters into agreements with other nations to set guidelines for the presence of a U.S. armed force in that country. One such nation is Kyrgyzstan, which, until recently, was a major thoroughfare for the U.S. Government to move troops and supplies to certain deployed locations.<sup>182</sup> The agreement between the U.S and the Kyrgyz Republic governed the presence and operation of the Transit Center at Manas, through which almost all troops deploying to Afghanistan and elsewhere passed. The agreement stated that “The United States shall contract

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<sup>178</sup> Rhyne at 6-7.

<sup>179</sup> Memorandum from Richard T. Ginman, Director for Defense Procurement and Acquisition Policy, *Class Deviation—Authority to Acquire Products and Services Produced in Countries Along a Major Route of Supply to Afghanistan or in Afghanistan* (Apr. 4, 2014).

<sup>180</sup> *Id.*

<sup>181</sup> *Id.*

<sup>182</sup> AF Brief in Response to SBA Comments on the Protest of Latvian Connection, LLC (B-408633) (copy on file with Author).

with Kyrgyz companies for the fulfillment of contracts related to the Transit Center at Manas International Airport to the maximum extent feasible when their bids are competitive and constitute the best value to the United States in accordance with the laws and regulations of the United States.<sup>183</sup> The United States also was required to provide periodic information sessions for Kyrgyz companies interested in learning about bidding for United States contracts at the Transit Center at Manas International Airport.<sup>184</sup> Requiring an agency to conduct small business set-asides would have directly conflicted with the government's agreement with the Kyrgyz Republic.

For all these diverse areas of operations, there are specific statutes and/or international agreements that the United States has executed for strategic political and military reasons. The SBA's desire to garner a few more government procurement contracts for small business concerns does not trump those political and military interests. Thus, a large majority of the time, a contracting officer, either by statute or international agreement, is able to avoid a requirement to conduct a small business set-aside. In fact, the SBA's own regulations state the criteria by which the regulation can be avoided by contracting officers because the contracting officer and small business representative have to agree that the procurement is in the best interest of:

- (1) Maintaining or mobilizing the Nation's full productive capacity;
- (2) War or national defense programs;
- (3) Assuring that a fair proportion of the total purchases and contracts for property, services and construction for the Government in each industry category are placed with small business concerns; or
- (4) Assuring that a fair proportion of the total sales of Government property is made to small business concerns.<sup>185</sup>

Even if the contracting officer, based on the criteria above, has a clear exemption from the requirement to conduct a set-aside, the analysis still has to be done. Further, if the SBA does not agree with the particular DoD agency's representative, as discussed earlier, the agency head will make the final determination.<sup>186</sup> The decision of the agency head is not likely to differ from that of the agency's contracting officer, so it is unlikely that the SBA's opinion will carry much weight, nor is it likely to be followed by the agency. Therefore, more often than not, the SBA

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<sup>183</sup> AF Brief, citing *Agreement Between the Government of the U.S.A. and the Government of the Kyrgyz Republic Regarding the Transit Center at Manas International Airport and Any Related Facilities/Real Estate*, ¶ 7 (Jul 14, 2009).

<sup>184</sup> 10 U.S.C. § 2304(c)(4) (2011).

<sup>185</sup> 13 C.F.R. § 125.2(a) (2013).

<sup>186</sup> 15 U.S.C. § 644(a) (2013).

regulations will turn out to be rather toothless in compelling agencies to conduct small business set-asides.

### C. Applying Small Business Set-Asides to Overseas Procurements Will Also Conflict with the Letter and Spirit of Valid, Enforceable International Executive Agreements

In cases where a direct statutory authorization to enter contracts with host nation businesses does not exist, the executive branch may enter into mutually beneficial international agreements to establish preferences for host nation companies. The executive branch is usually granted broad authority to enter into international agreements that are not submitted to the Senate for its advice and consent.<sup>187</sup> The Supreme Court and historical practice support the validity of executive agreements.<sup>188</sup> Further, the prevalence of executive agreements has increased greatly over time.<sup>189</sup> From 1789 to 1839, the United States entered into 60 treaties, while only entering into 27 executive agreements. During the World War II era, the number of executive agreements began to rise exponentially.<sup>190</sup> The types of executive agreements vary from memoranda of understanding (MOUs) to status of forces agreements (SOFAs) entered into by executive agencies.

A conflict between international executive agreements and an administrative agency interpretation and implementation of a statute is more difficult to resolve than a clear conflict with a U.S. statute or treaty. Unlike treaties, these agreements do not require the advice and consent of the U.S. Senate, but normally are legally binding.<sup>191</sup> Also, the agreement need not be signed by the President, so long as a person with the authority to sign and bind the U.S. Government does so.<sup>192</sup> Similar to an administrative interpretation, a properly executed and enforceable international executive agreement cannot supersede inconsistent provisions of earlier acts of Congress.<sup>193</sup> However, the law is murkier when an international executive agreement conflicts with a regulatory interpretation of a statute.

In the case of small business set-asides, an international agreement requiring or encouraging the utilization of local contractors would compete with a requirement to contract with U.S. small businesses. The resolution of this conflict will be based upon the location of the contracting agency, and the individual contracting officer interpreting the regulations. In just about any overseas contracting environment, a

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<sup>187</sup> U.S. v. Belmont, 301 U.S. 324 (1937).

<sup>188</sup> Michael John Garcia, Congressional Research Service, International Law and Agreements: Their Effect on U.S. Law at 9 (citing U.S. v. Belmont, 301 U.S. 324 (1937)).

<sup>189</sup> Garcia at 4-5.

<sup>190</sup> *Id.*

<sup>191</sup> *Id.* at 7.

<sup>192</sup> Restatement (Second) of Foreign Relations Law § 123 (1965).

<sup>193</sup> *Id.*

contracting officer is likely to be able to avoid using certain provisions of the FAR because of an exemption elsewhere in the FAR or the international agreements in place.

Utilizing foreign agreements to avoid domestic regulations, and vice-versa, could create confusion for contracting officers and will defeat the political and economic purpose of entering into reciprocal procurement agreements with other countries. For contracting officers, the process of conducting a procurement would be more difficult because of the conflicting requirements. Also, an agency could face a litigation risk by enforcing the provisions of an international agreement at the expense of a small business set-aside. Further, by looking at the specific provisions of a selection of these agreements, one can see that imposing a requirement to conduct a small business set-aside also cuts against the political and economic reasons for having these agreements.

#### 1. The FAR Exempts From Certain U.S. Laws and Policies Countries with which the United States Has Entered into Executive Agreements

The United States regularly will enter into a Memorandum of Agreement with countries where the United States has military installations or other interests and relationships. The FAR recognizes the importance of these agreements and the inappropriateness of applying domestic policy to these overseas locations.<sup>194</sup> The DFARS states “as a result of memoranda of understanding and other international agreements, DoD has determined it *inconsistent with the public interest* to apply restrictions of the Buy American statute or the Balance of Payments Program to the acquisition of qualifying country.”<sup>195</sup> The DFARS then lists the qualifying countries, all 22 of them.<sup>196</sup> A statutory provision aimed at increasing the number of small businesses participating in federal government procurements for the benefit of the United States’ economy through a restriction of competitive procedures should be treated the same as the Buy American Act, and should be inapplicable to overseas contracts.

One such international agreement exists between the United States and the United Kingdom. The United States and the United Kingdom have had a reciprocal defense procurement agreement since 1975.<sup>197</sup> Even before the establishment of the

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<sup>194</sup> Defense Federal Acquisition Regulation Supplement (DFARS), 48 C.F.R. § 225.872-1 (2012).

<sup>195</sup> DFARS, § 225.872 (2012).

<sup>196</sup> *Id.* (Listing Australia, Austria, Belgium, Canada, Czech Republic, Denmark, Egypt, Finland, France, Germany, Greece, Israel, Italy, Luxembourg, Netherlands, Norway, Poland, Portugal, Spain, Sweden, Switzerland, Turkey, United Kingdom of Great Britain and Northern Ireland).

<sup>197</sup> Memorandum of Understanding Between the Government of the United States and the Government of the United Kingdom of Great Britain and Northern Ireland Relating to the Principles Governing Cooperation in Research and Development, Procurement and Logistics Support of Defense Capability (December 16, 2004) (*available at* [http://www.acq.osd.mil/dpap/cpic/ic/reciprocal\\_procurement\\_memoranda\\_of\\_understanding.html](http://www.acq.osd.mil/dpap/cpic/ic/reciprocal_procurement_memoranda_of_understanding.html)).

FAR, the United States was entering into agreements to establish mutually beneficial procurement relationships with the United Kingdom to:

- 1) Make the most cost-effective and rational use of their respective industrial, economic, and technological resources consistent with national laws, regulations, policies, and procedures;
- 2) Promote the widest possible use of standard or interoperable equipment; and
- 3) Develop and maintain an advanced technological capability for the North Atlantic Alliance, and particularly with respect to the signatories of this Memorandum of Agreement.<sup>198</sup>

Although the statement references “national laws, regulations, policies, and procedures,” the FAR provides a couple of exceptions allowing a contracting officer to adhere to these agreements, even if FAR Part 19 was changed to apply outside the United States and its outlying areas.<sup>199</sup> An enforcement of the “automatic reservation” or the Rule of Two as a priority could cause these agreements to lose their intended effect. A U.S. contracting officer in the U.K. would be required to give preference to U.S. small businesses, which would directly contradict one of the purposes of this agreement. Although the law may not be clear, an overseas contracting officer is most likely to use other provisions of the FAR to exempt an acquisition from the requirements of FAR Part 19 set-asides, were those provisions changed to apply overseas.<sup>200</sup>

Italy is also one of the countries exempted by the DFARS.<sup>201</sup> The agreement with Italy is very similar to the one with the UK, but does have some additional language. For instance, the MOU states that both the United States and Italy desire “to develop and strengthen the friendly relations existing between them.”<sup>202</sup> Also, both countries are “seeking to achieve and maintain fair and equitable opportunities for the industry of each country to participate in the defense procurement programs of the other.”<sup>203</sup> Due to the FAR exception, specific certain U.S. policies do not apply to procurement accomplished pursuant to this MOU. If the Small Business

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<sup>198</sup> U.S./U.K. Reciprocal Defense MOU.

<sup>199</sup> U.S./U.K. Reciprocal Defense MOU, *See also* DFARS, 48 C.F.R. § 225.8 and FAR 6.302-4 (providing for the use of other than competitive procedures under 10 U.S.C. § 2304(c).

<sup>200</sup> Telephone Interview with Michael N. Hogan, Contracting Officer and director of Business Operations, 48th Contracting Squadron, RAF Lakenheath, United Kingdom. (June 6, 2014).

<sup>201</sup> DFARS, § 225.8.

<sup>202</sup> Memorandum of Understanding between the Government of the United States and the Government of the Italian Republic Concerning Reciprocal Defense Procurement (May 3, 2009) (*available at* [http://www.acq.osd.mil/dpap/cpic/ic/reciprocal\\_procurement\\_memoranda\\_of\\_understanding.html](http://www.acq.osd.mil/dpap/cpic/ic/reciprocal_procurement_memoranda_of_understanding.html)).

<sup>203</sup> U.S/Italian Reciprocal Defense MOU.



Act and its regulations applied overseas, or if the FAR was changed to do so, the new requirements would conflict with the goals of this MOU. The MOU exists not only for a financial or economic benefit, but also as a political endeavor to support the “friendly relations” between the United States and Italy. The application of small business set-aside procedures overseas could disrupt both of those efforts. Similar to agreement with the United Kingdom, contracting officers are likely to employ other provisions of the FAR to avoid implementing U.S. small business set-aside requirements in their areas of responsibility.

## VI. THE SMALL BUSINESS PARTICIPATION GOALS, AND THE FAILURE OF THE GOVERNMENT TO ACHIEVE THOSE GOALS, PRESENTS A POTENTIAL ADDITIONAL BASIS FOR THE SBA’S ATTEMPT TO REQUIRE THE UTILIZATION OF SMALL BUSINESS SET-ASIDES IN EXTRATERRITORIAL LOCATIONS

The outcome of this issue potentially implicates the achievement of the goals established for participation by small business concerns in federal government procurement. The Small Business Act amendments of 1978 established that the heads of each federal agency shall coordinate with the SBA to establish goals for participation by small business concerns in the federal government procurement system.<sup>204</sup> As stated above, any disagreement on the goaling was to be referred to OFPP.<sup>205</sup> The current goals require 23% of *all* federal procurement dollars to go to small business concerns.<sup>206</sup> Within that goal are individual requirements for the different types of small business concerns, e.g., small disadvantaged business, small women-owned disadvantaged business, and small veteran-owned disadvantaged businesses.<sup>207</sup> The goal has proven difficult to reach, with the government falling short since 2005.<sup>208</sup> There has been much criticism of the government’s failure to meet these goals, and of the SBA for the way in which it calculates the percentage of the goal achieved.<sup>209</sup> Many question the accuracy of the percentage of the goal met because the SBA excludes multiple types of contracts from the calculation of

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<sup>204</sup> Small Business Act Amendments of 1978, Pub. L. 95-507 § 221(j) 92 Stat. 1771 (1978) (current edition at 15 U.S.C. § 644(j)).

<sup>205</sup> *Id.*

<sup>206</sup> *Id.*

<sup>207</sup> *Id.*

<sup>208</sup> Patrick Clark, *At Long Last, the Government Is Poised to Meet Its Small Business Contracting Goal*, *The New Entrepreneur*, Businessweek.com (Feb. 24, 2014) (<http://www.businessweek.com/articles/2014-02-24/at-long-last-the-government-is-poised-to-hit-its-small-business-contracting-goal>). *See also* Press Release, House Committee on Small Business, *The Federal Government Shorts Small Businesses Again, Misses Contracting Goal For Seventh Straight Year* (Jul. 2, 2013) (*available at* <http://smallbusiness.house.gov/news/documentsingle.aspx?DocumentID=341334>)

<sup>209</sup> J.D. Harrison, *Small business contracting numbers inflated by errors and exclusions, data show*, *The Washington Post*, July 28, 2013 (*available at* [http://www.washingtonpost.com/business/on-small-business/small-business-contracting-numbers-inflated-by-errors-and-exclusions-data-show/2013/07/28/7fa2a4fc-f2f6-11e2-8505-bf6f231e77b4\\_story.html](http://www.washingtonpost.com/business/on-small-business/small-business-contracting-numbers-inflated-by-errors-and-exclusions-data-show/2013/07/28/7fa2a4fc-f2f6-11e2-8505-bf6f231e77b4_story.html)).

the amount of federal dollars being spent, including overseas contracts.<sup>210</sup> For FY 2012, about 22.5% of federal contract dollars were awarded to small businesses.<sup>211</sup> However, according to the House Committee on Small Business (Committee), if all procurement dollars are included, the amount of procurement money going to the small businesses in FY 2012 was actually around 19.4%. This issue has existed for several years, as highlighted in an SBA Inspector General report from 2011.<sup>212</sup>

In addition to discussing the types of contracts the SBA excludes from the calculation, the SBA IG Report highlights the SBA's opinion that overseas contracts should not be "excluded" from the requirements of FAR Part 19. As discussed above, this report was mentioned in the *Latvian Connection* case, and indicates that the SBA previously requested a change to FAR Part 19 to remove the foreign exclusion, but that request was unanimously denied.<sup>213</sup> The IG also mentions two legal memoranda from the SBA legal advisors.<sup>214</sup> The first memorandum, dated July 2, 2008, indicated that the Small Business Act should apply to overseas contracts.<sup>215</sup> The second, although unfinished, discussed exemptions from goaling requirements.<sup>216</sup> Currently, the SBA still exempts these types of contracts from its calculations, but not without some dispute.

The House Committee on Small Business (Committee) has attempted to force the SBA's hand to include overseas contracts. The Committee passed HR 3850 back in 2012, for inclusion in the FY 2013 NDAA.<sup>217</sup> The bill included language that required the SBA to include the overseas contracts in their calculations of total federal procurement dollars. The bill also included a provision that tied an agency's ability to meet the small business contracting goals to the agency head's performance evaluations.<sup>218</sup> In the final 2013 NDAA, only the provision regarding performance

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<sup>210</sup> SBA IG Report at 2 (the SBA also excludes mandatory and directed sources, credit card less than \$2,500, and acquisitions by agencies on behalf of foreign governments or international organizations).

<sup>211</sup> FY 2012 Small Business Procurement Scorecard (*available at* [http://www.sba.gov/sites/default/files/files/FY12\\_Final\\_Scorecard\\_Government-Wide\\_2013-06-20.pdf](http://www.sba.gov/sites/default/files/files/FY12_Final_Scorecard_Government-Wide_2013-06-20.pdf)).

<sup>212</sup> *Id.* (citing a study cited in House of Representatives Report No. 110-111, Part 1 (2007), that inclusion of foreign contract opportunities in the Federal prime contracts baseline would have reduced small business participation to 19.3 percent of all Federal contracts).

<sup>213</sup> *In the Matter of: Latvian Connection, LLC* Comp. Gen. B-408633, 2013 CPD ¶ 224. *Also see* SBA IG Report at 7.

<sup>214</sup> SBA IG Report at 2.

<sup>215</sup> *Id.*

<sup>216</sup> *Id.*

<sup>217</sup> Notice on Website for House Committee on Small Business (*available at* <http://smallbusiness.house.gov/legislation/contractingreform.htm>).

<sup>218</sup> H.R. 3850, 112th Cong., 2d Session (January 31, 2012).

evaluations was included.<sup>219</sup> The newest efforts being put forth by the Committee include new legislation to raise the goal from 23% to 25%.<sup>220</sup>

Although sometimes at odds, both the SBA and the Committee are trying to achieve the same goal: increase the amount of federal procurement money going to small business concerns. From the perspective of the Committee, one can see why increasing the goal should, theoretically, raise the percentage of participation. Even if the higher goal is not reached, raising the minimum might cause agencies to increase the amount of contract being awarded to small businesses. From the perspective of the SBA, one can understand the predicament. On the one hand, certain individuals are clamoring for the inclusion of overseas contracts in the calculation of total federal procurement dollars. On the other hand, the main acquisition regulations followed by overseas contracting officers, the FAR, does not require small business set-asides for the contracts awarded overseas. Thus, there is no credible mechanism with which the SBA can compel contracting agencies overseas to use the procedures that allow more small businesses to participate in the federal procurement system outside the United States and its outlying areas.

#### VII. THE INVOLVEMENT OF MULTIPLE AGENCIES, AND THE LIKELY INVOLVEMENT OF GAO AND COFC, COULD LEAD TO SEVERAL POSSIBLE OUTCOMES

The resolution of this issue could come in several forms. First, Congress could resolve the conflict by clarifying the Small Business Act to explicitly state its applicability to locations outside the United States or its outlying areas. Congress could also get involved if GAO sustains a protest and the Agency involved ignores GAO's recommendation. If an Agency disregards a GAO recommendation, then the matter is referred to Congress, and Congress would have an opportunity to resolve the matter legislatively.

A second path to resolution is through OFPP resolving the conflict between the regulations. OFPP could address the issue by opening a FAR case and changing the FAR language to allow for small business set-asides overseas, or create some other accommodation to resolve the discrepancy. At this time, there is no FAR case aimed at addressing this issue. Another, albeit less likely, option is the OFPP Administrator rescinding the SBA regulation. As discussed above, this is a rarely used course of action. Therefore, the most likely movement on the issue will come through litigation.

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<sup>219</sup> National Defense Authorization Act for Fiscal Year 2013, Pub. L. 112-239, 126 Stat. 1632 (2013).

<sup>220</sup> Greater Opportunities for Small Business Act of 2014, Unnamed H.R. Res., 113th Cong., 2d. Session (2014).

GAO or COFC could defer completely to the SBA or OFPP and recognize the agency's sole authority to determine the applicability of small business set-aside procedures to areas outside the United States or its outlying areas. Another option is a decision by GAO or COFC to divide the rule-making authority between the SBA and OFPP. As stated earlier, the "automatic reservation" is a statutory provision stated in 15 U.S.C. § 644(j), but the Rule of Two is a purely regulatory creation. If the Court or GAO determined that the SBA has exclusive authority to interpret the Small Business Act, then they could grant rule-making authority over 644(j) only to the SBA. At the same time, GAO or COFC could determine that the implementation of the remaining government-wide policy considerations of the Small Business Act remain the providence of OFPP and the FAR. A decision to divide the authority, though, will create different applicability for similar provisions in the law. Such a resolution could create significant confusion for procurement professionals worldwide and is unlikely to be the outcome.

Further complicating the potential resolution through a COFC case is the lack of precedential authority within COFC. Each individual COFC judge establishes his or her own precedent, and that precedent is not binding on the other COFC judges.<sup>221</sup> Therefore, even a decision from one COFC judge would not settle the matter.<sup>222</sup> The most definitive legal interpretation would eventually come from a decision by the Court of Appeals for the Federal Circuit.<sup>223</sup>

Finally, any uncertainty regarding the proper regulatory guidance for extra-territorial procurements will complicate an already incredibly complex field of practice. For example, the process of resolving a dispute between the agency and a small business representative presents several hurdles. Unlike the contracting offices in the United States, many overseas contracting agencies do not have in-house small business representatives. There would be additional costs associated with creating and filling those positions. If new positions were not created, then there would be logistical complications in resolving a disagreement with a small business representative and an agency head located stateside. An overseas procurement very likely could return to the United States for a decision regarding which procurement procedures to use. Adding these additional steps, and potentially slowing the process, are not likely increase the number of situations where the contracting officer determines that the four criteria are met. The more difficult the process, the less likely it becomes that any changes will actually improve the SBA's ability to create greater U.S. small business participation in the federal procurement process overseas.

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<sup>221</sup> *The Foley & Lardner Guide to Federal Procurement Protests* (2nd Edition), Foley & Lardner, LLP (May 2011) at 19.

<sup>222</sup> *Id.*

<sup>223</sup> *Id.*

Additionally, the Rule of Two was devised to increase small business participation in the federal procurement process.<sup>224</sup> The types of small businesses likely contemplated by the statute are those located in the United States because those businesses provide a direct impact on the U.S. economy through jobs, taxes, etc. In situations where the company is located overseas, the domestic economy loses some of the benefits of that small business, especially if the employees are all residents of the country in which the company is located. The employees are unlikely to be paying taxes to the United States, and are not spending money on the U.S. economy. Thus, providing other than competitive procedures for the benefit of these types of overseas companies may not further the policy goals of the Small Business Act.

## VIII. CONCLUSION

Congress has long recognized the importance of creating opportunities for U.S. small businesses to grow and thrive in the U.S. economy. To create such opportunities in the federal procurement system for small businesses, Congress requires certain procedures for providing small businesses exclusive opportunities to compete for government contracts, i.e., set-asides. In addition to statutory provisions set forth by Congress, certain agencies have implemented regulations to provide increased acquisition opportunities for small businesses.

The SBA, in an apparent attempt to increase the opportunities for small businesses to participate in federal government procurements, implemented new regulations requiring the application of small business set-aside procedures to all procurements, regardless of the place of performance. According to FAR 19.000(b), the small business set-aside provisions in FAR Part 19, except for Part 19.6, only apply to contracts to be performed in the United States and its outlying areas. Thus, the new regulations create a conflict with the current FAR provisions. The conflict could lead to confusion for contracting professionals in the field, as well as increasing the litigation risk for certain agencies unsure as to which regulations to follow.

The discrepancy between the FAR and the SBA's regulations can be resolved by Congress, by the agencies themselves, or through litigation. As discussed above, the most likely movement on this issue will be through litigation. If the issue is raised through a bid protest, then the matter would go to GAO or COFC for a decision. Either GAO or COFC should conduct a *Chevron* analysis, including *Chevron* Step 1.5, to determine which agency's regulation deserves deference. Based upon the legislative history of SBA and OFPP Acts and the current state of the law, deference should be given to OFPP and the FAR.

Finally, the policy behind the set-aside measures does not support an interpretation of the law that applies the requirements of FAR Part 19 to procurements outside the United States or its outlying areas. The stated purpose of the policy is to

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<sup>224</sup> 49 Fed. Reg. 40135 (October 12, 1984) (codified at 48 C.F.R. § 19.502-2).

assist in the growth and continued success of U.S. small businesses; thereby ensuring the growth and protection of the U.S. economy. The way to achieve those goals is to continue encouraging the participation of small businesses in the domestic federal procurement system. The federal government consistently has struggled to meet the mandated participation goals for small businesses, and that is without including overseas procurements. An inclusion of those dollars in the calculation, even with an expansion of FAR Part 19 procedures, is likely to cause the participation percentage to fall even farther below the goal. Thus, the focus of additional small business related regulations should be on improving small business participation within the United States, not on attempting to expand the reach of those provisions to locations outside the United States or its outlying areas.

AMERICAN MILITARY JUSTICE: RESPONDING TO THE  
SIREN SONGS FOR REFORM

DAVID A. SCHLUETER\*

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\* Hardy Professor of Law and Director of Advocacy Programs, St. Mary’s University School of Law. The author gratefully acknowledges the invaluable assistance of Ms. Candace Hough, J.D. 2016, and Mr. Brendan Villanueva-Le, J.D. 2015, in the preparation of this article.

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*Siren Song*: an alluring utterance or appeal; *especially*: one that is seductive or deceptive.<sup>1</sup>

## I. INTRODUCTION

In Greek mythology, a “siren” was a creature—half bird and half woman—that would lure sailors to destruction with their sweet and enticing songs.<sup>2</sup> Today, the American military justice system is being subjected to sweet and enticing calls for reform—siren songs.<sup>3</sup> At first hearing, the well-intentioned proposed reforms appeal to a sense of justice. On closer examination, however, those proposed reforms threaten the essence and functionality of an effective and efficient system of criminal justice that is applied in world-wide settings, in both peacetime and in war.

Proposals to change the American military justice system have generally come in waves, following major military actions, which tended to expose those elements or features of the system which had not worked well, or in the minds of the reformers, could be made better. For example, calls for reform followed World War I,<sup>4</sup> World War II,<sup>5</sup> and the Vietnam conflict.<sup>6</sup> Indeed, the Uniform Code of

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<sup>1</sup> *Siren Song Definition*, MERRIAM-WEBSTER.COM, <http://www.merriam-webster.com/dictionary/siren%20song> (last visited Feb. 14, 2015).

<sup>2</sup> *Siren*, ENCYCLOPEDIA BRITANNICA ONLINE, <http://www.britannica.com/EBchecked/topic/546538/Siren> (last updated Apr. 24, 2014).

<sup>3</sup> See, e.g., Don Christensen, *Commanders Flunk on Military Justice Reforms*, THE HUFFINGTON POST (updated Feb. 2, 2014, 5:59 AM), [http://www.huffingtonpost.com/don-christensen/commanders-flunk-on-milit\\_b\\_6258554.html](http://www.huffingtonpost.com/don-christensen/commanders-flunk-on-milit_b_6258554.html) (criticizing the current military justice system and proposing reform); Arlette Saenz & Brian Thurow, *Sen. Kirsten Gillibrand Renews Push for Senate Vote on Military Sexual Assault*, ABC NEWS (Dec. 2, 2014, 1:28 PM), <http://abcnews.go.com/Politics/sen-kirsten-gillibrand-renews-push-senate-vote-military/story?id=27308547> (reporting the push for reforms to the current military justice system).

<sup>4</sup> See David A. Schlueter, *The Court-Martial: An Historical Survey*, 87 MIL. L. REV. 129, 156–57 (1980) (discussing changes to the military justice system following World War I); Samuel T. Ansell, *Military Justice*, 5 CORNELL L.Q. 1, 1 (1919) (arguing that American military justice system was “un-American” and needed change); Samuel T. Ansell, *Some Reforms in Our System of Military Justice*, 32 YALE L.J. 146, 153–55 (1922) (discussing proposed amendments to the Articles of War); Frederick B. Wiener, *The Seamy Side of the World War I Court-Martial Controversy*, 123 MIL. L. REV. 109 (1989) (recounting the infamous “Crowder-Ansell” dispute over the appropriate role of military justice).

<sup>5</sup> See generally Edmund M. Morgan, *The Background of the Uniform Code of Military Justice*, 6 VAND. L. REV. 169 (1953) (discussing background of adoption of the UCMJ).

<sup>6</sup> See generally Birch Bayh, *The Military Justice Act of 1971: The Need for Legislative Reform*, 10 AM. CRIM. L. REV. 9 (1971) (recommending changes to military justice system); Edward F. Sherman, *Congressional Proposals for Reform of Military Law*, 10 AM. CRIM. L. REV. 25 (1971) (discussing proposed legislative changes); Henry Rothblatt, *Military Justice: The Need for Change*, 12 WM. & MARY L. REV. 455 (1971) (proposing changes to UCMJ); Edward F. Sherman, *Military Justice Without Military Control*, 82 YALE L.J. 1398, 1400 n.10 (1973) [hereinafter Sherman (1973)] (noting proposed legislative reforms that included limiting a commander’s role and limiting court-martial jurisdiction and that in span of a few years bills had been introduced by Senators Bayh and Ervin and by Congressman Bennett).

Military Justice was enacted in 1950 following calls for change by a wide cross-section of the American public, Congress, and legal communities<sup>7</sup> and amended in the 1980s with a move to bring court-martial practice in closer harmony with the federal rules of criminal procedure and evidence.<sup>8</sup>

In the last several decades, an increasing number of commentators have recommended reforms to virtually every component of the military system, including pretrial processing of charges,<sup>9</sup> court-martial jurisdiction,<sup>10</sup> the role of the

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<sup>7</sup> See Morgan, *supra* note 5, at 174 (discussing how members of Congress and the American people called for full protection of rights for military personnel).

<sup>8</sup> Military Justice Act of 1983, Pub. L. No. 98-209, 97 Stat. 1393 (1983). The Act modified the selection and appointment process for counsel and judges, permitted prosecution appeal of certain rulings by a military judge, and provided for certiorari review of the Court of Military Appeals, now the United States Court of Appeals for the Armed Forces, by the Supreme Court. *Id.* The Act also established a commission to consider the issue of tenure for military judges, Article III status for the Court of Military Appeals, and a retirement program for judges of that court. *Id.* In 1984, the Manual for Courts-Martial was completely revised. See George R. Smawley, *In Pursuit of Justice, A Life of Law and Public Service: United States District Judge and Brigadier General (Retired) Wayne Alley (U.S. Army 1952–1954, 1959–1981)*, 208 MIL. L. REV. 213, 277–78 (2011) (discussing changes in the 1980s to align the Military Rules of Evidence with the Federal Rules of Evidence).

<sup>9</sup> See, e.g., John S. Cooke, *The Twenty-Sixth Annual Kenneth J. Hodson Lecture: Manual for Courts-Martial 20X*, 156 MIL. L. REV. 1, 23 (1998) (recommending that all Article 32 investigating officers be lawyers); Jeffrey Corn & Victor M. Hansen, *Even If It Ain't Broke, Why Not Fix It? Three Proposed Amendments to the Uniform Code of Military Justice*, 6 J. NAT'L SECURITY L. & POL'Y 447, 469–73 (2013) (proposing that an Article 32 proceeding be made into a preliminary hearing); Brian C. Hayes, *Strengthening Article 32 to Prevent Politically Motivated Prosecution: Moving Military Justice Back to the Cutting Edge*, 19 REGENT U. L. REV. 173, 196–98 (2006) (recommending that Congress amend Article 32 UCMJ to require an independent determination of probable cause to try an accused); Ryan W. Leary, *Serious Offense: Considering the Severity of the Charged Offense When Applying the Military Pre-Trial Confinement Rules*, 221 MIL. L. REV. 131, 143–51 (2014) (recommending changes in pretrial confinement procedures); Michal Buchhandler-Raphael, *Breaking the Chain of Command Culture: A Call for an Independent and Impartial Investigative Body to Curb Sexual Assaults in the Military*, 29 WIS. J. L. GENDER & SOC'Y 341, 371-75 (2014) (recommending that DoD strip military commanders of authority to dispose of sexual assault complaints and arguing that authority to handle cases should rest with independent and impartial body after a comprehensive investigation).

<sup>10</sup> See, e.g., David L. Snyder, *Civilian Military Contracts on Trial: The Case for Upholding the Amended Exceptional Jurisdiction Clause of the Uniform Code of Military Justice*, 44 TEX. INT'L L.J. 65, 68, 96 (2008) (proposing model for contractor accountability and arguing that subjecting civilian contractors to court-martial is the only pragmatic way to ensure discipline and accountability on the battlefield); Alan F. Williams, *The Case for Overseas Article III Courts: The Blackwater Effect and Criminal Accountability in the Age of Privatization*, 44 U. MICH. J. L. REFORM 45, 60–64, 72–77 (2010) (noting jurisdictional gap created by the Military Extraterritorial Jurisdiction Act (MEJA) and amendments to Article 2, UCMJ, which expanded courts-martial jurisdiction to civilian contractors, and proposing that Congress create an Article III court overseas to try such cases).

commander,<sup>11</sup> the selection of court members,<sup>12</sup> the role of military lawyers,<sup>13</sup> the evidence rules,<sup>14</sup> sentencing,<sup>15</sup> post-trial processing,<sup>16</sup> summary courts-martial,<sup>17</sup> and appellate review of court-martial convictions.<sup>18</sup> There have also been recommenda-

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<sup>11</sup> See, e.g., Lindsay Nicole Alleman, Note, *Who Is in Charge, and Who Should Be? The Disciplinary Role of the Commander in Military Justice Systems*, 16 DUKE J. COMP. & INT'L L. 169, 170–81 (2006) (comparing American military justice system with those of Canada and Israel); Richard B. Cole, *Prosecutorial Discretion in the Military Justice System: Is It Time for a Change?*, 19 AM. J. CRIM. L. 395, 408–09 (1992) (recommending changes in how court-martial charges are handled).

<sup>12</sup> See, e.g., Guy P. Glazier, *He Called for His Pipe, and He Called for His Bowl, and He Called for His Members Three—Selection of Military Juries by the Sovereign: Impediment to Military Justice*, 157 MIL. L. REV. 1, 68 (1998) (recommending use of computer-based system for randomly selecting members); Victor Hansen, Symposium, *Avoiding the Extremes: A Proposal for Modifying Court Member Selection in the Military*, 44 CREIGHTON L. REV. 911, 940–44 (2011) (criticizing court member selection process codified under Article 25, UCMJ and proposing change to military's panel selection system by using the accused's peremptory challenges to address the unfairness of stacking a court-martial panel); James T. Hill, *Achieving Transparency in the Military Panel Selection Process with the Preselection Method*, 205 MIL. L. REV. 117, 131 (2010) (recommending that convening authority could use the Electronic Personnel Office (eMILPO) to preselect panel's qualifications); Stephen A. Lamb, *The Court-Martial Panel Selection Process: A Critical Analysis*, 137 MIL. L. REV. 103, 159–62 (1992) (recommending elimination of variable number of members who sit, repeal of accused's right to have an enlisted panel, establishment of neutral panel commissioner and random selection, and the use of alternate members on the panel); David A. Schlueter, *Military Justice in the 1990s: A Legal System in Search of Respect*, 133 MIL. L. REV. 1, 20 (1991) (recommending that military reduce or remove roles of prosecutors and commanders in selection of court members).

<sup>13</sup> See, e.g., Elizabeth Murphy, *The Military Justice Divide: Why Only Crimes and Lawyers Belong in the Court-Martial Process*, 220 MIL. L. REV. 129, 177 (2014) (proposing that military lawyers be given prosecutorial discretion over disposition of offenses).

<sup>14</sup> See, e.g., Elizabeth Hillman, *The "Good Soldier" Defense: Character Evidence and Military Rank at Courts-Martial*, 108 YALE L.J. 879, 900 (1999) (recommending that use of good military character evidence be limited at findings).

<sup>15</sup> See, e.g., Colin A. Kisor, *The Need for Sentencing Reform in the Military Courts-Martial*, 58 NAVAL L. REV. 39, 57–59 (2009) (recommending statutory changes to reforming court-martial sentencing procedures).

<sup>16</sup> See, e.g., David E. Grogan, *Stop the Madness! It's Time to Simplify Court-Martial Post-Trial Processing*, 62 NAVAL L. REV. 1, 17–28 (2013) (exploring complexity involved in post-trial procedures and concluding that those procedures are outdated and ultimately inure no real benefit to a military accused; recommending several reforms, including abandonment of the staff judge advocate's review and making court-martial sentences self-executing).

<sup>17</sup> Cooke, *supra* note 9, at 23 (recommending that summary courts-martial be abolished).

<sup>18</sup> See, e.g., John F. O'Connor, *Foolish Consistencies and the Appellate Review of Courts-Martial*, 41 AKRON L. REV. 175 (2008) (recommending that convicted service members decide whether to appeal their convictions and to permit them to waive appellate review as part of a pretrial agreement with the convening authority).

tions regarding the role of the military in making changes to the military justice system<sup>19</sup> and how changes should be made.<sup>20</sup>

What seems unique about the most recent wave of proposed changes is that they arise from the intractable problem of sexual offenses within the military, primarily sexual assaults. While the congressional focus and task forces have concentrated on reforms to address that problem, there seems to be a groundswell of “well, while you are at, please consider the following changes. . . .” One gets the distinct impression that there is a sort of piling on of ideas, criticisms, and suggestions. Some of the suggested reforms have been raised before and are now being recycled in the hopes that a more attuned Congress and Pentagon will consider the proposals.

One would think that the calls for reform would come primarily from a civilian community that is distrustful of anything military. That is not always the case, however. Many of the commentators calling for reform are current or former armed forces lawyers who have worked within the system and know its strengths and its shortcomings.<sup>21</sup>

This article divides the proposed reforms into three categories and analyzes why the proposed changes to the military justice system should be rejected, in whole or in part.

Part II of this article provides a brief overview of the American military justice system, from pretrial investigation through appellate review. It also addresses the question of what is, or should be, the primary role of the military justice system. Part III of the article focuses on the proposed reforms which would either limit a commander’s prosecutorial discretion in the system, or at least severely limit that authority. It also argues that these would undermine the effectiveness of the system.

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<sup>19</sup> John W. Brooker, *Improving Uniform Code of Military Justice Reform*, 222 MIL. L. REV. 1, 97 (2014) (recommending four-step process that the military itself should use in identifying and considering proposed reforms to military justice); Schlueter, *supra* note 12, at 30 (noting that anyone participating in military justice system has a professional and moral responsibility for policing the system).

<sup>20</sup> See Kevin J. Barry, *Modernizing the Manual for Courts-Martial Rule-Making Process: A Work in Progress*, 165 MIL. L. REV. 237, 264 (2000) (offering suggestions for modernizing the procedures for amending the *Manual for Courts-Martial (MCM)*); Kevin J. Barry, *A Reply to Captain Gregory E. Maggs’s ‘Cautious Skepticism’ Regarding Recommendations to Modernize the Manual for Courts-Martial Rule-Making Process*, 166 MIL. L. REV. 37, 61–64 (2000) (recommending changes to the how the rules are promulgated and addressing criticism to those recommendations); Gregory E. Maggs, *Cautious Skepticism About the Benefit of Adding More Formalities to the Manual for Courts-Martial Rule-Making Process: A Response to Captain Kevin J. Barry*, 166 MIL. L. REV. 1, 11–16 (2000) (criticizing proposed reforms to the MCM rule-making process).

<sup>21</sup> See generally James P. Young, *Court-Martial Procedure: A Proposal*, 41 REPORTER 20, 20–24 (2014), available at <http://www.afjag.af.mil/shared/media/document/AFD-141126-035.pdf#page=23> (suggesting numerous changes to the UCMJ); Christensen, *supra* note 3 (former Air Force chief prosecutor proposing prosecutorial discretion be taken out of the hands of commanders).

Part IV addresses the proposed reforms that would restrict court-martial jurisdiction overall or for certain offenses committed by American service members. Some commentators have suggested the court-martial jurisdiction should be limited to military offenses or offenses that are service-connected. Part V focuses on adopted changes that have reduced a commander's authority to grant post-trial clemency to an accused, or limit the information that a commander may consider in deciding whether to approve court-martial findings and the sentence.

Finally, Part VI offers concluding thoughts and a framework for considering the proposed reforms to the military justice system.

## II. AN OVERVIEW OF HOW AMERICAN MILITARY JUSTICE WORKS

Before addressing the proposed reforms for the military justice system, it is important to discuss briefly how the current system works, and the various participants within the system.

### A. In General

The statutory framework for military justice is the Uniform Code of Military Justice.<sup>22</sup> Article 36 states that the President may promulgate procedures for conducting courts-martial.<sup>23</sup> Those procedures are spelled out in the Manual for Courts-Martial<sup>24</sup> and in the Rules for Courts-Martial (RCM).<sup>25</sup> The Department of Defense, the service secretaries, and commanders may promulgate regulations to provide additional guidance.<sup>26</sup> Courts-martial, which are temporary tribunals,<sup>27</sup> are convened to decide the guilt or innocence of persons accused of committing offenses while subject to the jurisdiction of the Armed Forces.<sup>28</sup> Some argue that they are designed to enforce discipline<sup>29</sup> while others claim it's to ensure justice is done.<sup>30</sup>

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<sup>22</sup> 10 U.S.C. §§ 801–946 (2012) [hereinafter UCMJ].

<sup>23</sup> UCMJ art. 36 (2012).

<sup>24</sup> MANUAL FOR COURTS-MARTIAL, United States [hereinafter MCM].

<sup>25</sup> MCM, Part II, Rules for Courts-Martial [hereinafter R.C.M.].

<sup>26</sup> See generally UCMJ art. 36.

<sup>27</sup> *McLaughry v. Deming*, 186 U.S. 49, 63 (1902).

<sup>28</sup> See R.C.M. 504.

<sup>29</sup> David A. Schlueter, *The Military Justice Conundrum: Justice or Discipline?*, 215 MIL. L. REV. 1, 77 (2013).

<sup>30</sup> See DAVID A. SCHLUETER, *MILITARY CRIMINAL JUSTICE: PRACTICE AND PROCEDURE*, § 1-1 (8th ed. 2012) (addressing the dichotomy between justice and discipline within the military's legal system).

A commander convenes a court-martial to hear a specific case.<sup>31</sup> Although courts-martial are not part of the federal judiciary, the Supreme Court of the United States may ultimately review a military conviction.<sup>32</sup>

## B. Pretrial Procedures

Commanders are responsible for conducting a thorough and impartial inquiry into alleged offenses<sup>33</sup> and in doing so, they regularly obtain legal advice from a judge advocate.<sup>34</sup> During that pretrial investigation, an accused is entitled to the protections of the privilege against self-incrimination as guaranteed by the Fifth Amendment and Article 31 of the UCMJ,<sup>35</sup> Fourth Amendment protections regarding searches and seizures,<sup>36</sup> and the Sixth Amendment right to counsel.<sup>37</sup>

The Uniform Code of Military Justice<sup>38</sup> includes punitive articles which proscribe both strictly military offenses,<sup>39</sup> such as disobedience of an order<sup>40</sup> and

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<sup>31</sup> See UCMJ arts. 22–24 (designating those with power to convene general, special, and summary courts-martial); R.C.M. 504 (setting out procedure for convening court-martial). The UCMJ provides that the President of the United States and a service Secretary may convene a general court-martial. UCMJ art. 24(a).

<sup>32</sup> UCMJ art. 67a (establishing that decisions by the Court of Appeals for the Armed Forces are subject to review by the United States Supreme Court; 28 U.S.C. § 1259 (2012) (establishing that the appeals from the Court of Appeals for the Armed Forces may be reviewed by the Supreme Court by writ of certiorari). See generally Andrew S. Effron, *Supreme Court of Review of Decisions by the Court of Military Appeals: The Legislative Background*, ARMY LAW., Jan. 1985, at 59 (reviewing the Military Justice Act, which placed the Court of Military Appeals directly under the U.S. Supreme Court’s review).

<sup>33</sup> R.C.M. 1205.

<sup>34</sup> See UCMJ art. 37 (listing the requirement that before convening a general court-martial the convening authority must consider the advice of the staff judge advocate). This is sometimes referred to as the “pretrial advice.” SCHLUETER, *supra* note 30, at § 7-3(A).

<sup>35</sup> UCMJ art. 31; Mil. R. Evid. 301–05.

<sup>36</sup> Mil. R. Evid. 311–21.

<sup>37</sup> These constitutional protections are implemented by case law and by the Military Rules of Evidence (MRE), which are located in Part III of the MCM. See, e.g., Mil. R. Evid. 301 (noting the privilege against self-incrimination); Mil. R. Evid. 304 (detailing procedures for determining admissibility of accused’s statements); Mil. R. Evid. 305 (providing for Article 31(b), UCMJ warnings and right to counsel warnings); Mil. R. Evid. 311–16 (enumerating the rules addressing requirements for searches and seizures); Mil. R. Evid. 321 (defining admissibility of eyewitness identifications). See generally 1 STEPHEN A. SALTZBURG, LEE D. SCHINASI & DAVID A. SCHLUETER, MILITARY RULES OF EVIDENCE MANUAL, §§ 301.01, et seq. (7th ed. 2011).

<sup>38</sup> UCMJ arts. 1-146.

<sup>39</sup> See generally DAVID A. SCHLUETER, CHARLES H. ROSE, VICTOR HANSEN, & CHRISTOPHER BEHAN, MILITARY CRIMES AND DEFENSES, § 3.2 (2d ed. 2012) (discussing punitive articles in UCMJ).

<sup>40</sup> UCMJ art. 90.

desertion,<sup>41</sup> as well as common law offenses, such as larceny<sup>42</sup> and murder.<sup>43</sup> If it appears that a service member has violated a punitive article, the commander has broad discretion to decide how to dispose of an accused's misconduct. The commander may simply counsel the service member or issue a reprimand,<sup>44</sup> begin proceedings to administratively discharge the service member,<sup>45</sup> or impose nonjudicial punishment.<sup>46</sup> Under this third option, the commander decides whether the service member is guilty and, if so, adjudges the punishment.<sup>47</sup> Finally, the commander may formally prefer court-martial charges against the service member.<sup>48</sup>

If a commander prefers court-martial charges, those charges are forwarded up the chain of command for recommendations and actions. If the commander believes that the charges are serious enough to justify a general court-martial—which are equivalent to a civilian felony trial—the commander orders an Article 32 hearing.<sup>49</sup> At that hearing, which approximates a preliminary hearing in civilian criminal justice trials, the service member is entitled to be present, to have the assistance of defense counsel, to cross-examine witnesses, and to have witnesses produced.<sup>50</sup>

If the decision is made to refer charges to a court-martial, the convening authority—a commander authorized by the UCMJ to “convene” a court-martial—selects the court members.<sup>51</sup> The convening authority does not select the counsel or the military judge.<sup>52</sup> Specific provisions in the UCMJ prohibit a convening authority from unlawfully influencing the participants in the court-martial or the outcome of the case.<sup>53</sup> In many cases, the accused and the convening authority engage in plea

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<sup>41</sup> UCMJ art. 85.

<sup>42</sup> UCMJ art. 121.

<sup>43</sup> UCMJ art. 118.

<sup>44</sup> See SCHLUETER, *supra* note 30, § 1-8 (listing various options available to the military commander).

<sup>45</sup> See *id.* § 1-8(B) (discussing nonpunitive measures such as administrative discharge).

<sup>46</sup> UCMJ art. 15. Unless the service member is assigned to a vessel, the service member may demand a court-martial in lieu of the nonjudicial punishment. *Id.* The term “vessel” is defined in 1 U.S.C. § 3 (2012). “The word “vessel” includes every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water.” 1 U.S.C. § 3 (2012).

<sup>47</sup> See R.C.M. 306(c)(2).

<sup>48</sup> Although technically, any person subject to the UCMJ may prefer charges against another; the preferral is almost always done by the service member's immediate commander.

<sup>49</sup> UCMJ art. 32.

<sup>50</sup> UCMJ art. 32.

<sup>51</sup> UCMJ arts. 23–24 (authority to convene general courts-martial, special courts-martial, and summary courts-martial).

<sup>52</sup> SCHLUETER, *supra* note 30, § 8-3(D) (establishing the process for selecting individuals to sit as court members).

<sup>53</sup> See UCMJ art. 37. Unlawful command influence has been the subject of considerable commentary and case law. See generally Martha Huntley Bower, *Unlawful Command Influence: Preserving the Delicate Balance*, 28 A.F. L. REV. 65 (1988) (discussing unlawful command

bargaining and execute a pretrial agreement.<sup>54</sup> Typically, those agreements require the accused to plead guilty in exchange for a capped maximum sentence.<sup>55</sup>

### C. Trial Procedures

At trial, the accused is entitled to virtually the same procedural protections he would have in a state or federal criminal court.<sup>56</sup> For example, a military accused has the right to file pretrial motions in limine, motions to suppress, and motions to dismiss the charges on a wide range of grounds;<sup>57</sup> the right to extensive discovery, equal to that of the prosecution;<sup>58</sup> the right to a speedy trial, as provided in the UCMJ and the Manual for Courts-Martial;<sup>59</sup> the right to confront witnesses;<sup>60</sup> the right to decide whether to be tried by a judge alone or by members;<sup>61</sup> and the right to challenge the presiding military judge for cause.<sup>62</sup>

If an accused enters a guilty plea, the military judge must conduct a thorough “providency” inquiry to insure that the accused is pleading guilty voluntarily and

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influence); Anthony P. DeGiulio, *Command Control: Lawful Versus Unlawful Application*, 10 SAN DIEGO L. REV. 72 (1972) (examining the disciplinary policies established by command directives, the rule which blocks the accused from serving as the convening authority, and command control over counsel and military judges); Larry A. Gaydos & Michael Warren, *What Commanders Need to Know About Unlawful Command Control*, ARMY LAW., Oct. 1986, at 9 (presenting a methodology to inform commanders about problems of lawful and unlawful command influence); James D. Harty, *Unlawful Command Influence and Modern Military Justice*, 36 NAVAL L. REV. 231 (1986) (discussing the corrective measures that must be taken when commanders exercise unlawful command influence); Joseph Hely, *Command Influence on Military Justice*, 15 ST. LOUIS U. L.J. 300 (1970) (discussing the inherent tendency to abuse command influence); Lieutenant Richard C. Johnson, *Unlawful Command Influence: A Question of Balance*, THE JUDGE ADVOCATE GEN. (NAVY) J. 87, 88 (Mar.–Apr. 1965) (discussing problem of command control in system); Luther C. West, *A History of Command Influence on the Military Judicial System*, 18 U.C.L.A. L. REV. 1 (1970) (addressing improper command influence).

<sup>54</sup> See generally SCHLUETER, *supra* note 30, ch. 9.

<sup>55</sup> *Id.*

<sup>56</sup> See UCMJ art. 36(a) (requiring that the rules of procedure for military courts parallel the procedures used in federal courts).

<sup>57</sup> R.C.M. 905. See generally SCHLUETER, *supra* note 30, ch. 13 (discussing motions practice).

<sup>58</sup> UCMJ art. 46; see R.C.M. 701 (setting out rules for discovery by both prosecution and defense counsel).

<sup>59</sup> UCMJ art. 10; see R.C.M. 707 (speedy trial rule). The 120-day rule does not include delays requested by the defense; thus, a case may take much longer than 120 days if the defense requests delays. R.C.M. 707(c).

<sup>60</sup> U.S. CONST. amend. VI.

<sup>61</sup> UCMJ art. 16.

<sup>62</sup> UCMJ art. 16; R.C.M. 902. For grounds for possible challenges to the military judge see UCMJ art. 26. See also R.C.M. 502, 503, and 902.



knowingly<sup>63</sup> and that it reflects the intent of both the accused and the government.<sup>64</sup> On the other hand, if the accused pleads not guilty, and the case is tried on the merits, the Military Rules of Evidence apply.<sup>65</sup> The accused may be tried either by a panel of members (the court-martial panel) or by a military judge.<sup>66</sup> If the accused is found guilty, sentencing is a separate proceeding which follows immediately.<sup>67</sup> Unlike the federal rules, the Military Rules of Evidence apply during sentencing.<sup>68</sup> The accused is entitled to present witnesses and other evidence for the court's consideration, and to challenge the prosecution's evidence.<sup>69</sup>

#### D. Post-Trial Review and Appellate Review of Courts-Martial

Post-trial review of a court-martial conviction at the command level are extremely detailed.<sup>70</sup> A copy of the record of trial is given to the accused, at no cost,<sup>71</sup> and depending on the level of punishment imposed on an accused, a judge advocate prepares a formal legal review of the proceedings.<sup>72</sup> That review, along with any clemency matters prepared by the accused,<sup>73</sup> are presented to the convening authority for his or her consideration.<sup>74</sup> The convening authority's powers in this area are typically very broad; he or she has the discretion to approve or disapprove any findings of guilt and either approve, suspend, or reduce the severity of the sentence.<sup>75</sup>

Depending on the level of court-martial and the punishment imposed, appellate review is automatic in one of the service courts of criminal appeals.<sup>76</sup> Before those courts an accused is represented by appellate counsel<sup>77</sup> and members

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<sup>63</sup> R.C.M. 910; *see* United States v. Care, 40 C.M.R. 247 (C.M.A. 1969) (setting out requirements for what has become known as the *Care* inquiry).

<sup>64</sup> *See generally* United States v. King, 3 M.J. 458 (C.M.A. 1977); United States v. Green, 1 M.J. 453 (C.M.A. 1976).

<sup>65</sup> Those rules generally mirror the Federal Rules of Evidence but include a number of rules not found in the federal rules. Section III of the MREs includes very specific guidance on searches and seizures and inspections, eyewitness identification, and confessions. *See generally* SALTZBURG, et al., *supra* note 37, at Section V (explaining privileges under the MREs); *cf.* MIL. R. EVID. 501–513 (containing detailed rules governing privileges).

<sup>66</sup> R.C.M. 903.

<sup>67</sup> *See generally* SCHLUETER, *supra* note 30, ch. 16 (discussing sentencing procedures).

<sup>68</sup> R.C.M. 1001; MIL. R. EVID. 1101.

<sup>69</sup> *Id.* R.C.M. 1001(c).

<sup>70</sup> *See* SCHLUETER, *supra* note 30, ch. 17 (detailing the post-trial review process).

<sup>71</sup> UCMJ art. 54(c); R.C.M. 1104.

<sup>72</sup> UCMJ art. 60(d); R.C.M. 1106.

<sup>73</sup> *Id.* R.C.M. 1105.

<sup>74</sup> R.C.M. 1106.

<sup>75</sup> UCMJ art. 60; R.C.M. 1107.

<sup>76</sup> UCMJ art. 66.

<sup>77</sup> UCMJ art. 70.

of those courts are typically high-ranking military officers.<sup>78</sup> Those courts possess fact-finding powers<sup>79</sup> and have the authority to reassess a court-martial sentence.<sup>80</sup> An accused may petition for further review by the United States Court of Appeals for the Armed Forces, which is composed of five civilian judges and sits in Washington, D.C.<sup>81</sup> Finally, in certain cases, a service member may seek certiorari review by the Supreme Court.<sup>82</sup>

## E. Summary

For purposes of this article, it is important to note several key points from the foregoing discussion: First, the military justice systems procedures closely parallel many of the procedures used in civilian criminal justice systems. Second, a military accused is entitled to most, if not all, of the constitutional protections that are available to someone being tried in a civilian criminal court. Third, commanders are an integral part of the military justice system. Finally, lawyers and judges are heavily involved at all levels of the military criminal justice system.

### III. A SIREN SONG SUNG: ELIMINATE OR REDUCE THE COMMANDER'S PROSECUTORIAL DISCRETION

#### A. In General

Given the predominate role of commanders in the American military justice system, it is not surprising that those seeking to reform the system would focus their calls for change on the commander's role—starting with exercising discretion to even charge a service member with a crime all the way through post-trial review of a service member's court-martial conviction. As noted, *supra*, commentators, legislators, and the Department of Defense have struggled with balancing the competing roles of justice and discipline vis-à-vis the commander's roles.<sup>83</sup> The most recent and significant wave of proposals affecting the commander's role was triggered in 2013 by a growing number of revelations that sexual assaults in the military were being largely ignored and unprosecuted.<sup>84</sup> In response to that seemingly intractable problem and the military's slow response, several task forces were formed to consider reforms to the military justice system. If the past is prologue, there should be

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<sup>78</sup> UCMJ art. 66.

<sup>79</sup> R.C.M. 1203(b).

<sup>80</sup> R.C.M. 1203(b).

<sup>81</sup> UCMJ art. 67.

<sup>82</sup> UCMJ art. 67a; 28 U.S.C. § 1259; *see also* Effron, *supra* note 32, at 59 (overviewing the developments that led to the Military Justice Act).

<sup>83</sup> Schlueter, *supra* note 29, at 77 (concluding that primary purpose of military justice system is to enforce good order and discipline).

<sup>84</sup> Luis Martinez, *Number of Military Sexual Cases Higher This Year*, ABC News (Nov. 7, 2013, 5:28 PM), <http://abcnews.go.com/blogs/politics/2013/11/number-of-military-sexual-assault-cases-higher-this-year> (reporting the rise of military sexual assaults in 2013).

doubt, however, that the move to limit a commander's powers will continue to be challenged. It will be the same siren song, but a different verse.

This section first focuses on proposed changes to the UCMJ which would greatly reduce or limit the commander's role in preferring charges or convening a court-martial, and then turns to arguments as to why those changes should be rejected, in whole or in part. Although at first blush the proposed changes would seem to make the military justice fairer, they in effect would potentially undermine the system and have an adverse effect on good order and discipline.

## B. The Proposals

Proposals to limit or remove the commander's powers to prefer court-martial charges or convene a court-martial generally fall into three categories. First, there have been proposals to eliminate the commander's prosecutorial powers and place them in the hands of military lawyers, alone.<sup>85</sup> One of the arguments supporting that approach is that lawyers, not commanders, are in the best position to assess whether a particular charged offense warrants a court-martial.<sup>86</sup>

A second category of proposals recommends that the decision to charge an accused with a crime be made by a commander outside the accused's chain of command, but within the military command structure.<sup>87</sup> These recent proposals,

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<sup>85</sup> See, e.g., Murphy, *supra* note 13, at 175 (proposing that military lawyers obtain prosecutorial discretion over disposition of offenses); Letter from Heidi Boghosian, Exec. Dir., National Lawyers Guild to Mr. Paul S. Koffsky, Deputy Gen. Counsel, Dep't of Defense (June 30, 2014), *available at* <http://www.nlg.org/news/releases/national-lawyers-guild-submits-comments-improving-military-justice-system-department> (recommending that prosecutorial discretion be placed in the hands of independent prosecutors)

<sup>86</sup> See, e.g., Murphy, *supra* note 13, at 175–76 (listing reasons for military attorneys to exert prosecutorial discretion instead of commanders).

<sup>87</sup> In 2013, Senator Gillibrand sponsored the Military Justice Improvement Act (MJIA) which proposed that commanders would no longer have jurisdiction over specified offenses and the commander's power to grant post-trial clemency would be limited. S. 967, 113th Cong. (2013). In summary, her bill would have required that for offenses where the maximum punishment included confinement for more than one year (in effect a felony grade offense), that the decision to file court-martial charges would be made by someone in the rank of at least O-6, with significant experience in trying such cases, and outside the chain of command. *Id.* Second, the bill would have required that only commanders outside the chain of command of the accused could actually convene general and special courts-martial; that responsibility would be handled by offices established by the chiefs of staff of each service. *Id.* The bill also proposed that a commander would no longer be permitted to consider a service member's character in deciding how to dispose of a case. *Id.* Although Senator Gillibrand's bill had bipartisan support, it eventually failed in the Senate by a close vote. Laura Basset, *Senators Shoot Down Gillibrand's Military Sexual Assault Reform Bill*, THE HUFFINGTON POST (Dec. 11, 2013, 2:10 PM), [http://www.huffingtonpost.com/2014/12/11/gillibrands-military-sexual-assault\\_n\\_6309108.html](http://www.huffingtonpost.com/2014/12/11/gillibrands-military-sexual-assault_n_6309108.html); see also Eugene R. Fidell, *What Is to Be Done? Herewith a Proposed Ansell-Hodson Military Justice Reform Act of 2014* (May 13, 2014) <http://globalmjreform.blogspot.com/2014/05/what-is-to-be-done-herewith-proposed.html> (proposing "Ansell-Hodson Military Justice Reform Act of 2014").

which are not entirely new,<sup>88</sup> are grounded in the view that a commander may be biased in favor of an accused and decide, for inappropriate reasons, not to charge that accused.<sup>89</sup> But the opposite is true as well. Critics of the system can argue that commanders may be biased against a service member and treat that service member unfairly—a criticism which in part led to the very adoption of the Uniform Code of Military Justice.<sup>90</sup> Still another related criticism is that the commander may treat similarly situated service members differently.<sup>91</sup>

A third category of proposals recommends that the prosecution of military offenses be handled by civilian prosecutors, in much the same way in which military justice cases are handled in other countries.<sup>92</sup> The principle argument is that that approach is consistent with emerging international norms and that if that approach works well in other countries, it should certainly work well in the United States.<sup>93</sup>

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<sup>88</sup> Use of a central command to prosecute military cases was proposed in legislation in the 1970s. See Sherman (1973), *supra* note 6, at 1400 n.10 (noting proposed legislative reforms which would have transferred a commander's authority over courts-martial to an independent military judiciary command under the control of the Judge Advocate General).

<sup>89</sup> See Lindsay Hoyle, *Command Responsibility—A Legal Obligation to Deter Sexual Violence in the Military*, 37 BOSTON COLLEGE INTERNATIONAL & COMP. L. REV. 353, 360 (2014) (noting that unit commanders are often biased in favor of an accused with whom they have a working relationship).

<sup>90</sup> Schlueter, *supra* note 3, at 158 (noting the perceived injustice toward service members in World War II); Frederick Bernays Weiner, *The Seamy Side of the World War I Court-Martial Controversy*, 123 MIL. L. REV. 109, 112 (1989) (noting that prosecution of enlisted service members, in part, prompted the “Crowder-Ansell” dispute concerning court-martial practices during World War I and its underlying currents).

<sup>91</sup> James W. Smith, *A Few Good Scapegoats: The Abu Ghraib Courts-Martial and the Failure of the Military Justice System*, 27 WHITTIER L. REV. 671, 693 (2006) (using the term “different spansks for different ranks” and arguing that military justice system failed by treating officers and enlisted members differently in Abu-Ghraib courts-martial).

<sup>92</sup> See generally Eugene R. Fidell, *A World-Wide Perspective on Change in Military Justice*, 48 A.F. L. REV. 195, 197 (2000) (noting that in country after country changes are being made to how military cases are prosecuted, and by whom and that the American military justice system “pays precious little attention to developments in other countries’ systems”); Sherman (1973), *supra* note 6, at 1400 (noting that in considering potential changes to the military justice system, other countries’ approaches are “especially relevant”).

<sup>93</sup> See Editorial, *No Hope for Justice*, N.Y. DAILY NEWS (Mar. 17, 2014, 4:00 AM), <http://www.nydailynews.com/opinion/no-hope-justice-article-1.1722347> [hereinafter N.Y. DAILY NEWS] (discussing the reasoning of supporters such as New York Senator Gillibrand for removing sexual assault crimes in the US military justice system “from the chain of command to independent prosecutors,” in the same manner as Canada, Israel and Germany have done); *Remove Prosecution of Sexual Assault from Military Chain of Command*, NAT’L ORG. FOR WOMEN, [http://action.now.org/p/dia/action/public/?action\\_KEY=8152](http://action.now.org/p/dia/action/public/?action_KEY=8152) (last visited Feb. 12, 2015) [hereinafter NAT’L ORG. FOR WOMEN] (discussing the need to remove sexual assault crimes from the chain of command in the US military justice system and adopt a separate system like Britain, Canada, and Israel); Op-Ed., *Gillibrand Should Keep up the Pressure to End Sexual Assaults in The Military*, BUFFALO NEWS (Mar. 12, 2014, 11:17 PM), <http://www.buffalonews.com/opinion/buffalo-news-editorials/gillibrand-should-keep-up-the-pressure-to-end-sexual-assaults-in-the-military-20140312> [hereinafter BUFFALO NEWS] (emphasizing that the removal of sexual assaults from the chain of command has already occurred in Britain, Canada, and Israel, and should occur in the United States).

## C. Responses to the Proposals to Remove or Limit the Commander's Prosecutorial Powers

### 1. In General: A System of Discipline or Justice?

In considering any proposed reforms regarding the role of commanders, it is critical that Congress recall that the primary function and purpose of the military justice system is to enforce good order and discipline in the armed forces.<sup>94</sup>

Those who view military justice as primarily a system of justice tend to see the role of the commander as a hindrance to justice and a relic of the past. Those who view the system as primarily a system for maintaining good order and discipline, see the commander's role as indispensable. Most of the governing rules and regulations in the military justice system attempt to balance those competing views. Despite the views of some commentators that the military justice system is primarily a system of justice,<sup>95</sup> the system's function and purpose have not changed since the original Articles of War were adopted in the 1700s. It was, and remains, a system designed to enforce discipline and good order.<sup>96</sup>

### 2. The Need for Commanders in the Military Justice System

The military courts have recognized that the commander is vested with broad discretion to decide how to best deal with discipline problems in his or her command and whether to prefer court-martial charges.<sup>97</sup> The commander's options range from a written letter of reprimand in the service member's file, nonjudicial punishment, an administrative discharge to court-martial charges.<sup>98</sup> Those decisions are made after consulting with the Staff Judge Advocate or a military prosecutor, who are members of the command.<sup>99</sup> The Staff Judge Advocate is expected to provide sound legal advice based on the nature and extent of the alleged criminal activity, the availability and admissibility of evidence against the accused, the needs of the command, the time necessary to investigate and prosecute the case, and the likely outcome of a trial on the merits.<sup>100</sup> Those are the types of decisions that local district attorneys and United States Attorneys make on a daily basis.

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<sup>94</sup> See Schlueter, *supra* note 29, at 77 (concluding that primary purpose of military justice is to enforce good order and discipline).

<sup>95</sup> *Id.* at 24 (citing commentators who view military justice as primarily a system of justice).

<sup>96</sup> *Id.* at 77 (concluding that primary purpose of military justice system is, in fact, to enforce good order and discipline).

<sup>97</sup> See, e.g., *United States v. Hagen*, 25 M.J. 78, 84 (C.M.A. 1987) (holding that courts hesitate to review commander's decision regarding prosecution; there is strong presumption that convening authorities perform their duties without bias).

<sup>98</sup> SCHLUETER, *supra* note 30, § 1-8 (discussing options available to the commander for dealing with a service member's misconduct).

<sup>99</sup> UCMJ art. 34; SCHLUETER, *supra* note 30, at § 7-3.

<sup>100</sup> *Id.*

However, in the military the decision is the commander's to make, not the lawyer's.<sup>101</sup> That is because it is the commander, not the lawyer, who is responsible for the good order, discipline, and morale within the command.<sup>102</sup> American military commanders are well trained and highly educated. Those who fail to perform are usually removed from command or denied valued promotions.<sup>103</sup> Furthermore, the lawyers who advise them are also well trained and highly educated. And there are consequences if they fail to fulfill their obligations.<sup>104</sup>

### 3. It is Critical that Commanders Have Trust and Confidence in Their Legal Advisors

Under the current system, staff judge advocates serve as legal advisors for the commanders of major and subordinate commands.<sup>105</sup> It is critical that commanders trust and confide in those legal advisors on matters involving military justice, which in turn impact morale, and good order and discipline. That trust and confidence inures to the overall benefit of the command when the command is deployed and commanders must count on their legal advisors in matters far beyond military justice, such as operational law, international agreements, and important military and civilian personnel matters.<sup>106</sup>

Some proposals would remove the service member's commander, and even the commander's staff judge advocate, from making decisions on whether to prefer court-martial charges. Any changes to the system that would separate the commander's staff legal advisor from the important decision-making process of dealing with serious offenses—would undermine that critical relationship, not only

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<sup>101</sup> R.C.M. 407.

<sup>102</sup> John S. Cooke, *Introduction: Fiftieth Anniversary of the Uniform Code of Military Justice Symposium Edition*, 165 MIL. L. REV. 1, 8 (2000) (arguing that commanders are integral figures in military justice); Michael L. Smidt, *Yamashita, Medina, and Beyond: Command Responsibility in Contemporary Military Operations*, 164 MIL. L. REV. 155, 159 (2000) (commander is responsible for, inter alia, discipline of his or her personnel).

<sup>103</sup> See Bower, *supra* note 53, at 67 n.10 (1988) (noting that “administrative sanctions have been employed, including forced resignations.”). *But See* Melissa Epstein Mills, *Brass-Collar Crime: A Corporate Model for Command Responsibility*, 47 WILLAMETTE L. REV. 25 (2010) (“[I]n modern military times, the United States has never subjected one of its own commanders to criminal prosecution on a true command responsibility theory”).

<sup>104</sup> See, e.g., Lisa Burgess, *Top Air Force Lawyer Relieved of Command*, STARS & STRIPES (Dec. 9, 2006), available at <http://www.stripes.com/news/top-air-force-lawyer-relieved-of-command-1.57765> (high ranking JAG relieved of command for failing to notify authorities of disciplinary actions taken by State where he was licensed to practice).

<sup>105</sup> See SCHLUETER, *supra* note 30, § 7-3(A) (outlining the procedural requisite of the Staff Judge Advocate's pretrial advice).

<sup>106</sup> See generally Franklin D. Rosenblatt, *Non-Deployable: The Court-Martial System in Combat from 2001 to 2009*, 44 CREIGHTON L. REV. 1045 (2011) (discussing courts-martial practices in Afghanistan and Iraq from 2001 to 2009); William Westmoreland & George Prugh, *Judges in Command: The Judicialized Uniform Code of Military Justice in Combat*, 3 HARV. J.L. & PUB. POL'Y 1 (1980) (presenting views based upon their experiences in the combat environment).

in regards to military justice matters, but also the broader legal issues commanders face at home and when deployed.

#### 4. Commanders Should Retain Prosecutorial Discretion

##### (a) *Comparison to Civilian Prosecutorial Decisions*

Although in many respects the American military mirrors civilian criminal justice systems, the military justice system is unique, and the role of the commander in that system is unique. As one commentator has written:

The United States military justice system is integral to the military's mission. It is unique, and for good reason. Unlike the civilian justice system, which exists solely to enforce the laws of the jurisdiction and punish wrongdoers, our military justice system exists in order to help the military to succeed in its mission: to defend the nation. It is structured so that those in charge, commanding officers, can carry out the orders of their civilian leaders. Ultimately, it is structured to fight and win wars.<sup>107</sup>

Thus, shifting prosecutorial discretion to either a different command structure, or to military lawyers, would clearly undermine the commander's broad prosecutorial discretion. The proposed changes in the Military Justice Improvement Act<sup>108</sup> would have transferred the local commander's decision to some unspecified command structure, outside the commander's chain of command, and require the recommendations of a senior armed forces lawyer, who would be disconnected in time and space from the command. That amendment would have been tantamount to informing a district attorney that the decision to prosecute or not prosecute serious cases would be made in the state capital, or in Washington, D. C.—and that the decision would be binding on local authorities. Not only would that system undermine the effectiveness of the district attorney's offices, it would undermine the populace's confidence in the ability of local authorities to take care of local crime. So too with commanders. Once the members of a command discover that the decision regarding court-martial charges is being made by a person with no connection to the command, the members of the command will view the commander as powerless to deal with serious offenses in a quick and efficient manner.

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<sup>107</sup> Charles "Cully" Stimson, *Sexual Assault in the Military: Understanding the Problem and How to Fix It*, HERITAGE (NOV. 6, 2013), <http://www.heritage.org/research/reports/2013/11/sexual-assault-in-the-military-understanding-the-problem-and-how-to-fix-it>.

<sup>108</sup> S.967, 113th Congress (2013).

(b) *An Academic or Ivory Tower Decision*

Proposals to shift the decision to prosecute or not prosecute a case to a centralized command structure would mean that a high-ranking lawyer outside the command would be routinely making decisions concerning court-martial charges. Some may view that exercise as primarily “academic,” which is disconnected from the real-world problems of the local command. Worse, others may view this as an “ivory tower” decision.<sup>109</sup>

The decision to prosecute almost always involves an armed forces prosecutor personally interviewing potential witnesses, reviewing the law enforcement reports, speaking personally to the commanders in the chain of command, and providing an informed “on the ground” assessment of the strengths and weaknesses of the case against an accused. In deciding whether to prosecute an accused, the prosecutor must make an informed assessment of whether the available evidence supports the charges against an accused.<sup>110</sup>

If prosecutorial discretion were removed to a high-ranking office at a centralized location, most of those critical elements in the decision-making process would be missing. A review of the memos, e-mails, and electronic evidence cannot adequately substitute for a decision made by the local commander, after a careful assessment and advice by the commander’s legal advisor.

(c) *Undermining the Chain of Command*

Under the current system, it is the unit, or company commander, who usually initiates the charging process by preparing a charge sheet, i.e., “preferring charges.”<sup>111</sup> That decision is made after consulting the military prosecutor assigned to that unit. Each commander in the chain of command is responsible for considering the possible charges and providing another level of assessment before it reaches the desk of the commander, acting as the convening authority on the case.<sup>112</sup> Removing the commander from the process of deciding what charges to bring would disrupt the normal chain of command —and potentially create doubt in the minds of the

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<sup>109</sup> *Ivory Tower Definition*, DICTIONARY.COM, <http://dictionary.reference.com/browse/ivory+tower> (last visited Feb. 15, 2015) (defining an ivory tower as “an attitude of aloofness from or disdain or disregard for worldly or practical affairs”).

<sup>110</sup> Experienced litigators know that a case which looks strong on paper can take on a different light after they personally interview witnesses and go over their pretrial statements, assess their demeanor, and then decide whether they will be strong or weak witnesses. Depending on the location of any central legal center charged with deciding whether to go forward with charges, counsel in that office will miss that opportunity. In short, they will make an ivory-tower and not real-world assessment.

<sup>111</sup> UCMJ art. 30; R.C.M. 304(b)(1).

<sup>112</sup> SCHLUETER, *supra* note 30, at § 6-2 (discussion of process of forwarding charges up through the chain of command).



service members whether the commander had any real authority over them.<sup>113</sup> The officers in an accused's chain of command are in the best position to make decisions that directly affect good order and discipline in that command.

(d) *The Need to Hold the Commander Responsible for the Offenses of Members of the Command*

There is still another reason for not stripping prosecutorial authority from the commander. If commanders no longer have the necessary disciplinary role in bringing charges or otherwise taking action to punish misconduct, it may be difficult to hold them personally responsible for the delicts of the service members under their command. For example, the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia overturned the conviction of General Markač, a commander of a Special Police unit during the Croatian War of Independence in the 1990s.<sup>114</sup> The appellate court noted that although General Markač had some control over his subordinate commanders, his authority to discipline them for their misdeeds was not within his power because any crimes committed by members of his command fell under the jurisdiction of civilian prosecutors.<sup>115</sup>

Thus, the court said, there was a question about whether he could be held liable for crimes committed by his subordinates.<sup>116</sup> Although that court did not decide whether the commander could be held responsible, it is important to note that the court recognized the problem. The same issue could occur under the proposed amendments, where someone outside the chain of command is making a binding

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<sup>113</sup> See generally Victor M. Hansen, *The Impact of Military Justice Reforms on the Law of Armed Conflict: How to Avoid Unintended Consequences*, 21 MICH. ST. INT'L L. REV. 229, 266 (2013) (removing commander's authority to prefer charges would seriously undermine commander's authority within the unit; in future cases the members of the unit might question or doubt the commander's ability to initiate disciplinary proceedings against them).

<sup>114</sup> Prosecutor v. Gotovina & Markač, Case No. IT-06-90-A, Appeal Judgment (Int'l Crim. Trib. for the Former Yugoslavia Nov. 16, 2012).

<sup>115</sup> The Appeals Court observed:

Turning first to superior responsibility, the Appeals Chamber notes that the Trial Chamber did not explicitly find that Markač possessed effective control over the Special Police. The Trial Chamber noted evidence indicative of a superior-subordinate relationship and found that commanders of relevant Special Police units were subordinated to Markač. *However, the Trial Chamber was unclear about the parameters of Markač's power to discipline Special Police members, noting that he could make requests and referrals, but that "crimes committed by members of the Special Police fell under the jurisdiction of State Prosecutors."* (Citations omitted, Emphasis added).

Prosecutor v. Gotovina & Markač, Case No. IT-06-90-A, Appeal Judgment, ¶ 148 (App. Chamber, Int'l Crim. Trib. for the Former Yugoslavia Nov. 16, 2012). See generally Gary D. Solis, *The Gotovina Acquittal: A Sound Appellate Course Correction*, 215 MIL. L. REV. 78 (2013).

<sup>116</sup> *Id.*

decision to prosecute or not prosecute crimes occurring within the commander's command.<sup>117</sup>

Every CEO for a large organization knows that responsibility for the organization must be accompanied by the authority to manage the organization. The same holds true, to an even greater extent, in the military.<sup>118</sup>

## 5. Congress Should Not Adopt Other Countries' Systems as Models for American Military Justice

Proposals to eliminate or reduce the commander's prosecutorial discretion seem to rest on the view that first, military commanders are not to be trusted in exercising prosecutorial discretion<sup>119</sup> and that second, Congress should follow the lead of other countries and adopt procedures used in countries such as Canada and Great Britain.<sup>120</sup> That argument is reminiscent of the debate over whether other countries' laws should serve as a model for American legal systems.<sup>121</sup> In the hearings on those proposals, some commentators have urged Congress to go further and apply this approach to the prosecution of all cases by civilian prosecutors.<sup>122</sup> The

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<sup>117</sup> See Hoyle, *supra* note 89, at 387 (recommending that command responsibility be incorporated into the UCMJ as means of remedying lack of command interest in prosecuting sexual assault cases).

<sup>118</sup> See, e.g., Amy J. Sepinwall, *Failures to Punish: Command Responsibility in Domestic and International Law*, 30 MICH. J. INT'L L. REV. 251, 255 (2009) (noting that commander's failure to punish can be viewed as an expression of support for the act and thus constitute part of the injury).

<sup>119</sup> Bill Briggs, *Critics Underwhelmed with Pentagon Plan to Stem Military Sex Assaults*, U.S. NEWS (Aug. 15, 2013), <http://www.nbcnews.com/news/other/critics-underwhelmed-pentagon-plan-stem-military-sex-assaults-f6C10928841> (“[T]here is a lack of trust in the system that has a chilling effect on reporting.” (quoting Senator Gillibrand)).

<sup>120</sup> See Sherman (1973), *supra* note 6, at 1425 (arguing that the American military justice system should model the British or West German-Swedish military systems); see also N.Y. DAILY NEWS, *supra* note 93, discussing the reasoning of supporters such as New York Senator Gillibrand for removing sexual assault crimes in the US military justice system “from the chain of command to independent prosecutors,” in the same manner as Canada, Israel and Germany have done); NAT'L ORG. FOR WOMEN, *supra* note 93 (discussing the need to remove sexual assault crimes from the chain of command in the US military justice system and adopt a separate system like Britain, Canada, and Israel); BUFFALO NEWS, *supra* note 93 (emphasizing that the removal of sexual assaults from the chain of command has already occurred in Britain, Canada, and Israel, and should occur in the United States).

<sup>121</sup> See generally Stephen Calabresi, “*A Shining City On A Hill*”: *American Exceptionalism And The Supreme Court's Practice Of Relying On Foreign Law*, 86 B.U. L. REV 1335, 1338 (2006) (noting that the debate over whether an American court should apply foreign law is a “tale of two cultures—an elite lawyerly culture that favors things foreign and a popular culture that dislikes them. . .”).

<sup>122</sup> See N.Y. DAILY NEWS, *supra* note 93 (discussing the reasoning of supporters such as New York Senator Gillibrand for removing sexual assault crimes in the US military justice system “from the chain of command to independent prosecutors,” in the same manner as Canada, Israel and Germany have done); NAT'L ORG. FOR WOMEN, *supra* note 93 (discussing the need to remove sexual assault crimes from the chain of command in the US military justice system and adopt a separate system

argument is that the United States' military justice system is an "outlier" and that it is somehow deficient.<sup>123</sup>

It is helpful to understand generally how other countries' military justice systems work, especially in joint military operations with those countries. But Congress should not try to emulate other countries' military justice systems as model for the American military justice system.<sup>124</sup> The United States military is exceptional.<sup>125</sup> And its military justice system is very different than other countries' systems.<sup>126</sup> Before Congress gives any serious consideration to adopting the procedures used in other countries, it should compare those systems in terms of size of the military force, the world-wide and geographical disbursement of military personnel, the purpose of those military justice systems, the history and experience of those systems, and each country's expectations for its commanders in enforcing good order and discipline.

For example, various commentators have written that "[t]he [foremost] distinctive factor that separates the United States military from all other militaries is its ability to 'command the commons.'<sup>127</sup> "America is the only country that can project military might globally."<sup>128</sup> "The military justice system... goes wherever the troops go—to provide uniform treatment regardless of locale or circumstances."<sup>129</sup> Given the global nature of America's armed forces, commanders must have the ability to "expeditiously deal with misconduct to prevent degradation of the unit's effectiveness and cohesion."<sup>130</sup>

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like Britain, Canada, and Israel); BUFFALO NEWS, *supra* note 93 (emphasizing that the removal of sexual assaults from the chain of command has already occurred in Britain, Canada, and Israel, and should occur in the United States).

<sup>123</sup> See N.Y. DAILY NEWS, *supra* note 93 (discussing the reasoning of supporters such as New York Senator Gillibrand for removing sexual assault crimes in the US military justice system "from the chain of command to independent prosecutors," in the same manner as Canada, Israel and Germany have done); NAT'L ORG. FOR WOMEN, *supra* note 93 (discussing the need to remove sexual assault crimes from the chain of command in the US military justice system and adopt a separate system like Britain, Canada, and Israel); BUFFALO NEWS, *supra* note 93 (emphasizing that the removal of sexual assaults from the chain of command has already occurred in Britain, Canada, and Israel, and should occur in the United States).

<sup>124</sup> See *Lawrence v. Texas*, 539 U.S. 558, 598 (2003) (Scalia, J. dissenting) (warning of the dangers of imposing "foreign moods, fads, or fashions on Americans.").

<sup>125</sup> See Calabresi, *supra* note 121, at 1392 (describing United States' military power as exceptional).

<sup>126</sup> See Theodore Essex & Leslea Tate Pickle, *A Reply to the Report of the Commission of the 50th Anniversary of the Uniform Code of Military Justice*, 52 A.F. L. REV. 233, 258 (2002) (describing how other countries' militaries and military justice systems are "radically different from the United States").

<sup>127</sup> CRAIG CARUANA, *AMERICAN POWER: STILL THE BEST HOPE FOR PEACE* 77 (2012).

<sup>128</sup> Calabresi, *supra* note 121, at 1392 (quoting JOHN MICKLETHWAIT & ADRIAN WOOLDRIDGE, *THE RIGHT NATION: CONSERVATIVE POWER IN AMERICA* (2004)).

<sup>129</sup> James B. Roan and Cynthia Buxton, *The American Military Justice System in the New Millennium*, 52 A.F. L. REV. 185, 191 (2002).

<sup>130</sup> *Id.*

As noted by the Chairman of the Joint Chiefs of Staff:

“While many countries can afford for the center of the[ir] military justice systems to be located...far from the arenas of international armed conflict, we require a more flexible capability that can travel with the unit as it operates in any part of the world.”<sup>131</sup> Any delay in “disciplinary action will invariably prejudice good order.”<sup>132</sup>

Finally, it is important to note that the American military justice system deals with different types of caseloads. As noted by the Chairman of Joint Chiefs Staff:

“[T]he scope and scale of our allies’ caseloads are vastly different than ours. None of our allies handle the volume of cases that the U.S. military does. This is likely due to the greater size of our military forces in comparison.”<sup>133</sup>

Even assuming that there is some merit in adopting another country’s approach to military justice, the burden should be on the reformers to show that the American model is lacking and that adopting the other country’s model will not adversely impact good order and discipline.

#### IV. A SIREN SONG SUNG: LIMIT COURT-MARTIAL JURISDICTION TO CERTAIN OFFENSES

##### A. The Proposals

A second siren song of reform consists of proposals to limit court-martial jurisdiction. Currently, a court-martial has subject matter jurisdiction over a wide range of offenses including those which are purely military in nature and those

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<sup>131</sup> REPORT OF THE ROLE OF THE COMMANDER SUBCOMM. TO THE RESPONSE SYSTEMS TO ADULT SEXUAL ASSAULT CRIMES PANEL 108 (2014), *available at* [http://responsesystemspanel.whs.mil/Public/docs/Reports/02\\_RoC/ROC\\_Report\\_Final.pdf](http://responsesystemspanel.whs.mil/Public/docs/Reports/02_RoC/ROC_Report_Final.pdf) (last visited Jul. 25, 2015) (quoting Transcript of RSP Public Meeting 209 (Sept. 25, 2013) (testimony of Lieutenant Colonel Kevin C. Harris, U.S. Marine Corps)).

<sup>132</sup> Roan & Buxton, *supra* note 129, at 191. In this same vein the late Judge Robinson O. Everett, former Chief Judge of the Court of Military Appeals, cogently pointed out: “[J]ustice delayed is justice defeated. . . . In military life, where to maintain discipline, the unpleasant consequences of offenses must be quick, certain and vivid—not something vague in the remote future.” Roan & Buxton, *supra* note 129, at 191 (quoting Robinson O. Everett, *Military Justice in the Armed Forces of the United States* (The Telegraph Press 1956)).

<sup>133</sup> REPORT OF THE ROLE OF THE COMMANDER SUBCOMM. TO THE RESPONSE SYSTEMS TO ADULT SEXUAL ASSAULT CRIMES PANEL 108 (2014), *available at* [http://responsesystemspanel.whs.mil/Public/docs/Reports/02\\_RoC/ROC\\_Report\\_Final.pdf](http://responsesystemspanel.whs.mil/Public/docs/Reports/02_RoC/ROC_Report_Final.pdf) (last visited Jul. 25, 2015) (quoting Transcript of RSP Public Meeting 209 (Sept. 25, 2013) (testimony of Lieutenant Colonel Kevin C. Harris, U.S. Marine Corps)).

which are common law offenses.<sup>134</sup> As long as the accused is subject to personal court-martial jurisdiction, he or she may be prosecuted for violating one of the offenses listed in the UCMJ.<sup>135</sup>

One proposed change to the military justice system, which seems perpetual, is that court-martial jurisdiction should be limited to purely military offenses, such as desertion or disobeying a lawful order.<sup>136</sup> Under this approach, the military would be able to prosecute military offenses, but not common law offenses. The latter would be subject to civilian prosecution.

A second proposal is that the now rejected “service-connection” requirement be reinstated so that a court-martial would only have jurisdiction over offenses where there was some nexus between the offense and military interests.<sup>137</sup>

## B. Responses to Proposals to Limit Court-Martial Jurisdiction

Proposals to limit court-martial jurisdiction seem to be grounded on a basic mistrust of the military justice system and a view that limiting jurisdiction to purely military offenses or service-connected offenses will somehow make the system fairer. In reality, these proposals, like a siren song, may have the appearance of fairness, but do not actually grant any substantial due process rights that do not already inure to a service member’s benefit and at the same time undermine the ability of a commander to provide good order and discipline to his or her command.

The following section responds to both proposals—that the court-martial jurisdiction be limited to military offenses or that it be limited to service-connected offenses. Both present similar problems of application.

### 1. For Purposes of Effective Military Justice There is No Distinction Between Common Law Offenses and Military Offenses

For purposes of the military justice system, that distinction between common law offenses and military offenses is meaningless. Service members who commit crimes such as larceny,<sup>138</sup> sexual assault,<sup>139</sup> and murder<sup>140</sup> pose as significant a threat to good order and discipline as do the crimes of desertion,<sup>141</sup> disobedience of an

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<sup>134</sup> UCMJ art. 18; R.C.M. 201.

<sup>135</sup> UCMJ art. 17.

<sup>136</sup> See, e.g., Michael I. Spak, *Military Justice: The Oxymoron of the 1980’s*, 20 CAL. W. L. REV. 436, 450 (1984) (proposing that court-martial jurisdiction be limited to purely military offenses).

<sup>137</sup> See Fidell, *supra* note 87 (proposing “Ansell-Hodson Military Justice Reform Act of 2014”).

<sup>138</sup> UCMJ art. 121 (larceny).

<sup>139</sup> UCMJ art. 120 (sexual assault).

<sup>140</sup> UCMJ art. 118 (murder).

<sup>141</sup> UCMJ art. 85 (desertion).

order,<sup>142</sup> and conduct unbecoming an officer and a gentleman.<sup>143</sup> The casual observer who asks what business the military has in trying service members who have stolen fellow service members' belongings does not understand the real problem posed by such "barracks" thieves."<sup>144</sup> Under the proposed revisions, would a court-martial have jurisdiction over larceny of government property, but not larceny of another's personal possessions? If that distinction were attempted, where would one try a principled and consistent line? The subtext of proposals to limit court-martial jurisdiction to purely military offenses is that American military justice cannot be trusted to try fairly a service member. Thus, the subtext continues, if courts-martial are to continue in existence, their ability to do harm should be limited to those offenses which are uniquely military in nature.

## 2. For Purposes of Effective Military Justice There is No Distinction Between Service-Connected and Non Service-Connected Offenses

In considering any proposals to adopt a service-connection requirement for court-martial jurisdiction, it is critical to note that such a requirement existed between 1969 and 1987. Thus, there is historical evidence of how such a limitation would work on the current military justice system.

In 1969, the Supreme Court held in *O'Callahan v. Parker*,<sup>145</sup> that courts-martial had subject matter jurisdiction over only "service-connected" offenses.<sup>146</sup>

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<sup>142</sup> UCMJ art. 90 (disobedience of orders).

<sup>143</sup> UCMJ art. 133 (conduct unbecoming an officer).

<sup>144</sup> See, e.g., *United States v. Morgan*; 40 C.M.R. 583, 586 (A.B.R. 1969) (holding that trial counsel's reference to accused as a "barracks thief" and that such persons caused problems for the commander, was "merely a statement of common knowledge with the military community"). Most service members, enlisted and officers, understand the real damage to moral and discipline in a unit where an accused has stolen a possession from a fellow service member, a comrade in arms. It undermines trust and confidence in the ranks, qualities that are indispensable for good order and discipline.

<sup>145</sup> 395 U.S. 258 (1969). Sergeant O'Callahan, while on leave and dressed in civilian clothes, attempted to rape a young girl in her Honolulu hotel room. He was court-martialed for that offense and related offenses. Following a decision by the United States Court of Military Appeals affirming his conviction, he sought habeas corpus relief in federal district court. The district court and court of appeals denied relief.

<sup>146</sup> *Id.* at 272. The Court concluded that the offenses in O'Callahan's case were not service-connected:

In the present case petitioner was properly absent from his military base when he committed the crimes with which he is charged. There was no connection-not even the remotest one-between his military duties and the crimes in question. The crimes were not committed on a military post or enclave; nor was the person whom he attacked performing any duties relating to the military. Moreover, Hawaii, the situs of the crime, is not an armed camp under military control, as are some of our far-flung outposts.

*Id.* at 273.

Writing for the Court, Justice Douglas observed that courts-martial were “not yet an independent instrument of justice” and that “courts-martial as institution are singularly inept in dealing with the nice subtleties of constitutional law.”<sup>147</sup> Two years later, the Supreme Court again addressed the question of service connection in *Relford v. Commandant*.<sup>148</sup> A unanimous Court concluded that Relford’s court-martial had subject matter jurisdiction and set out what became popularly characterized as the twelve *Relford* factors for determining service connection.<sup>149</sup> The Court said that those factors were to serve as a template for the lower court’s use in determining, in an *ad hoc* fashion, whether an offense was service connected. A few years later the Court in *Schlesinger v. Councilman*<sup>150</sup> condensed those factors. Stating its confidence in the military criminal system,<sup>151</sup> the Court said that the task of determining service connection is largely a question of:

- (1) Measuring the impact of the offense on military discipline and effectiveness;
- (2) Determining whether the military interest in deterring the offense is distinct from and greater than that of civilian society; and

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<sup>147</sup> *Id.* at 265.

<sup>148</sup> 401 U. S. 355 (1971). Corporal Relford, while at Fort Dix, New Jersey, sexually assaulted two civilian women. *Id.* at 360. The first victim was the sister of another service member who was abducted from her car in the hospital parking lot. *Id.* The second victim was the wife of a service member who worked at the Post Exchange and was assaulted on the post as she drove from her on-post home to the exchange. *Id.*

<sup>149</sup> The twelve factors listed by the Court are:

1. The serviceman’s proper absence from the base.
2. The crime’s commission away from the base.
3. Its commission at a place not under military control.
4. Its commission within our territorial limits and not in an occupied zone of a foreign country.
5. Its commission in peacetime and its being unrelated to authority stemming from the war power.
6. The absence of any connection between the defendant’s military duties and the crime.
7. The victim’s not being engaged in the performance of any duty relating to the military.
8. The presence and availability of a civilian court in which the case can be prosecuted.
9. The absence of any flouting of military authority.
10. The absence of any threat to a military post.
11. The absence of any violation of military property.

One might add still another factor implicit in the others:

12. The offense’s being among those traditionally prosecuted in civilian courts.

*Relford v. Commandant*, U. S. Disciplinary Barracks, Ft. Leavenworth, 401 U.S. 355, 365 (1971). Applying these factors, the Court held that the accused’s offenses were service-connected. *Id.* at 369.

<sup>150</sup> 420 U.S. 738 (1975). Captain Councilman was charged with selling marihuana to another service member. *Id.* at 739.

<sup>151</sup> *Id.* at 758.

(3) Deciding whether that interest can be adequately vindicated in the civilian courts.<sup>152</sup>

In his dissent in *O'Callahan*, Justice Harlan prophetically wrote: “[I]nfinite permutations of possibly relevant factors are bound to create confusion and proliferate litigation over the [court-martial] jurisdiction issue.”<sup>153</sup> In attempting to follow the Supreme Court’s guidance over the next twelve years, the military courts struggled in applying the service connection requirement.<sup>154</sup> In so doing, the courts devised a number of guidelines which often required very fine line-drawing. One such test was to determine the situs of the offense. For example, a drug sale consummated just off post was normally not service connected.<sup>155</sup> But a drug sale begun off post and consummated on post was service connected.<sup>156</sup> The service connection requirement was finally put to rest in *Solorio v. United States*.<sup>157</sup> The Court, by a vote of 5 to 4 concluded that the majority in *O'Callahan* had departed from long-standing precedent which held that Congress holds plenary power over the military and that court-martial jurisdiction should depend on whether the accused was a member of the armed forces when he or she committed the charged offenses.<sup>158</sup>

The proposal to reinstitute the service connection requirement through an amendment to the UCMJ—no matter how carefully crafted—would take the military courts back to a time where considerable resources were spent on sorting out what constituted a service-connected offense.<sup>159</sup>

### 3. The Problem of Mixed Offenses

Making distinctions between military and common law offenses, or creating distinctions between service-connected and non-service connected offenses, creates an issue where an accused has committed multiple offenses—some of which are in the excluded list of offenses (common law offenses) and some which are on the

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<sup>152</sup> *Id.* at 760.

<sup>153</sup> *O'Callahan*, 395 U.S. at 273 (Harlan, J. dissenting).

<sup>154</sup> See SCHLUETER, *supra* note 30 at § 4-11(B) (discussing military courts’ application of *Relford* factors).

<sup>155</sup> For example, in *United States v. Klink*, 5 M.J. 404 (C.M.A. 1978), a drug case prosecuted by this author, the Court of Military Appeals reversed the conviction, holding that there was no service connection where the drug offense occurred 30 feet off-post.

<sup>156</sup> *United States v. Seivers*, 8 M.J. 63 (C.M.A. 1979).

<sup>157</sup> 483 U. S. 435 (1987). *Solorio*, a member of the Coast Guard, was court-martialed for sexually assaulting young female victims.

<sup>158</sup> *Id.* at 451.

<sup>159</sup> In *Solorio* the Supreme Court noted the “confusion created by the complexity of the service connection requirement,” and that “much time and energy has also been expended in litigation over other jurisdictional factors, such as the status of the victim of the crime, and the results are difficult to reconcile.” *Id.* at 449.



included list (military offenses). Or where some offenses are service-connected, and others are not.

It is not uncommon for a service member to be tried for multiple offenses at a single court-martial. For example, consider the case of a male service member who:

- First, sexually assaults (a common law offense) a female service member (probably service connected), and a civilian female off-base (probably non service-connected),<sup>160</sup> at the same party;
- Second, violates a direct order from his commander to have no contact with the victim pending an investigation (a military offense, which would probably be service connected),<sup>161</sup> and
- Third, goes AWOL (a military offense which is probably service connected)<sup>162</sup> to avoid prosecution.

Under current military justice procedures, because commanders are permitted to try a service member of all known offenses at a single trial,<sup>163</sup> the service member would be subject to one court-martial for all four offenses. In this hypothetical, all four of the charged offenses relate to one another and provide context for the fact finders. But if the court-martial has jurisdiction only over the military offenses of disobedience of the no-contact order and the AWOL, the accused would be subjected to two separate trials—one in the military and the other under the civilian justice system—assuming a civilian prosecutor was willing to try the accused on the two sexual assault charges. While that would not technically be a violation of double jeopardy,<sup>164</sup> it subjects the accused to two separate trials and is certainly not any fairer to either the victim or the accused.<sup>165</sup> And there is authority for the

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<sup>160</sup> UCMJ art. 120.

<sup>161</sup> UCMJ art. 90.

<sup>162</sup> UCMJ art. 86.

<sup>163</sup> R.C.M. 307(c)(4) (all known charges may be charged at same time); *see also* R.C.M. 601(e) (2) Discussion (stating that ordinarily all known charges against an accused should be referred to a single court-martial).

<sup>164</sup> *See, e.g.,* United States v. Ragard, 56 M.J. 852, 856 (Army Ct. Crim. App. 2002) (holding no violation of double jeopardy clause: District of Columbia Corporation Counsel processed civilian charges against accused under pretrial diversion program; even assuming accused was punished for civilian charges, civilian and military offenses were distinct).

<sup>165</sup> A service member facing both a court-martial and a civilian trial might have to retain multiple defense counsel. While a civilian counsel can represent an accused at a court-martial, a military defense counsel is not authorized to represent service members in civilian criminal trials. Depending on existing agreements between military and civilian authorities, a service member might be placed in pretrial confinement in a civilian facility, which would not be subject to military regulations concerning the condition of the facility or the treatment of those confined. From the viewpoint of a victim, in the hypothetical the victim might have to testify at both the court-martial and the civilian trial. Her testimony would probably be important for the disobedience of an order

view that if an accused is tried first by a civilian court, a court-martial may not be permitted to hear the case if the charges are related.<sup>166</sup>

#### 4. The Problem of Overseas Offenses

Under the current system, a service member who commits an offense overseas may be prosecuted for those offenses in a court-martial convened at that location. An applicable international treaty or agreement may confer concurrent, or exclusive, jurisdiction on the foreign government for certain offenses. The proposed limitations on court-martial jurisdiction would potentially create jurisdictional gaps over offenses that were not purely military offenses or service-connected offenses. That would mean that for those excluded offenses, an alternate system of prosecuting those offenses would be required.

One alternate approach would be to rely on the host foreign government to try the service member. That alternative would only work if the United States was willing to turn over its citizens to the host country's criminal justice system—not always a wise or prudent course where the host country's criminal justice system provides less due process protections than the American system. That approach has been used, for example, for service members assigned in countries such as Germany where the United States has a Status of Forces Agreement.<sup>167</sup>

An alternate approach would be to vest prosecution in the hands of federal prosecutors, assuming that the federal government had jurisdiction over those offenses.<sup>168</sup> In 2000, Congress enacted the Military Extraterritorial Jurisdiction

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charge to establish that the accused in fact came into contact with her, despite the no-contact order by his superiors. Those problems could be avoided by trying all three offenses at a single court-martial.

<sup>166</sup> See, e.g., *United States v. Anderson*, 36 M.J. 963, 969 (A.F.C.M.R. 1993) (citing Air Force policy of not conducting military prosecution after state prosecution; if military trial is held first, the question of subsequent state prosecution is matter for state to decide); *United States v. Olsen*, 24 M.J. 669, 671 (A.F.C.M.R. 1987) (accused's court-martial conviction reversed where trial followed conviction in state court; government failed to follow Air Force Regulation 111-1, (now AFI 51-201), which prohibits court-martial following civilian trial unless the Secretary of the Air Force specifically approves the prosecution). Cf. *United States v. Lorenc*, 26 M.J. 793, 794-95 (A.F.C.M.R. 1988) (court-martial not barred by A.F. Reg. 111-1 (now AFI 51-201) where civilian and military offenses were sufficiently dissimilar).

<sup>167</sup> AGREEMENT BETWEEN THE PARTIES TO THE NORTH ATLANTIC TREATY REGARDING THE STATUS OF THEIR FORCES (NATO SOFA), Art. VII (noting jurisdiction of United States for offenses punishable by United States but not by receiving state). See generally SCHLUETER, *supra* note 30, at § 4-12(C) (discussing issue of concurrent jurisdiction with foreign courts).

<sup>168</sup> See Military Extraterritorial Jurisdiction Act (MEJA), 18 USC § 3261 (2012). Congress enacted MEJA to fill a perceived jurisdictional gap over civilians employed by, or accompanying, the armed forces abroad. 18 USC § 3261(a). See, e.g., *United States v. Lazarro*, 2 M.J. 76 (C.M.A. 1976). In *Lazarro*, the accused was charged with stealing government funds from the commissioned officers' mess in Japan. The court noted that that offense could have been tried in a United States district court because 18 USC § 641, larceny of United States funds, applied overseas. See generally Jan

Act (MEJA) in an attempt to close a jurisdictional gap over civilians who were employed by or accompanying the armed forces overseas.<sup>169</sup> That Act, however, only covers felony offenses.<sup>170</sup> Under that approach, the accused and witnesses could be transported back to the United States for trial in a United States District Court. Or Congress could create a system of federal courts overseas to handle those cases.<sup>171</sup> It is clear that either of those approaches would create a new set of jurisdictional, logistical, and legal issues such as providing defense counsel, subpoenaing and transporting witnesses, and imposing pretrial confinement.<sup>172</sup>

A third alternate solution would be to recognize an “overseas exception,” similar to the approach taken by the military courts in responding to the *O’Callahan-Relford* service connection requirements, discussed, *supra*.<sup>173</sup> But if the proposed changes limiting court-martial jurisdiction rest on the view, expressed by Justice Douglas in *O’Callahan*, that “courts-martial as institution are singularly inept in dealing with the nice subtleties of constitutional law,”<sup>174</sup> then service members tried overseas by courts-martial would be subjected to an inferior criminal justice process.

## 5. Inability to Impose Nonjudicial Punishment

Nonjudicial punishment is considered an essential disciplinary tool for commanders to use in dealing with minor offenses.<sup>175</sup> Limiting court-martial jurisdiction to only military offenses or service-connected offenses would, by implication, necessarily negatively impact a commander’s authority to impose nonjudicial punishment under Article 15 of the UCMJ for minor offenses. Article 15 provides that a commander may impose punishment, for minor offenses instead of court-martialing a service member.<sup>176</sup> Such procedures permit the commander to impose punishment without preferring court-martial charges, often to the benefit of an accused, who if convicted, would have a conviction on their record.<sup>177</sup> Unless a service member is

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Horbaly & Miles Mullins, *Extraterritorial Jurisdiction and Its Effect on the Administration of Military Criminal Justice Overseas*, 71 MIL. L. REV. 1 (1976) (discussing issue of jurisdiction for offenses committed overseas).

<sup>169</sup> MEJA, 18 USC § 3261.

<sup>170</sup> *Id.*

<sup>171</sup> Sherman (1973), *supra* note 6, at 1421 (discussing possibility of creating divisions of United States District courts in foreign countries, but noting difficulty of obtaining agreement from host countries).

<sup>172</sup> *See id.* at 1420 (noting problems of transporting the accused and other participants back to the United States)

<sup>173</sup> *See, e.g.,* United States v. Black, 1 M.J. 340, 342–45 (C.M.A. 1976) (discussing overseas exception).

<sup>174</sup> *O’Callahan*, 395 U.S. at 265.

<sup>175</sup> SCHLUETER, *supra* note 30, at § 3-1 discussing the importance of the commander’s ability to impose nonjudicial punishment).

<sup>176</sup> UCMJ art. 15.

<sup>177</sup> UCMJ art. 15.

attached to a vessel, the service member can turn down the commander's proposed Article 15 procedures and demand a court-martial.<sup>178</sup> The same is true for a summary court-martial; the accused must consent, unless they are assigned or attached to a vessel.<sup>179</sup> If the UCMJ is amended to provide for court-martial jurisdiction over only military offenses, which are service-connected, and the commander offers the accused an Article 15, or prefers summary court-martial charges, the accused can refuse to proceed, and thus put the commander in the "check-mate" position of not being able to impose nonjudicial punishment under Article 15—thus depriving the commander of that important disciplinary tool.

## 6. Adverse Effect on Power to Impose Pretrial Confinement

Under the current system, a commander may place an accused in pretrial confinement pending disposition of the charges.<sup>180</sup> The system provides for both command review<sup>181</sup> and judicial review of that decision by a neutral and detached hearing officer,<sup>182</sup> and then by a military judge.<sup>183</sup> The current system is an integrated and coordinated decision by the chain of command, which in part depends on the probable disposition of the charges.<sup>184</sup> Limiting court-martial jurisdiction to purely military offenses could impose jurisdictional and administrative questions about the ability of a commander to impose pretrial confinement for an offense over which the military had no jurisdiction. Assuming that a commander had no authority to dispose of non-military offenses, it would put the commander in the position of arresting and detaining service members, on behalf of the civilian community which could, but not necessarily, have jurisdiction over non-military offenses.

## 7. Potential Speedy Trial Problems

The military justice system currently recognizes several speedy trial protections—constitutional, statutory, and regulatory.<sup>185</sup> Those protections are triggered by the preferral of court-martial charges and/or pretrial confinement of the accused. Under the current system commanders and legal advisors work together to ensure that the case moves in a timely and efficient manner. Separating military and non-

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<sup>178</sup> UCMJ art. 15.

<sup>179</sup> UCMJ art. 15.

<sup>180</sup> MCM, R.C.M. 305(c) (discussing imposition of pretrial confinement).

<sup>181</sup> MCM, R.C.M. 305(h)(2) (commander must decide, within 72 hours, whether to continue pretrial confinement).

<sup>182</sup> MCM, R.C.M. 305(i)(1) (review by neutral and detached reviewing officer).

<sup>183</sup> The accused could file a motion for appropriate relief with the military judge. *See* SCHLUETER, *supra* note 30, at § 13-5(C) (discussing motion for appropriate relief regarding pretrial confinement issues).

<sup>184</sup> MCM, R.C.M. 305(h)(2) Discussion (listing multiple factors to be considered in deciding whether to impose pretrial confinement, including the weight of the evidence against the accused).

<sup>185</sup> *See* SCHLUETER, *supra* note 30, at § 13-3(D) (discussing speedy trial protections under the Sixth Amendment, the Fifth Amendment, and the UCMJ).

military offenses would create legal and administrative problems of coordinating parallel military and civilian proceedings, thus potentially creating speedy trial issues.<sup>186</sup> For example, placing an accused in civilian confinement might trigger the military's speedy trial rules, depending on whether the confinement was requested by the military.<sup>187</sup> If an accused were charged with committing both military and non-military offenses and was subjected to parallel proceedings, which one should go first? If the civilian trial goes first, would that time count against the government for not trying the accused in a court-martial earlier?<sup>188</sup>

## 8. Plea Bargaining Adversely Affected

As in the civilian community, the military justice system depends heavily on the ability of the convening authority and the accused to plea bargain and execute a "pretrial agreement."<sup>189</sup> Those agreements typically require the accused to enter a plea of guilty in return for reduction of charges, dismissal of some of the charges, or a sentence limitation. Separating military from non-military offenses would mean that an accused, facing both types of charges, would have to plea bargain with both military and civilian authorities. Both sides would be potentially disadvantaged. The prosecution would be potentially disadvantaged by losing one or more charges to the civilian prosecutor, which could be used as bargaining chips. The accused would also lose that option, and would be further disadvantaged by needing another counsel licensed to practice in the civilian jurisdiction pressing the civilian charges

## 9. Adversely Affecting Agreements with Local Civilian Prosecutors

Many installations have agreements with local prosecutors (state and federal) that determine which office—military or civilian—will prosecute an accused.<sup>190</sup>

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<sup>186</sup> See, e.g., *United States v. Duncan*, 34 M.J. 1232, 1240–41, 1245 (A.C.M.R. 1992), *aff'd on other grounds*, 38 M.J. 476 (C.M.A. 1993) (providing detailed discussion on problems associated with concurrent jurisdiction and holding that accused was denied speedy trial where military delayed prosecution until after prosecution by DOJ).

<sup>187</sup> See, e.g., *United States v. Thomas*, 43 M.J. 626, 636–37 (A.F. Ct. Crim. App. 1995) (accused's confinement in military facility not accountable to U.S.; confinement was at request of Germans pending their lengthy investigation); *United States v. Bramer*, 43 M.J. 538 (N-M. Ct. Crim. App. 1995) (civilian confinement, not requested by military, did not start speedy trial clock); *United States v. Youngberg*, 38 M.J. 635, 546–47 (A.C.M.R. 1993) (speedy trial clock did not run from date of preferral of charges where German authorities did not waive jurisdiction until shortly before trial); *United States v. McCallister*, 24 M.J. 881, 887 (A.C.M.R. 1987) (accountability began when accused was held in civilian jail at request of government); *United States v. Asbury*, 28 M.J. 595, 597–99 (N.M.C.M.R. 1989) (time spent in civilian detention did not count against government for speedy trial purposes).

<sup>188</sup> See, e.g., *Duncan*, 34 M.J. at 1245, *aff'd on other grounds*, 38 M.J. 476 (C.M.A. 1993) (noting that agreement between DOJ and military can authorize delay of military proceedings; court concluded that accused should have been tried by court-martial before federal prosecution).

<sup>189</sup> See generally SCHLUETER, *supra* note 30, ch. 9 (discussing military pretrial agreement practices and policies).

<sup>190</sup> See, e.g., AR 27-10, *Military Justice*, ch. 23 (discussing agreements with federal authorities to

Those agreements are very beneficial in promoting good community relations between the local command and the surrounding civilian community. The proposed amendments make no provision for such agreements. Is it intended that after the O-6 legal advisor decides to prosecute a case, the local agreements are no longer operative? Would the O-6 be bound by such agreements? Is the O-6 required to contact the local civilian prosecutor and decide on the next best steps? In either event, the local command has no say in resolving the issues, even though the decision could have an impact on local military-civilian relations.

#### 10. Issuing Get-Out-of Jail Free Tickets for Service Members

The underlying assumption in any proposals to limit court-martial jurisdiction is that if military authorities do not prosecute service members for common law offenses, civilian authorities will. That can be a false assumption. Civilian prosecutors, for the most part, are often overwhelmed in dealing with their civilian population. It would be a mistake to assume that simply because a service member committed an offense in the same geographical area covered by a civilian prosecutor, the prosecutor would be willing to add to their case load. Unless the crime was viewed as a threat to the civilian community, most prosecutors would hesitate to prosecute the case. The same would generally hold true for federal prosecutors.

Because under the Tenth Amendment, Congress could not deputize a state prosecutor to try American service members<sup>191</sup> it is conceivable that crimes by service members would go unpunished. The same would be truer for service members who commit offenses overseas, where the foreign court may have no interest in prosecuting military personnel.

#### 11. The Problem of Political Pressure

As one commentator has noted, there is often tremendous political pressure on commanders in deciding whether to prosecute a service member.<sup>192</sup> A clear example of that arose from the recent media and Congressional attention placed on the prosecution of sexual assaults in the military justice system; significant political pressure being brought to bear on officials in the Department of Defense to fix the problem.<sup>193</sup> A consistent theme in the public debate was the view that too many

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prosecute service members).

<sup>191</sup> See U.S. Const. amend. X (reserving powers for the States)

<sup>192</sup> Hayes, *supra* note 9, at 175 (noting that military leaders are extremely susceptible to congressional pressure).

<sup>193</sup> See Pauline Jelinek, *Pentagon: Reports of Sexual Assaults Up 46 Percent*, WASH. POST (Nov. 7, 2013), available at [http://www.washingtonpost.com/world/national-security/pentagon-reports-of-sexual-assaults-up-46-percent/2013/11/07/e864f03e-47ed-11e3-bf0c-cebf37c6f484\\_story.html](http://www.washingtonpost.com/world/national-security/pentagon-reports-of-sexual-assaults-up-46-percent/2013/11/07/e864f03e-47ed-11e3-bf0c-cebf37c6f484_story.html) (reporting the rise in sexual assaults has caused some to lose confidence in the Department of Defense); *DOD Strives to Eliminate Sexual Assault*, U.S. DEP'T OF DEFENSE (Dec. 20, 2013), <http://www.defense.gov/news/newsarticle.aspx?id=121380>.

service members were escaping prosecution and that it was the local commanders who were to blame. It was that debate that prompted proposed changes to shift the decision to prosecute or not prosecute to a centralized office, staffed by high ranking officers with trial experience. Ironically, moving the prosecutorial decisions to a higher, centralized office might simply exacerbate the potential for political pressure. There is a real danger that Congress, the President, or the media could subject a service member to a court-martial because of such pressures on that office, and not because there was probable cause to believe that he or she committed the offense.<sup>194</sup>

### C. Summary of Responses

The foregoing discussion makes it clear that limiting court-martial jurisdiction to purely military offenses or to offenses which are service connected, creates a whole host of issues., These issues would not only threaten the ability of a commander to maintain discipline, but may actually result in greater administrative burdens on military and civilian authorities, with little or no additional protections for victims of crimes committed by service members.

## V. A SIREN SONG HEARD: REDUCING THE COMMANDER'S ABILITY TO GRANT POST-TRIAL CLEMENCY

### A. In General

A third siren song relates to the commander's post-trial authority to grant clemency to an accused who has been convicted by a court-martial.<sup>195</sup> This song varies from the first two in that this siren song was heard by Congress in 2013 and resulted in amendments to the UCMJ. It is consistent with the first two songs, however, in that it severely limits a commander's powers—after a service member has been convicted.

In the National Defense Authorization Act for Fiscal Year 2014, Congress amended Article 60 to circumscribe the convening authority's powers to set aside a court-martial's findings and sentence.<sup>196</sup> The changes were the result of Congressional reaction to at least one case where a convening authority set aside the sexual assault conviction of a high-ranking officer on grounds of insufficient evidence to support the conviction.<sup>197</sup> Before that enactment, a convening authority possessed

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<sup>194</sup> Hayes, *supra* note 9, at 176 (recounting experience of general whose promotion was held up twice in Senate due to media attention on his role in not prosecuting an accused for murder of soldier, whom the accused believed to be a homosexual).

<sup>195</sup> The 2013 National Defense Authorization Act, Pub. L. 113-66, made a significant number of amendments to both the UCMJ and the Manual for Courts-Martial. One of those changes was an amendment to Article 60, UCMJ, which resulted in limiting the commander's clemency powers. *Id.* at § 1706.

<sup>196</sup> UCMJ art. 60.

<sup>197</sup> Craig Whitlock, *Air Force General's Reversal of Pilot's Sexual-Assault Conviction Angers*

broad discretion to set aside findings and sentences, in whole or in part, for any or no reason at all. That power was originally grounded in the belief that an accused's service record could warrant post-trial relief.<sup>198</sup> But it also reflected the view that the court-martial may have gotten it wrong, either in finding the accused guilty or in the sentence it adjudged.

The amendments to Article 60 altered the convening authority's post-trial powers with regard to his or her actions on the court-martial findings and on the sentence adjudged by the court-martial. Summarized, the amendments to Article 60 concerning the commander's powers regarding findings provide that:

- A convening authority may not disapprove a finding of guilty, or reduce the finding to a lesser-included offense, unless the accused was found guilty of a "qualifying offense."<sup>199</sup> A qualifying offense,<sup>200</sup> must meet two criteria. First, the maximum authorized punishment for the offense includes confinement for two years or less.<sup>201</sup> And second, the sentence adjudged by the court-martial does not include dismissal, a dishonorable or bad-conduct discharge, or confinement for more than six months.<sup>202</sup>
- Even if those two criteria are met, certain sexual offenses are excluded.<sup>203</sup> The Secretary of Defense may exclude other offenses, by promulgating regulations.<sup>204</sup>
- If the convening authority takes action to dismiss or change the findings for a qualifying offense, he or she must provide a written explanation for that action.<sup>205</sup>

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*Lawmakers*, WASH. POST (Mar. 8, 2013), [http://www.washingtonpost.com/world/national-security/air-force-generals-reversal-of-pilots-sexual-assault-conviction-angers-lawmakers/2013/03/08/f84b49c2-8816-11e2-8646-d574216d3c8c\\_story.html](http://www.washingtonpost.com/world/national-security/air-force-generals-reversal-of-pilots-sexual-assault-conviction-angers-lawmakers/2013/03/08/f84b49c2-8816-11e2-8646-d574216d3c8c_story.html).

<sup>198</sup> See *Uniform Code of Military Justice: Hearings on H.R. 2498 Before a Spec. Subcomm. of the House Comm. on Armed Services*, 81st Cong. 1182–85 (1949) (hearings on the proposed adoption of the Uniform Code of Military Justice).

<sup>199</sup> UCMJ art. 60(c)(3).

<sup>200</sup> UCMJ art. 60(c)(3)(D) (defining qualifying offense).

<sup>201</sup> UCMJ art. 60(c)(3)(B)(i)(I).

<sup>202</sup> UCMJ art. 60(c)(3)(B)(i)(II).

<sup>203</sup> UCMJ Article 60(c)(3)(D) lists the following sexual offenses as not being qualifying offenses: rape, Article 120(a); sexual assault, Article 120(b); rape, sexual assault or sexual abuse of a child, Article 120b; and forcible sodomy, Article 125.

<sup>204</sup> UCMJ art. 60(c)(3)(D)(i)(III).

<sup>205</sup> UCMJ art. 60(c)(2)(C).



The effect of these changes is that the convening authority's power to set aside a finding of guilt at the post-trial stage is now limited to relatively minor offenses or light punishments, which do not involve sex-related offenses.<sup>206</sup>

Regarding the ability of a convening authority to take actions on an adjudged sentence, a commander may not disapprove, commute, or suspend, in whole or in part, any adjudged sentence including a dismissal, a punitive discharge, or confinement for more than six months.<sup>207</sup> In effect, a convening authority's powers are severely limited in all but the most minor of cases.

Finally, a 2014 amendment to the Manual for Courts-Martial now provides that the convening authority may not consider any evidence concerning a victim's character unless that evidence was presented at trial.<sup>208</sup> The commander, however, is permitted to consider matters submitted by the victim, who may have something to say about the service member's conviction or adjudged sentence.<sup>209</sup>

The following discussion presents several reasons why the recently enacted amendments should be abrogated, and the commander's powers restored.

## B. Responses to Reducing the Commander's Post-Trial Clemency Powers

### 1. In General

The UCMJ provides for careful review of any court-martial conviction, starting at the command level. Depending on the level of court-martial and the sentence adjudged, the commander who convened the court-martial considers legal advice from his or her staff judge advocate, in a post-trial recommendation, on whether it is appropriate to approve the findings and the sentence. That legal recommendation generally focuses on reporting the results of the court-martial,<sup>210</sup> whether there are any recommendations for clemency from the court-martial itself,<sup>211</sup> and in some cases it must include a discussion and recommendation on alleged legal errors in the court-martial.<sup>212</sup> In determining the most appropriate action to take on review,

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<sup>206</sup> See generally Brent A. Goodwin, *Congress Offends Eisenhower and Cicero by Annihilating Article 60, UCMJ*, ARMY LAW., Jul. 2014, at 23 (discussing 2014 changes to Article 60, which dramatically altered the convening authority's discretion in acting on an accused's court-martial).

<sup>207</sup> UCMJ art. 60(c)(3)(D).

<sup>208</sup> R.C.M. 1107(b)(3)(C). The change was in response to a mandate from Congress in the National Defense Authorization Act for Fiscal Year 2014. National Defense Authorization Act for Fiscal Year 2014, Pub. L. 113-66, § 1706(b), 127 Stat 672, 961 (2014).

<sup>209</sup> UCMJ art. 60(d)(1).

<sup>210</sup> R.C.M. 1106(d)(3).

<sup>211</sup> R.C.M. 1106(d)(3).

<sup>212</sup> R.C.M. 1106(d)(4). See also *United States v. Hill*, 27 M.J. 293 (C.M.A. 1988) (noting that the President intended in the Manual for Courts-Martial that the staff judge advocate respond to any allegations of legal error submitted post-trial by the defense counsel).

the commander may consider information submitted by an accused that was not formally offered into evidence at trial.<sup>213</sup>

Once the commander takes final action on the case, and depending on the level of court-martial and the adjudged sentence, the case is automatically appealed to one of the service's Courts of Criminal Appeals for review.<sup>214</sup> It has been assumed for many years that an accused's best chance of obtaining post-trial relief of a conviction was at the initial review stage by a convening authority.<sup>215</sup> That is no longer the case.

## 2. Deferring Deserved Clemency

The effect of the changes to the convening authority's post-trial powers means that no matter how deserving an accused may be of clemency, the convening authority may not act. Instead, the service member must wait until his or her case is heard by one of the services' Courts of Criminal Appeals. Those courts do have the power to consider legal arguments as to why the conviction should be reversed and whether there is sufficient factual information to support the conviction. The military appellate courts also have the power to reassess a service member's sentence. But appellate review can sometimes take years to complete. Thus, even assuming a service member could have been granted some relief by the convening authority, he or she may have to wait for appellate relief. In the meantime, the service member may have already completed his or her confinement and been discharged.

## 3. Adverse Impact on Discipline

Although it is not likely to be a common occurrence, a case could arise where the convening authority's lack of post-trial powers could adversely impact discipline. For example, members of the command may perceive political pressure was brought to bear on the decision to prosecute a service member, or that it is clear that the court members convicted an accused but strongly believed that some clemency was required. In addition, the command may conclude that the system is rigged against service members—a perception that has long plagued the military justice system.<sup>216</sup>

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<sup>213</sup> R.C.M. 1107(b)(3)(A)(iii) and 1105.

<sup>214</sup> UCMJ art. 66.

<sup>215</sup> See, e.g., *United States v. Rivera*, 42 C.M.R. 198, 199 (C.M.A. 1970) (noting that post-trial review of court-martial by convening authority provides best chance for clemency). Cf. Michael J. Marinello, *Convening Authority Clemency: Is it Really an Accused's Best Chance for Relief?*, 54 NAVAL L. REV. 169, 195–196 (2001) (noting that post-trial clemency is not common; most cases in which reduction of sentence occurred was due to pretrial agreement between an accused and the convening authority).

<sup>216</sup> See generally Schlueter, *supra* note 12, at 5-8 (noting reasons for lack of respect for military justice).

## VI. CONCLUSION

Proposals to reform the military justice system are not new, and will be a permanent part of the American military justice landscape. The most recent round of proposals arose from frustration and anger that many feel towards the military's initial response to what appeared to be systemic problems in dealing with sexual assault cases. That anger is understandable. And lethargic responses to that problem are indefensible.

But the answer to that problem does not rest in removing or reducing the commander's roles, pretrial or post-trial, or in limiting court-martial jurisdiction. This is not the first time that the military has faced problems and it will not be the last. One feature of the military is that it does respond, adapt, and can issue orders to fix the problems.

There is a danger that in rushing to "fix" what some consider to be problems in the military justice system, the fix will throw off the delicate balance between discipline and justice—to the detriment of the command structure, those accused of committing offenses, and victims of the alleged offenses.<sup>217</sup>

The UCMJ was enacted in 1950 as a response to complaints and concerns about the operation of the existing Articles of War during World War II.<sup>218</sup> In enacting the UCMJ, Congress struggled with the issue of balancing the need for command control and discipline against the view that the military justice system could be made fairer.<sup>219</sup> The final product was considered a compromise.<sup>220</sup> On the one hand, there was concern about the ability of the commander to maintain discipline within the ranks. On the other hand, there was concern about protecting the rights of service members against the arbitrary actions of commanders. Although the commander remained an integral part of the military justice structure, the statute expanded due process protections to service members and created a civilian court to review courts-martial convictions. Since its enactment, the UCMJ has been amended numerous times, sometimes to favor the prosecution of offenses and at other times to expand the protections to the accused.

The proposed amendments discussed in this article clearly undermine the commander's authority. Thus, whether intended or not, the balance tips in favor of the accused, even though the apparent intent is to ensure that more cases go to trial.

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<sup>217</sup> See generally Hansen, *supra* note 113, at 271 (2013) (noting that while efforts to reform the military justice system are warranted, the author concludes that reducing the role of the commander will undermine the ability of the commander to regulate his or her subordinates regarding the law of armed conflict).

<sup>218</sup> See generally Morgan, *supra* note 5, at 169 (discussing background of adoption of the UCMJ).

<sup>219</sup> See *United States v. Littrice*, 13 C.M.R. 43, 47 (C.M.A. 1953) (identifying "the necessity of maintaining a delicate balance between justice and discipline").

<sup>220</sup> See *id.* at 47 (referring to the liberalizing of the military justice system as a compromise).

In doing so, it affects the very core of the military justice system—the role of the commander. And it adversely affects anyone associated with the alleged offenses in the command: witnesses, counsel, and even victims. Currently, the commander and his or her legal advisor consider all of those interests in deciding whether to prosecute a case or choose some other route for dealing with the issue. Placing that decision in some distant office or in the hands of civilian prosecutors creates the possibility that those diverse interests are not adequately considered or balanced.

If Congress is to make any changes to the Uniform Code of Military Justice, it should be to first, reaffirm the view that the primary purpose of the military justice system is to enforce good order and discipline and second, retain the commander's critical role in that system, without limitation.<sup>221</sup>

The Supreme Court of the United States has stated that the purpose of the military is to fight and win wars.<sup>222</sup> It is absolutely essential that commanders—who are ultimately responsible for accomplishing that mission—be vested with the authority and responsibility for maintaining good order and discipline within their command. To that end, the UCMJ should be amended by adding the following language:

The purpose of military law is to assist in maintaining good order and discipline in the armed forces, to provide due process of law, to promote efficiency and effectiveness in the military establishment, and thereby to strengthen the national security of the United States.

That proposed language, which is a variation on similar language in the preamble to the Manual for Courts-Martial,<sup>223</sup> reflects the long-standing and tested view that the military justice system is designed primarily to promote good order and discipline.

Finally, in responding to the siren songs of reform, Congress should carefully analyze the proposed changes, consider the myriad potential problems of administering any proposed reforms, as discussed *supra*, and determine whether less drastic measures can be taken to remedy any perceived problems in the military justice system.

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<sup>221</sup> Schlueter, *supra* note 29, at 77 (concluding that the primary purpose of the military justice system is to promote good order and discipline).

<sup>222</sup> United States ex rel. Toth v. Quarles, 350 U.S. 11, 17 (1955).

<sup>223</sup> The Preamble to the Manual for Courts-Martial lists the due process language first, before the language concerning good order and discipline. In my view, the order of those purposes is critical. Listing the discipline purpose first more accurately reflects the function and purpose of the military justice system. Schlueter, *supra* note 29, at 77 (concluding that the primary purpose of the military justice system is to promote good order and discipline).





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