

# THE AIR FORCE LAW REVIEW



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BOYS (AND GIRLS) GONE WILD: THE MISGUIDED DEVELOPMENT OF THE ROBUST LANGUAGE OR DEBATE DOCTRINE UNDER THE FEDERAL LABOR RELATIONS AUTHORITY

*LIEUTENANT COLONEL FRANK D. HOLLIFIELD*

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*CAPTAIN CARMAN A. LEONE*

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BOYS (AND GIRLS) GONE WILD:  
THE MISGUIDED DEVELOPMENT OF THE ROBUST LANGUAGE  
OR DEBATE DOCTRINE UNDER THE FEDERAL LABOR  
RELATIONS AUTHORITY

*LIEUTENANT COLONEL FRANK D. HOLLIFIELD\**

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\* Lt Col Frank D. Hollifield, Judge Advocate, United States Air Force (LL.M., Atlanta John Marshall Law School (2014); LL.M., The Judge Advocate General Legal Center and School (2009); J.D., The University of Alabama (2000); M.P.A., The University of Alabama (1994); B.A., The University of Alabama (1994)) serves as Associate General Counsel, Defense Logistics Agency (DLA), Ft. Belvoir, Virginia.

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*CN (Chief Negotiator): [After receiving a letter from LRO (Labor Relations Officer) during negotiations about management negotiation proffer.] “We’re going to shove this up your ass.”<sup>1</sup>*

*“...the FLRA (Federal Labor Relations Authority) will shove this up your ass”*

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<sup>1</sup> Dep’t of the Air Force v. AFGE (*Grissom*), 51 FLRA 7, 20 (Aug. 18, 1995). The substance of the epigraph is from a negotiating session held at Grissom ARB, Indiana between Air Force management representatives (LRO – Labor Relations Officer) and members of the negotiating team from AFGE, Local 3254 (CN – Chief Negotiator; NEG – Negotiator) on 3 December 1992. In the process of negotiating over the conversion of (then) Grissom Air Force Base to Grissom Air Reserve Base, the LRO handed the following letter to the Union negotiation team:

FROM: 305 MSSQ/MSCE

TO: Fred Hartig, President AFGE Local 3254

SUBJ: Negotiations, AFGE Local 3254 and Grissom Air Force Base

1. You requested, on behalf of Local 3254, to enter into full contract negotiations. After much discussion, you and management agreed that negotiations could be postponed until August 1993. We requested that the verbal agreement be put in writing to assure complete understanding. You did submit to the Civilian Personnel Office an agreement to be signed by management and Local 3254 expressing that you would agree to postponing the contract negotiations if certain stipulations would be agreed to by management.

2. After consideration of the entire proposal to postpone contract negotiations, management cannot agree to all stipulations requested to therefore, we will enter into full contract negotiations as you previously requested.

3. This means that ground rules for full contract negotiations must be negotiated. The Parking Proposal submitted to the realignment negotiating team applies to contract article XXXV; as such, we will defer negotiations on that subject until full contract negotiations begin. Our original agreement regarding contract negotiations resulted in negotiating the two articles of your choice. Management did not agree to add, supplement, or change any other contract article. An agreement was reached on one of the articles, Performance Evaluations, and you have unilaterally requested mediation on the compressed work schedule portion of the Work Schedule article. Since we will be entering into full contract negotiations, we will be prepared to finalize that article at that time. With that said, the ground rules for realignment and contract negotiations are no longer valid.

4. All realignment negotiations, the ground rules associated with realignment negotiations, and all official time for realignment negotiations will cease as of the end of the negotiations meeting on 3 December 1992. Any future meetings to discuss the Training Committee plans and recommendations will be by mutual consent of the current assigned chief negotiators.

5. Please contact me to discuss the date, time, and place for the initial meeting to discuss the ground rules for full contract negotiations. Management will appoint two members to negotiate the ground rules....

LRO: *[Indicates she doesn't think that language is appropriate.]*

CN: "I don't give a fu-- what you think."

CN: *[Repeatedly screams "[Are you]...refusing to negotiate?"]*

LRO: *[No.]*

NEG (Negotiator): *[After reading the letter] "You can't be that fu--ing stupid, lady." "I always knew you was stupid, I knew you was goddamn stupid."*<sup>2</sup>

*[Union negotiation team exits the room and re-congregates in a downstairs porch area. The LRO and management team follows in the process of leaving the building.]*

CN to LRO: "Are you ending the negotiating session?"

LRO: "Yes, we are. And it's time for you folks to go back to work [or "You all should return to work."]

CN: "You can suck my di--." <sup>3</sup>

## I. INTRODUCTION

The preceding dialogue actually took place between a Management Negotiation Team and a Union Negotiation Team at (then) Grissom Air Force Base, Indiana on 3 December 1992.<sup>4</sup> The dialogue is verbatim, as reflected in the Federal Labor Relations Authority's (FLRA) decision in *Department of the Air Force v. AFGE (Grissom)*, 51 FLRA 7 (Aug. 18, 1995).<sup>5</sup> The FLRA's decision in the *Grissom* case, while not the first or last case in the FLRA's development of the robust language or debate doctrine (also known as the robust language or speech doctrine) in its jurisprudence, is a watershed case. It represents the establishment of latitude for Federal sector unions to engage in threatening, harassing, and even grossly vulgar discussion and assaults on management officials in the name of the right to form, join, or assist any labor organization, or to refrain from such activity, without fear of penalty or reprisal under 5 U.S.C. § 7102.<sup>6</sup> Case law that constitutes part of

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<sup>2</sup> *Id.* at 21.

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

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

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

<sup>6</sup> 5 U.S.C. § 7102 (2010) provides:

Each employee shall have the right to form, join, or assist any labor organization, or to refrain from such activity, freely and without fear of penalty or reprisal, and each

5 U.S.C. § 7102 jurisprudence, also notes that the Federal agency has the right to discipline an employee who is engaged in otherwise protected remarks or actions that “exceed the boundaries of protected activity such as flagrant misconduct.”<sup>77</sup> Union officials or representatives, under FLRA case law, do have the right to use “intemperate, abusive, or insulting language without fear of restraint or penalty.”<sup>78</sup> This is the robust language or debate doctrine, where the law under 5 U.S.C. § 7102, recognizes that labor representatives and management are humans and will engage in heated discussion or debate to get legitimate points across. However, this stops at “intemperate, abusive, or insulting language without fear of restraint or penalty” on the part of union representatives, as Federal employees, in these discussions or debates with management. That said, the robust language or debate doctrine under FLRA jurisprudence represents an aberration in robust language or debate jurisprudence, overreaches where it needlessly exposes management officials to obnoxious conduct with impunity from employees, and runs counter to legal conventions which range from First Amendment law to similar doctrines in private or non-Federal work settings to the original intentions behind Federal sector labor legislation.<sup>9</sup> This development of the robust language or debate doctrine under FLRA case law is, therefore, due to be nullified and made consistent with similar legal traditions in order to restore balance to the Federal sector labor-management relationship.

The case for nullification of the FLRA robust language or debate doctrine, as undertaken in this paper, includes four main arguments. First, the FLRA’s decision in *Grissom* was poorly-founded on the case law and previous jurisprudence it cites. Second, the development of FLRA robust language or debate case law accords Federal sector unions the ability to engage in vulgar, obnoxious, and insubordinate

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employee shall be protected in the exercise of such right. Except as otherwise provided under this chapter, such right includes the right –

- (1) To act for a labor organization in the capacity of a representative and the right, in that capacity, to present the views of the labor organization to heads of agencies and other officials of the executive branch of the Government, the Congress, or other appropriate authorities, and;
- (2) To engage in collective bargaining with respect to conditions of employment through representatives chosen by employees under this chapter.

<sup>7</sup> *Grissom*, 51 FLRA at 11.

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

<sup>9</sup> A “seminal” case in the private sector (National Labor Relations Board; NLRB) is the NLRB’s decision in *Atlantic Steel Co. and Chastain (Atlantic Steel)*, 245 NLRB 814 (1979). In *Atlantic Steel*, the employee (and Union representative) was found to have been rightfully disciplined for walking away from a supervisor and uttering “lying son of a bit--”, “motherfu--ing lie,” and “motherfu--ing liar” (testimony inconsistent). Other cases, such as *Marico Enters., Inc. and Local I-J, Serv. Emps. Int’l Union IEU, AFL-CIO (Marico)*, 283 NLRB 726 (1987), have upheld discipline for employees who have engaged in conduct or misconduct such as obscene finger gestures at management or supervisors (“shooting the bird” in *Marico*). Executive Order 11491, which formed the basis of the Civil Service Act of 1978 (which included the codification of 5 U.S.C. § 7102), spells out these “original intentions” best, where it notes: “WHEREAS the participation of employees should be improved through maintenance of constructive and cooperative relationships between labor organizations and management officials.”

conduct under the “false flag” of representational rights, whereas private and non-Federal sector labor unions do not enjoy the same latitude. Moreover, Federal sector employees enjoy much more in the way of *guaranteed* rights and benefits, as well as personal and representational guarantees that private and non-federal sector employees do not. Third, the development of the FLRA’s robust language or debate doctrine runs counter to the original intentions behind both the Civil Service Reform Act of 1978 and the provisions of 5 U.S.C. § 7102. Fourth, the *Grissom* decision has subsequently developed into a series of cases that effectively justify vulgar, obnoxious, and insubordinate conduct under the “false flag” of preserving the representation rights under 5 U.S.C. § 7102, which continues to “dog” the balance of labor-management relationships to this day. This decision and the test it has produced must be overruled and nullified and replaced with a more effective, even-handed, more trustworthy (for all parties involved) rule for the parties to be applied more consistently in the future.

## II. THE FLRA’S DECISION IN THE *GRISSOM* CASE

The FLRA’s decision in *Department of the Air Force v. AFGE (Grissom)*, 51 FLRA 7 (Aug. 18, 1995), represents the current, dysfunctional state of the law under the robust language or debate doctrine, where it is the seminal case in this doctrine. Understanding the problems under the doctrine requires an understanding of the case itself. The *Grissom* case was brought before an Administrative Law Judge (ALJ), and was then appealed to the FLRA for an alleged violation of the prohibition against agency unfair labor practices under 5 U.S.C. § 7116(a)(1) and (2), where the Air Force disciplined the Negotiator (for the outbursts noted above), with a 14-day suspension.<sup>10, 11</sup> The ALJ found for the Air Force, and the Union subsequently appealed to the FLRA.<sup>12</sup> The FLRA’s decision is based on the 5 U.S.C. § 7102 rights, as noted above, where Union officials or representatives may use “intemperate, abusive, or insulting language without fear of restraint or penalty” in the representational capacity provided for under 5 U.S.C. § 7102.<sup>13</sup> In the *Grissom* case, the FLRA does note that this right is tempered by the agency’s “right to discipline an employee who has engaged in otherwise protected activity for remarks or actions that ‘exceed the boundaries of protected activity such as flagrant misconduct.’”<sup>14</sup>

<sup>10</sup> See *Grissom*, 51 FLRA at 7.

<sup>11</sup> 5 U.S.C. § 7116(a)(1) & (2) provides:

- (a) For the purposes of this chapter, it shall be an unfair labor practice for an agency –
  - (1) To interfere with, restrain, or coerce any employee in the exercise by the employee of any right under this chapter;
  - (2) To encourage or discourage membership in any labor organization by discrimination in connection with hiring, tenure, promotion, or other conditions of employment.

<sup>12</sup> See *Grissom*, 51 FLRA at 7.

<sup>13</sup> See *id.* at 8 (citing Navy Facilities Eng’g Command, 45 FLRA 138 (1992)).

<sup>14</sup> See *id.* at 11 (citing U.S. Air Force Logistics Command, Tinker Air Force Base, Okla., 34 FLRA

## A. The Balancing Test Used in *Grissom*

The determination as to whether a Union representative's speech or activity "exceeds the boundaries of protected activity" requires a balancing of union interests of effective representation and management interests in maintaining good order and discipline in the workplace. The *Grissom* decision notes that the FLRA, in the process to determining if Union representatives have engaged in "flagrant misconduct" that excepts otherwise protected speech from protection under the robust language or debate doctrine, balances the employee's rights to engage in protected activity, which "permits leeway for impulsive behavior... against the employer's right to maintain order and respect for its supervisory staff on the jobsite."<sup>15</sup> The FLRA notes, in striking this balance, that it examines what it has determined to be the following relevant factors: (1) the place and subject matter of the discussion; (2) whether the employee's outburst was impulsive or designed; (3) whether the outburst was in any way provoked by the employer's conduct; and (4) the nature of the intemperate language or conduct.<sup>16</sup> The FLRA then notes that, according to its case law, "the foregoing factors need not be cited or applied in any particular way in determining whether an action constitutes flagrant misconduct."<sup>17</sup> The FLRA states in both *Grissom* and the case that it cites, that an Arbitrator, ALJ, or the FLRA does not have to apply all of the relevant factors to determine whether the balance between the Union's right "to engage in impulsive behavior" and the agency's "right to maintain order and respect for its supervisory staff on the jobsite."<sup>18</sup>

## B. Analysis Under the Balancing Test Used in *Grissom*

Crucial to the analysis of the *Grissom* case as the seminal case in the FLRA's robust language or debate doctrine is the determination as to *how* the FLRA balanced the interests of the union in effective representation and management in maintaining good order and discipline in the workplace. In the *Grissom* case, the FLRA specifically cites "there is no contention that the remarks were made in front of other employees on the job site or that they disrupted the work of the unit."<sup>19</sup> The decision goes on to note that "it is undisputed that Smith's language was impulsive rather than designed."<sup>20</sup> The FLRA essentially "punts" the next element where it notes: "Although the extent to which Smith's comments were 'provoked' by the Respondent's conduct is not clear, the record shows that the comments were made

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385 (1990)).

<sup>15</sup> *See id.* at 11 (citing Dep't of Defense, Defense Mapping Agency Aerospace Ctr., St. Louis, Mo., 17 FLRA 71 (1985) (quoting Dep't of the Navy, Puget Sound Naval Shipyard, 2 FLRA 54 (1979)).

<sup>16</sup> *See id.* at 12 (citing Defense Mapping Agency at 80-81).

<sup>17</sup> *See id.* (citing U.S. Dep't of Defense, Defense Logistics Agency and AFGE, Local 2693, 50 FLRA 212, 217-18 (1995)).

<sup>18</sup> *See id.*

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

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

in reaction to a letter from the Respondent certain previously agreed-upon negotiations about which the union received no prior notification.”<sup>21</sup> The FLRA justifies the Union representative’s conduct under the fourth element of the above-noted test (nature of the intemperate language or conduct) by stating “while the remarks made by Smith were offensive and should not be condoned, when examined as a whole and in context, they were not of such an outrageous and insubordinate nature as to remove them from the protection of the Statute.”<sup>22</sup> The FLRA does not elaborate on the “examin[ation] as a whole” or the context that somehow mitigates the nature of the intemperate language or conduct, but instead, notes: “In this regard, Smith’s remarks are similar remarks found not to constitute flagrant misconduct in other cases.”<sup>23</sup> The “other cases” cited by the FLRA include no “flagrant misconduct” where a Union representative called a supervisor an “asshole” and a “space cadet” in one case, and where a Union representative remarked to a supervisor “I am going to get your ass,” among any of a number of other cases.<sup>24</sup> The FLRA does not provide “context” for the cited cases or any attempt to justify that the examples proffered (of the nature of the intemperate language or conduct) are anything close to comparable to those in the *Grissom* case.<sup>25</sup> Even more improbably the FLRA then simply states: “Based on the foregoing, and on the Statute, prior precedent compels us to find that Smith’s remarks did not constitute flagrant misconduct. Therefore the Respondent [Air Force] violated section 7116(a)(1) and (2) by disciplining Smith, based, in part, on those remarks.”<sup>26</sup> To say that the FLRA found for the Union in the logic chain noted above (which contains no logical gaps or gaps in quotation) is incompletely founded or not founded at all on the tests cited by the FLRA, would be an understatement. The FLRA grants the facts in the Air Force’s favor on the first two of four factors in the balancing test cited.<sup>27</sup> The FLRA then ambiguously justifies that the Union representative may or may not have somehow been provoked by the proffer of the letter.<sup>28</sup> The letter reflects a management decision to reverse course on a verbal agreement concerning the upcoming negotiations that was based, at least in part,

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<sup>21</sup> See *Grissom*, 51 FLRA at 20. What the FLRA does not include in its statement about the proffer of the letter or the contents of the letter is the fact that the letter, as clearly noted above, cancels the “previously agreed-upon negotiations” where the Union had proffered a proposal to clarify a verbal agreement, with new (and not previously-agreed-upon) stipulations. A fair question as to the appropriateness of the Union representative’s reaction, after being caught attaching new terms to a verbal agreement, comes to mind, but it is never explored by the FLRA’s decision.

<sup>22</sup> *Grissom*, 51 FLRA at 12.

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

<sup>24</sup> *Id.* at 12-13.

<sup>25</sup> *Id.* On its face, the *Grissom* decision leaves a “huge gulf” between cases where the words and phrases proffered as “comparators” are comparable and somehow mitigate: “You can’t be that fu--ing stupid, lady”; “I always knew you was [sic] stupid, I knew you was [sic] god damn [sic] stupid”; and “You can suck my di--” in front of the LRO’s fellow members of the Management Negotiation Team.

<sup>26</sup> *Id.* at 13.

<sup>27</sup> See *Grissom*, 51 FLRA at 12.

<sup>28</sup> See *Grissom*, 51 FLRA at 20.

on the Union's proffer of a written proposal to memorialize the verbal agreement.<sup>29</sup> The Union's effective "counter" to the verbal agreement included new stipulations apparently never discussed before.<sup>30</sup> In any event, the FLRA specifically states that the extent is not clear as to the degree that the letter's proffer *actually provoked* the Union Representative's language and conduct that followed.<sup>31</sup> As to whether the nature of the language and the conduct of the Union representative were "flagrant misconduct" sufficient enough to remove it from protection, the FLRA *specifically notes* that the Union Representative's language and conduct "were offensive and should not be condoned," but the FLRA states that unspecified context justifies the language and conduct. The reasoning in the *Grissom* case effectively renders the balancing test meaningless and allows for no real requirement that Union representatives justify their conduct and the circumstances as outweighing the Federal agencies' interests in maintaining order and respect for its supervisory staff on the jobsite.<sup>32</sup>

### C. Criticism of the *Grissom* Analysis and Decision

The *Grissom* decision, where it is poorly-founded and executed, begs scrutiny of the ALJ's reasoning (where he found for the Air Force) and the case law that the FLRA based its reversal of the ALJ's decision on, since it represents the "stepping off point" of a defective line of case law, as a failure to properly balance Union and management interests under 5 U.S.C. § 7102 jurisprudence. Relevant at this point to this discussion are *both* the observations of the ALJ *and* the true meanings and holdings of the cases cited by the FLRA in the *Grissom* decision. The observations of the ALJ and the discussion of the case law that the FLRA uses to justify the *Grissom* decision (and reversal of the ALJ's decision) will be taken in turn, as further proof of the poor foundations of the robust language or debate doctrine in *Grissom* and subsequent cases that cite *Grissom* for the authority of the robust language or debate doctrine. The ALJ's decision is very instructive as to the nature of the exchange where actual references to the transcript provide more in the way of context. The ALJ acknowledges full awareness of the rights of the Union representatives' right

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<sup>29</sup> *See id.*

<sup>30</sup> *See id.*

<sup>31</sup> *See id.*

<sup>32</sup> This observation is effectively bolstered by the article entitled "Improving the Federal Employee Redress System" by Peter Marksteiner where he notes that "ranting, raving, and hurling obscenities at management officials in the workplace" can be "somehow related to union activity" and effectively renders the Union official "almost untouchable." Peter R. Marksteiner, *Improving the Federal Employee Redress System*, 17 Lab. Law. 389, 394 (2002). As examples of his assertions, Marksteiner notes the circumstances behind the *Grissom* case and another case where a visiting Union official referred to a supervisor/management official as a "goddamned monkey" and made the following threat: "Don't you know who you are dealing with? Boys like you end up missing and even your family will never find you. You know what I mean, boy?" *Id.* at 396; citing *Hearing on Labor-Management Relations at the Social Security Administration Before the Subcomm. on Social Security of the House Comm. on Ways and Means*, 105th Cong. (1998) (statement of Jim Schampers, Social Security District Manager, Waco, Texas).

to policies “favoring uninhibited, robust, and wide-open debate in labor disputes.”<sup>33</sup> The ALJ further re-affirms that “flagrant misconduct” is the boundary for Union officials to exceed in order to lose the protection under the robust language or debate doctrine.<sup>34</sup> The ALJ, the individual with the greater access to live witness testimony in the matter, noted: “Negotiations are not Sunday School exercises; nevertheless, vicious, vulgar, personal attacks of a highly sexual nature during negotiations is not protected activity.”<sup>35</sup> The ALJ even gives the Union representatives “the benefit of the doubt,” where he states that Ms. Smith (the LRO) “earned no kudos for diplomacy by her letter of December 3, 1992.”<sup>36</sup> As far as context goes, the ALJ takes pains to note that the Management Negotiation Team was shocked, and the Union representatives’ language and conduct was not effectively provoked by the Management Negotiation Team’s actions and language.<sup>37</sup> The FLRA does not overrule credibility determinations made by judges unless a clear preponderance of all relevant evidence demonstrates that the determination was incorrect.<sup>38</sup> As a

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<sup>33</sup> *Grissom*, 51 FLRA at 11-12; citing *Old Dominion Branch No. 496, Nat’l Ass’n of Letter Carriers v. Austin*, 418 U.S. 264 (1974).

<sup>34</sup> *Id.* at 12.

<sup>35</sup> *Id.* The ALJ further notes:

Messrs. Hartig and Smith combined in a vicious, uncouth, rude, vulgar, and profane personal attack on Ms. Sula Smith. Mr. Hartig’s voice was loud, his face red and his manner threatening when he shouted, *inter alia*, “We’re going to shove this up your ass” and “... the FLRA will shove this up your ass”; when Ms. Smith said that language was not appropriate, Mr. Hartig shouted in reply “I don’t give a fu-- what you think.” Mr. Smith joined in and said loudly, “You can’t be that fu--ing stupid, lady”; and then yelled, “I always knew you was stupid, I knew you was god damn stupid” or “I always thought you were stupid and now I know it.” Then outside, as they were leaving, Mr. Hartig told Ms. Smith, “You can suck my di--.” Their language constituted flagrant misconduct; was not protected conduct; and both Mr. Hartig and Mr. Smith were disciplined for their flagrant misconduct. The ALJ cites *Dep’t of Defense, Defense Mapping Agency, Aerospace Ctr., St. Louis, Mo.*, 17 FLRA 71 (1985).

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

<sup>37</sup> *Id.* at 24-25. The ALJ notes:

[E]ven the most cursory examination would have shown that negotiations were not being terminated, but only that realignment negotiations were ended and the parties would now move to full contract negotiations. She did nothing to provoke the loud, obscene diatribe inflicted upon her by Messrs. Hartig and Smith. She did not raise her voice, she did not use abusive or foul language, and she did not make derogatory comments. (Tr. 124.) Union negotiator Dicken was embarrassed by the conduct of Hartig and Melvin Smith (Tr. 215.) Col Moran was “taken back”; disappointed that people he had worked with for 10 ½ months would say those kind of things; disgusted (Tr. 184.); asked “Do we really have to take that kind of language?” (Tr. 186.) Ms. Craddock was shocked, appalled, and embarrassed (Tr. 201); and Ms. Sula Smith had never heard such language used (Tr. 146), was surprised, hurt, and quite embarrassed (Tr. 142). Indeed, as noted above, as a result of the vile and abusive personal attack of Messrs. Hartig and Smith, Ms. Sula Smith had to seek counseling, at her personal expense.

<sup>38</sup> *Dep’t of the Air Force, Randolph Air Force Base, San Antonio, Tex., and AFGE Local 1840*, 65

matter of fact, the FLRA specifically “adopt[s] the judge’s findings, conclusions, and recommended Order only to the extent consistent with this decision. We conclude that the Respondent violated the Statute, as alleged in the complaint.”<sup>39</sup> The FLRA’s treatment of the ALJ’s decision would be almost credible, if the FLRA noted the inconsistencies under fact and law, but the FLRA never points out any respect in which it differs from the ALJ’s findings and conclusions, aside from a difference in decision.<sup>40</sup> Further, as noted above, the FLRA never even articulates its reasoning under the balancing test, discussed above, whether it deigns to consider a majority of factors it states are relevant in its own balancing test or not.<sup>41</sup>

### 1. The *Grissom* Case Misuses the FLRA’s Decision in *AFGE and INS*, Where It Asserts That *Grissom* Somehow Falls Within Union-Management Balance for Protected Speech

In the process of giving what can only be described as “scant” attention to its own factors in the balancing test, the FLRA cobbles together cases that are only partially relevant or accurate, in light of the *Grissom* facts, to draw an overreaching conclusion. This is especially in light of the fact that the FLRA’s decision makes factual determinations concerning the application of facts to factors in the balancing test, which overturn the ALJ’s decision, where he was arguably in the better position to observe witnesses and develop facts during his hearing. The FLRA, in the *Grissom* case, cites to *AFGE and U.S. Department of Justice, Immigration and Naturalization Service (INS)*, 44 FLRA 1395 (1992), for the proposition that Section 7102 stands for the premise that unions and members may exercise the right to form, join, or assist any labor organization, or to refrain from such activity, without fear of penalty or reprisal.<sup>42</sup> As noted above, the FLRA found that the use of the words “asshole” and “space cadet” were protected under the ambit of Section 7102 and that punishment for their use was an unfair labor practice under Section 7116.<sup>43</sup> In the *INS* case, the grievant told a supervisor “I’m advising you now, asshole” during the course of an off-hours telephone call, where the grievant was discussing a request for official time and Leave Without Pay to perform Union duties from his home telephone.<sup>44</sup> During the same telephone call, the Grievant referred to the supervisor as a “space cadet” in response to the supervisor stating that the Grievant should pursue “official channels” to get the request acted on.<sup>45</sup> The agency suspended the Grievant for four

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FLRA 61 (2010).

<sup>39</sup> *Grissom*, 51 FLRA at 7.

<sup>40</sup> *See generally Grissom*, 51 FLRA 7.

<sup>41</sup> *See id.*

<sup>42</sup> *AFGE and U.S. Dep’t of Justice, Immigration and Naturalization Serv. (INS)*, 44 FLRA 1395, 1402 (1992).

<sup>43</sup> *See Grissom*, 51 FLRA at 12-13.

<sup>44</sup> *INS*, 44 FLRA 1395.

<sup>45</sup> *Id.*

days.<sup>46</sup> Given that the balance to be struck is a balance in which “permits leeway for impulsive behavior ... against the employer’s right to maintain order and respect for its supervisory staff on the jobsite.”<sup>47</sup> The telephone call was off-hours for the Grievant, where the Grievant was on his home telephone, and there very well may have never been an issue that would undermine the good order and discipline in the office, but for the fact that the agency disciplined an employee for remarks made in an off-hours telephone call. In any event, the utterance of “I’m advising you now, asshole” and “space cadet” to the supervisor from a home telephone scarcely rises to the level of the vulgar and vituperative attack on Ms. Sula Smith that is the subject of the *Grissom* case.<sup>48</sup>

## 2. The FLRA Misuses the FLRA’s *San Bruno* Decision to Justify That the Speech in the *Grissom* Case Falls Within the Ambit of “Protected Speech”

As opposed to the vulgar and vituperative attack on management officials (primarily Ms. Sula Smith) in *Grissom*, the FLRA cites to the decision in *Department of the Navy, Facilities Engineering Command, Western Division, San Bruno, California and NFFE, Local 2096 (San Bruno)*, 45 FLRA 138, 155 (1992), for the premise that a Union representative has the right to use “intemperate, abusive, or insulting language without fear of restraint or penalty” if he or she believes such rhetoric to be an effective means to make the Union’s point and notes that the decision cites to *Old Dominion Branch No. 46, National Association of Letter Carriers, AFL-CIO v. Austin* 418 U.S. 264, 283 (1984).<sup>49</sup> In the *San Bruno* decision, the FLRA notes: “First, we find many of Teale’s remarks, including his ethnic reference, offensive and do not condone them. However, our sensibilities are not at issue here and the protections of the Statute are not extended only to such comments as we condone.”<sup>50</sup> The “ethnic reference” attributed to Teale is the reference to a management official as “Sicilian Frank,” and the letter goes further to “cast aspersions” on management, where it suggests that purported management actions include guile and intrigue reminiscent of that found in the Soviet Union.<sup>51</sup> The comments were made in a

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

<sup>47</sup> See *Grissom*, 51 FLRA at 11.

<sup>48</sup> See *Grissom*, 51 FLRA at 24-25.

<sup>49</sup> See *Grissom*, 51 FLRA at 11.

<sup>50</sup> Dep’t of the Navy, Facilities Eng’g Command, W. Div., San Bruno, Cal. and NFFE, Local 2096 (*San Bruno*), 45 FLRA 138, 155 (1992).

<sup>51</sup> See *id.* at 142-43. The letter states:

UNION MEMBERSHIP AND UNAFFILIATED LOWER ECHELON STAFF:

WAR HAS BEEN DECLARED!!! AUGUST THE 25<sup>th</sup> shall forever remain a day of infamy on my calendar. August 25th 1989 was the day when [the Western Division] made it a personal WAR against ME!

This afternoon we...were informed as to who [the Western Division] had decided had to go...Naturally the DEATH LIST included ALL OF THE CON REPS plus

letter written by the Grievant, in response to a proposed Reduction in Force (RIF) action, and distributed to “four or five people” (despite the reference to a distribution to nine people in the letter).<sup>52</sup> The FLRA’s decision, at the cited point in the *San Bruno* opinion, actually provides the perfect distinction between the circumstances in the *Grissom* case and the *San Bruno* case.<sup>53</sup> The FLRA specifically notes (as to “context”): “When examined as a whole and in context, it is clear that the thrust of Teale’s letter was a condemnation of the Respondent’s decision to conduct a major reduction in force. As indicated by its text, the letter was written on the same afternoon as Teale was informed of the particular individuals who were to be subject to the upcoming RIF.”<sup>54</sup> Further, the *San Bruno* decision (the circumstances behind the Union letter in controversy was a RIF at the Navy’s San Bruno Facilities Engineering Command Facility) is predicated on the single use of an ethnic epithet, and actually goes to great pains to avoid the same vile and vituperative language and conduct

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THE ONE AND ONLY GS-9 ENGINEERING TECH. The bastards (for that is the most fitting adjective short of pure unadulterated profanity that sufficiently describes the bed of rattlesnakes in San Bruno) would have saved their poor typist a few hunts and pecks on the typewriter by simply typing [nine] Con Reps and John Teale.

[The Union President] also informed me that Admiral Montoya who was intending on leaving the Navy in December has decided to leave now in October so as it will give him plenty of time to commence to begin a new organization supplying Title II’s to the Navy. (And I thought such intrigue went out of style fifty years ago. I’ve got news for you all. Intrigue, guile, and graft is still with us and I guess it will always be although I will interject that in Russia not too long ago, such antics would result in ten well-aimed pieces of lead right between the ears.) Not so in America.

Another gem is that [the Western Division] have overstepped their authority. They are legal to RIF 50 bodies ONLY... Over 50 must come from OPM – Not Captain Smith and certainly not Sicilian Frank. (I do hope I don’t get kneecapped for the latter remark... if I do you will know who is responsible.)

[The Union President] informed me that the NFFE is commencing legal action against [the Western Division] in Washington on Monday next, 28 August. [The Union President] asks that we all do one thing (well several) write letters to everyone you can think of, Senators, Congressmen, The President (George Bush), newspapers, radio, and TV stations. Let everyone know what a bunch of bastards are running things for the Navy in San Bruno. It is time to pull out all the stops. Blackmail is a good way to start. If you have anything on any of these sons of bit--es let us know (quietly). Anything we can hold over their heads like they are doing with us

Patriotism, efficiency, and zeal are rewarded by pure treachery. I wouldn’t be surprised if Ruccolo hasn’t written the entire fiasco up as a &%%\$#ing [direct translation] Benny Sug [Beneficial Suggestion submission] for what he can get out of it, he is that kind of fellow.

<sup>52</sup> See *id.*

<sup>53</sup> See *id.* at 155-56.

<sup>54</sup> *Id.* at 156.

visited on Ms. Sula Smith in the *Grissom* case (to include the use of “&#36” to replace that would assumedly otherwise be “fu--ing” and the justification of the use of the word “bastard” as “the most fitting adjective short of pure unadulterated profanity”).<sup>55</sup> Another consideration in the *San Bruno* decision is the fact that the letter was a part of a larger campaign to save jobs in an actual RIF, directed by the NFFE Local President, as opposed to reacting to a letter proffered to notify of a change in a negotiating schedule.<sup>56</sup> In addition, it is significant to note that the *San Bruno* decision references an earlier FLRA decision, in which the Veterans Administration was the agency, where the FLRA found speech unprotected where it was not “replete with disparaging racial stereotyping and defamatory racial insults,” directed at one manager who is apparently unpopular with “rank and file” and to be excoriated as an “Uncle Tom” for reflecting management views after elevation to a management position.<sup>57</sup> While the attack visited on Mr. Raynold Cole is by no

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<sup>55</sup> *Id.* at 156-57; see note 35, 37.

<sup>56</sup> See *Dep’t of the Air Force v. AFGE (Grissom)*, 51 FLRA 7, 24-25 (Aug. 18, 1995); *San Bruno* at 142-43.

<sup>57</sup> See *San Bruno*, 45 FLRA at 157; citing *Veterans’ Admin., Washington, D.C., and Veterans’ Admin. Med. Ctr., Cincinnati, Ohio*, 26 FLRA 114 (1987). In the VA case, the Local President wrote the following about the Chief of Building Services at the Cincinnati VA facility:

FROM THE PRESIDENT’S DESK....

“Raynold Cole—The Polarity Paradox”

When the Chief of Personnel Service and myself are homogenous on anything, it is indeed an event which is extraordinary but, his captioning of Raynold Cole as a “bozo” is one of the most accurate character assessments I have ever encountered. Raynold Cole is the variable which was most significant in the decadence of Building Management Service. Under the auspices of Raynold Cole Building Management Service employees’ motivational levels have plunged to record lows and the entire service has been engulfed in a state of dysfunctionism. Raynold Cole has an autocratic style of management and consequently believes employees must be closely scrutinized and cannot be entrusted to carry out their respective tasks autonomously. He has abandoned his obligation to communicate with his employees and treat them as if they were on a subliminal level in comparison with himself. He has departed from the historical past practice of having one homogenous staff meeting for all Building Management Service employees and adapted a new practice of having several isolated section meetings and prohibiting employees from asking questions of any kind. It is often times said that an effective leader is supportive of his subordinates. If support is a prerequisite for the composite parts of an effective leader, Raynold Cole could not be categorized as an effective leader. Under no circumstances does he support his subordinates but rather succumbs in a submissive mannerism to whatever variable is operant, in the absence of sound logic or existent policy or statute Raynold Cole is an exact replica of the house negroes whom in exchange for a lesser burden, kept order among the defiant masses to the extent of initiating penalties if the “massuh” felt it was warranted. Expertise in labor/management, collective bargaining, management or EEO were not prerequisites for his position, because he does not possess any of these things. It is the ardent and vehement manner which he initiates actions and penalties upon instruction in addition to his concurrence with their theories of inferiority. The fact that he came from among rank and file employees has long

means excusable and is humiliating, it still does not reflect the sudden turn on Ms. Sula Smith, over the timing of negotiations in a meeting that included both Union members and Ms. Smith's fellow members of the Management Negotiation Team, into a vile, vulgar, vicious, and vituperative attack.<sup>58</sup>

### 3. The *Grissom* Case Misuses the U.S. Supreme Court's *Old Dominion* Decision's "Protected Speech" Decision to Justify the Decision in *Grissom*

As opposed to contemplating a vile, vulgar, vicious, and vituperative attack on management officials, the *Old Dominion Branch No. 496, National Association of Letter Carriers, AFL-CIO v. Austin*, 418 U.S. 264 (1974), is a U.S. Supreme Court case cited for the proposition that a Union representative has the right to use "intemperate, abusive, or insulting language without fear of restraint or penalty" if he or she believes such rhetoric to be an effective means to make the Union's point in a much milder context.<sup>59</sup> The Supreme Court decision in *Old Dominion* notes that such protected language is at least in large part afforded "cover" under law, because the term "scab" is a "common parlance in labor disputes and has specifically been held to be entitled to the protection of Section 7 of the National Labor Relations Act (private sector labor relations statutes).<sup>60</sup> As with the decision in the *San Bruno* case above, the *Old Dominion* case is easily distinguishable from the *Grissom* case, where (as opposed to a disagreement over a negotiation schedule) the language and conduct

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alluded him. Raynold Cole's appointment as Chairperson of the EEO Committee is a stereotypical response to EEO: Appoint a Black to serve as a figurehead while his anglo saxon counterpart, the Director makes all the decisions and has absolute authority over the committee.

Token appointments such as Raynold Cole's appointment to Chief of Building Management Service are representative of the purported incremental progress the oppressor has attempted to use in the past to mentally enslave blacks and consequently persuade them to deny their heritage in an asinine attempt to substantiate that they are homogenous with their anglo saxon counterparts. It appears that Raynold Cole is an updated rendition of the infamous era of the past that black artists captioned as "the spook who sat by the door" and the "Uncle Tom" era which plagued and demoralized blacks in the past. AFGE Local 2031 is demanding the removal of Raynold Cole.

<sup>58</sup> See *Grissom*, 51 FLRA at 11-12, 20, *San Bruno*, 45 FLRA at 157.

<sup>59</sup> See *Grissom*, 51 FLRA at 11-12, 20.

<sup>60</sup> *Old Dominion Branch No. 496, Nat'l Ass'n of Letter Carriers, AFL-CIO v. Austin (Old Dominion)*, 418 U.S. 264 (1974). The substance of the *Old Dominion* case is the litigation of a state libel suit filed over the distribution of a flier that contains the following verbiage concerning a labor dispute that had included the use of "scabs" by the employer:

[The letter included a list of "scabs," followed by a definition of a "scab" formulated by author Jack London.]

#### The Scab

After God had finished the rattlesnake, the toad, and the vampire. He had some awful substance left with which he made the scab.

of *Old Dominion* and *San Bruno* stem from an ongoing labor dispute or involve the very livelihood of Union employees *at that time*.<sup>61</sup> In addition, the “intemperate, abusive, or insulting language” contemplated in the *Old Dominion* case is the word “scab,” which is not just a subject of legitimate American literature, but it is a part of the American lexicon, not as profanity, but as a word to describe a certain class of worker in the context of a labor dispute. The Supreme Court’s decision in *Old Dominion*, as with the substance of the *San Bruno* decision, scarcely justifies (as intended by the FLRA in the *Grissom* case) the outburst in the *Grissom* case and does not provide the justification for finding for the Union in the *Grissom* case. The *Old Dominion* case is also significant for what it is *not cited for* by the FLRA. The Supreme Court, in the *Old Dominion* case opinion, observes: “One of the primary reasons for the law’s [Section 7 of the NLRA as an analogue to what would become 5 U.S.C. § 7102 under the Civil Service Reform Act of 1978] protection of union speech is to ensure that union organizers are free to try and *peacefully persuade* other employees to persuade other employees to join the union without inhibition or restraint [where organizations enjoy similar rights under Section 7 of the NLRA and 5 U.S.C. § 7102].”<sup>62</sup> Simply put, the U.S. Supreme Court condones a mildly derogatory term, “scab,” and stands for the premise that while Union-management relations require some controversy, the “bottom line” is that the protection accorded union speech is to further *peaceful persuasion*.

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A scab is a two-legged animal with a corkscrew soul, a water brain, a combination backbone of jelly and glue. Where others have hearts, he carries a tumor of rotten principles.

When a scab comes down the street, men turn their backs and Angels weep in Heaven, and the Devil shuts the gates of hell to keep him out.

No man (or woman) has a right to scab so long as there is a pool of water to drown his carcass in, or a rope long enough to hang his body with. Judas was a gentleman compared with a scab. For betraying his Master, he had character enough to hang himself. A scab has not.

Esau sold his birthright for a mess of pottage. Judas sold his Savior for thirty pieces of silver. Benedict Arnold sold his country for a promise of a commission in the British Army. The scab sells his birthright, country, his wife, his children and his fellowmen for an unfulfilled promise from his employer.

Esau was a traitor to himself; Judas was a traitor to his God; Benedict Arnold was a traitor to his country; a SCAB is a traitor to his God, his country, his family and his class.

<sup>61</sup> See Dep’t of the Navy, Facilities Eng’g Command, W. Div., San Bruno, Cal. and NFFE, Local 2096 (*San Bruno*), 45 FLRA 138, 142-143, 157 (1992).

<sup>62</sup> See *Old Dominion*, 418 U.S. at 279.

4. The FLRA's Use of Its Decision in *Defense Mapping* as the "Model" for Its "Protected Speech" Balancing Test is Misused, Where It Over-Extends *Defense Mapping's* Notion of "Protected Speech" to Justify the Decision in *Grissom*

The *Defense Mapping* case, as used in the *Grissom* case to articulate the FLRA's balancing test (along with the factors examined within the balancing test), similarly does not justify the FLRA's decision in the *Grissom* case.<sup>63</sup> The FLRA in the *Defense Mapping* case adopts the ALJ's findings and conclusions.<sup>64</sup> In the *Defense Mapping* case, the Grievant (in the context of a grievance meeting) pointed her finger directly at her supervisor and stated: "I did. I admit I said it ["get screwed"] before and I'll say it to your [sic] again George. Get screwed."<sup>65</sup> The context of the language and conduct that was the subject of the *Defense Mapping* case was a grievance meeting to discuss the Grievant's use of the phrase "get screwed" to her supervisor on the shop floor.<sup>66</sup> The utterance at the grievance meeting netted the Grievant a Letter of Reprimand, which she challenged before an ALJ and the FLRA.<sup>67</sup> The FLRA, in *Defense Mapping* decision, re-articulates the balancing test noted above and the four factors considered within that balancing test.<sup>68</sup> The FLRA then goes on to assess the case within the articulated balancing test.<sup>69</sup> The FLRA first notes that the place of discussion, a closed-door meeting with Grievant, weighs "heavily" in Grievant's favor.<sup>70</sup> The FLRA then notes that, where Grievant was in the process of being disciplined for uttering "get screwed" before, the utterance during the grievance meeting was not impulsive (and not in Grievant's favor).<sup>71</sup> Both the ALJ and the Authority noted a distinction between simply "letting off steam spontaneously" and engaging in excessively abusive behavior of supervisory staff.<sup>72</sup> Ultimately, both the ALJ and the FLRA found that the discipline handed down against the Grievant, under the circumstances, did not violate the Grievant's rights under 5 U.S.C. § 7102 and did not constitute an unfair labor practice under the provisions of 5 U.S.C. § 7116(a)(1).<sup>73</sup>

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<sup>63</sup> See Dep't of the Air Force v. AFGE (*Grissom*), 51 FLRA 11-12 (Aug. 18, 1995).

<sup>64</sup> Dep't of Defense, *Defense Mapping Agency Aerospace Ctr.*, St. Louis, Mo., 17 FLRA 71 (1985).

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

<sup>66</sup> See *id.* at 75.

<sup>67</sup> See *id.* at 71.

<sup>68</sup> See *id.* at 81; see also *Grissom*, 51 FLRA at 11.

<sup>69</sup> See Dep't of Defense, *Defense Mapping Agency Aerospace Ctr.*, St. Louis, Mo., 17 FLRA 71, 81 (1985).

<sup>70</sup> *Id.*

<sup>71</sup> *Id.* at 81-82.

<sup>72</sup> *Id.* at 82-83.

<sup>73</sup> *Id.* at 83; see also 5 U.S.C. §§ 7102, 7116.

## 5. Overview: *Grissom*'s Cases Proffered for Justification Do Not "Add Up"

The *Grissom* decision does not comport with the balancing test that it acknowledges is controlling in this case (*Defense Mapping*), where the Union representative's punishment for uttering "get screwed" was upheld by the FLRA. The *Grissom* case simply cites the balancing test and ignores its application. The *Grissom* decision inexplicably states that it adopts the ALJ's findings and conclusions, and recommended Order, only to the extent consistent with this decision (with none noted below, except for the "bottom-line conclusion").<sup>74</sup> In other words, the FLRA states it cannot find fault with the ALJ's findings and conclusions (despite the fact that it substitutes a number of factual determinations of its own for the original fact-finder and scarcely justifies its own reversal of the ALJ's original decision). In addition, the case law cited by the FLRA does not support the conclusions the FLRA draws, as also noted above. The *Grissom* case was hardly the first to be heard by the FLRA concerning language and conduct that was protected (or unprotected) under the robust language or speech doctrine, as made obvious by the cases it "cobble" together to justify its decision, but it is a "watershed case," where it represents a shift in the FLRA's robust language or speech doctrine and has spawned an unfortunate progeny of decisions that perpetuate, and magnify, the impact of the Authority's original error.<sup>75</sup> In addition to being ill-justified by previous case law and its own internal logic, the *Grissom* case is inconsistent with, and betrays the original intentions behind the Civil Service Reform Act of 1978, is even farther-reaching than private sector and non-Federal sector unions' similar rights (where they do not have the plethora of rights and benefits guaranteed to Federal employees), and exceeds even the rights accorded citizens under the First Amendment of the U.S. Constitution. The most "stark" comparison comes from the difference in the treatment of the robust language or debate doctrine in the closest analogue to the FLRA: the National Labor Relations Board (NLRB). The NLRB hears cases for private-sector union activity and cases concerning labor-management

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<sup>74</sup> Dep't of the Air Force v. AFGE (*Grissom*), 51 FLRA 7 (Aug. 18, 1995).

<sup>75</sup> Cases that the *Grissom* decision has subsequently been used to justify Union representational misconduct under the robust language or debate doctrine include (list not exhaustive): Marine Air-Ground Combat Ctr., Twenty-Nine Palms, Calif. and AFGE, Local 2018 (*29 Palms*), 1997 WL 114361 (1997); Air Force Flight Test Ctr. and AFGE Local 1406 (*Flight Test Center*), 52 FLRA 1455 (1998); in Defense Contract Mgmt. Agency and AFGE 3953, 59 FLRA 223 (2003); AFGE, Local 2586 and U.S. Air Force, 97th Air Mobility Wing, Altus AFB, Oklahoma, 59 FLRA 700 (2004); AFGE, Local 2145, and Dep't of Veterans Affairs Med. Ctr., Richmond, Va., 64 FLRA 121; Dept. of Transp., FAA and NATCO, 64 FLRA 66 (2010); U.S. Dept. of Justice, Bureau of Prisons Med. Ctr., Fort Worth, Tex. and AFGE 1298, 2000 WL 35566241 (2000); U.S. Dept. of Energy, Oak Ridge, Tenn. and Office and Prof'l Emps. Int'l Union, Local 268, 57 FLRA 343 (2001); NAGE, Local R3-32 and U.S. Air Force, 913th Air Wing, Willow Grove Air Station, Pa. (*Willow Grove*), 61 FLRA 127-28 (2005); AFGE and U.S. Dep't of Health and Human Servs., Nat'l Inst. of Env'tl. Health Sciences, Research, Triangle Park, N.C. (*Triangle Park*), 65 FLRA 117 (2011); AFGE, Local 987 and U.S. Dep't of the Air Force, Warner Robins Air Logistics Center, Robins Air Force Base, Ga. (*Warner-Robins ALC*), 63 FLRA 119 (2009).

relationships, within a context where private sector employees do not enjoy the protections guaranteed under statute for Federal sector employees.<sup>76</sup>

### III. FLRA ROBUST DOCTRINE/LANGUAGE COMPARISON TO PRIVATE OR NON-PUBLIC SECTOR APPLICATIONS

While there exists a large conceptual divide between private and public sector labor relations, the rules governing Federal sector employees was actually based on private sector laws and makes for a viable comparison between the two.<sup>77</sup> Section III(A) discusses the fact that the NLRB accords private sector employees (who have far fewer employment rights and guarantees concerning employment than Federal sector employees) much less in the way of latitude, when it comes to a robust language or debate doctrine. This development (which is much more restrictive of private sector employees) has developed overtime, which is discussed in Section III(B), below. Section III(C) culminates with a discussion of the impact of the two (private versus public) doctrines have on case law and the rights guaranteed for employees.

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<sup>76</sup> Title 5 of the U.S.C. was amended by the Civil Service Reform Act to provide the following provisions guaranteeing Federal employee rights: Chapter 23 (Merit System Principles; to include the emphasis on the protection of procedural rights for Federal employees); Chapter 43 (Guarantees concerning the assessment of and dealing with performance issues (to include appraisals, etc.) of employees); Chapter 11 (Establishment of the Office of Personnel Management; charged with promulgating and enforcing regulations that guarantee the rights of employees and management, with an emphasis on notice, guaranteed procedure and appeal rights); Chapter 12 (Establishment of the Merit Systems Protection Board and the Office of Special Counsel to guarantee employee rights in the cases of discipline, etc.); Chapter 75 (Procedures guaranteeing the rights of employees and enumerating the procedures management must adhere to in the process of disciplining Federal employees); Chapter 77 (Appellate procedures for employees disciplined; Chapter 54 (Merit Pay provisions); Chapter 71 (Labor-management relations; to include the guarantee of representational rights and limitations on management actions in dealing with labor unions); Chapter 53 (Grade and pay provisions; including guarantees of pay rates, overtime, etc.).

<sup>77</sup> *Civil Service Reform Act of 1978 and Reorganization of Plan No. 2 of 1978: Hearings Before the Committee on Governmental Affairs*, 95th Cong. 237 (1978) (Civil Service Commission Responses to Questions Posed to Senators [Abraham] Ribicoff and [Charles H.] Percy taken during testimony before the Committee on April 6, 1978.) An example of the parity between private sector adjudication (NLRB) and public sector adjudication of such issues heard by both bodies is best exemplified by an answer to the Committee tasked with developing the Civil Service Reform Act of 1978 question posed to the United States Civil Service Commission. The question posed was: "Will the FLRA have policy-setting, leadership role? Will it advise agencies or the President? Will it issue advisory opinions?" The Commission's answer was as follows:

FLRA will serve as a third-party adjudicatory body for Federal labor-management relations, just as the NLRB does for the private sector.

## A. NLRB versus FLRA Robust Language/Debate Doctrines

Ostensibly, the statutory rights that the Civil Service Act of 1978 affords Federal sector employees largely mirrors the rights afforded private sector employees under Section 7 of the National Labor Relations Act (NLRA).<sup>78</sup> While the provisions under the FLRA and the NLRA are very similar and are even conceptually cross-applied in the U.S. Supreme Court's *Old Dominion* decision above, the reality is very different. As Peter Marksteiner observed in *The Labor Lawyer*, there are very important distinctions between the FLRA-context, as compared with the NLRB-context:

Federal employees enjoy considerably more redress rights than their private sector counterparts, and there are virtually no barriers built into the system to discourage disgruntled employees from using the various complaint processes to harass supervisors and coworkers. Federal employees file complaints five times more often than private sector employees do, adding considerable costs to the price of trying to conduct business with a federal workforce. Moreover the costs are not solely economic in nature. It is growing increasingly difficult to attract and retain high quality employees in a system

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<sup>78</sup> See 5 U.S.C. § 7102 (2010) which provides:

Each employee shall have the right to form, join, or assist any labor organization, or to refrain from such activity, freely and without fear of penalty or reprisal, and each employee shall be protected in the exercise of such right. Except as otherwise provided under this chapter, such right includes the right –

- (1) To act for a labor organization in the capacity of a representative and the right, in that capacity, to present the views of the labor organization to heads of agencies and other officials of the executive branch of the Government, the Congress, or other appropriate authorities, and
- (2) To engage in collective bargaining with respect to conditions of employment through representatives chosen by employees under this chapter.

Section 7 of the NLRA provides:

many federal managers believe insulates employees from being held accountable for poor performance or misconduct.<sup>79</sup>

Further, Federal supervisory employees are left to feel helpless when dealing with Federal sector labor union representatives, where the Union representatives enjoy what can only be described as a “seriously inequitable bargaining position”:

[U]nion employees do not seem to be bound by the same standards of conduct all other employees must follow. It is not uncommon for union officials to resort to name calling and abusive language ... then hide behind the phrase “robust discussion.” I had a situation in my own office in which a visiting union employee called me a “goddamned monkey” and threatened me with the statement “Don’t you know who you are dealing with? Boys like you end up missing and even your family will never find you. You know what I mean, boy?” This statement was made while he was poking his finger in my chest. When I filed a grievance on this issue, the union responded by saying it was acceptable language because it was robust discussion. Both the contract and our Standards of Conduct require employees to behave in a courteous and non-threatening manner. Appointment to a union position should not exempt the representative from this basic requirement.<sup>80</sup>

As the following overview of NLRA case law reveals, the above threat visited on the Federal manager/supervisor by a Federal employee Union representative is also not reflected in private sector robust language or debate doctrine under NLRB jurisprudence, despite the fact that Federal employees already enjoy incomparably superior protections and benefits to those of employees in the private sector. Not least among these benefits is the fact that employees in the private sector work under largely “at-will” employment situations, but for Union activity in their favor: a situation clearly not contemplated by Federal employees, where (even absent the

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Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

<sup>79</sup> Peter Marksteiner, *Improving the Federal Employee Redress System*, 17 Lab. Law. 389, 390 (Winter/Spring 2002).

<sup>80</sup> Marksteiner at 397; citing *Hearing on Labor-Management Relations at the Social Security Administration before the Subcomm. on Social Security of the House Ways and Means Cmte.*, 105th Cong. (1998) (statement of Jim Schampers, Social Security district managers, Waco, Texas).

protection of Unions and the FLRA) the Merits Systems Protection Board acts as a “bulwark” against illegitimate removal from employment.<sup>81</sup>

## B. Overview of the Development of the Robust Language/Debate Doctrine Under the NLRB

While the statutory underpinnings provided by 5 U.S.C. § 7102 and Section 7 of the NLRA, the development of the robust language or debate doctrine between the Federal and private sectors has been starkly different; to the point of almost being a “study in opposites.”<sup>82</sup> As with the analysis of the development of the robust language or debate doctrine under the FLRA, the study of the doctrine under the NLRB requires essentially “going back to the beginning”: the first or seminal cases in the doctrine’s development. A seminal case in the development of the balancing test to determine whether individual speech (in a representational capacity) is protected or not is the NLRB’s decision in *Atlantic Steel Company and Chastain* (*Atlantic Steel*), 245 NLRB 814 (1979).<sup>83</sup> In *Atlantic Steel*, the NLRB was faced with a set of circumstances where Chastain (a Union official) asked a supervisor if a probationary employee had worked over time.<sup>84</sup> The *Atlantic Steel* opinion notes that Chastain made the inquiry out of concern for the probationary employee.<sup>85</sup> The supervisor replied, on the shop floor and with Chastain and two other employees within earshot that the “whole crew” had been asked to take overtime, instead of just the probationary employee.<sup>86</sup> As the supervisor began to walk away, Chastain turned to another employee and called the supervisor a “lying son of a bit—,” stated that the supervisor had told a “motherfu--ing lie,” or referred to the supervisor as a “motherfu--ing liar.”<sup>87</sup> The differentiation between the purported statements is the fact that the testimony on Chastain’s utterance is inconsistent, as reflected in the NLRB’s opinion in *Atlantic Steel*.<sup>88</sup> Chastain was suspended, pending discharge, which was later imposed.<sup>89</sup>

In its calculus to determine whether Chastain’s language and conduct was protected, the NLRB examined “several factors” to determine if Chastain has “crossed the line” and had lost the protection of the statute (NLRB): (1) the place of discussion; (2) the subject matter of the discussion; (3) the nature of the employee’s

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<sup>81</sup> See generally 5 U.S.C., Ch. 43 and 75.

<sup>82</sup> See 5 U.S.C. § 7102 (2010).

<sup>83</sup> Dep’t of the Air Force v. AFGE (*Grisson*), 51 FLRA 7 (Aug. 18, 1995); *Atlantic Steel Company and Chastain*, 245 NLRB 814 (1979).

<sup>84</sup> *Atlantic Steel Company and Chastain*, 245 NLRB 814 (1979).

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

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

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

outburst; and (4) whether the employee's outburst was, in any way, provoked by an employer's unfair labor practice.<sup>90</sup> The NLRB found the following:

Here the arbitrator considered the factors which the Board considers, and conclude that the employee's discharge was warranted based on reasons not repugnant to the Act. He noted that the incident occurred on the production floor during working time (not at a grievance meeting), that the employee's question about overtime expressed legitimate concern which could be grieved, and that the supervisor had investigated and answered the question promptly; but, nevertheless, the employee had reacted in an obscene fashion without provocation and in a work setting where such conduct was not normally tolerated. He further considered the employee's past record and concluded that, considered together, this record established a reasonable basis for discharge.<sup>91</sup>

The NLRB adopted the arbitrator's findings and conclusions to the extent they were consistent with the NLRB's decision.<sup>92</sup> In an obvious "underscore" of the difference between the treatment of the robust language or debate doctrine in the Federal and private sectors, *Atlantic Steel* actually "reins in" the protected speech short of the "obscene insubordination short of physical violence":

We find nothing in the arbitrator's decision that is repugnant to the Act. Indeed a contrary result in this case would mean that any employee's off-hand complaint would be protected activity which would shield obscene insubordination short of physical violence. That result would not be consistent with the Act. Accordingly we conclude that it will effectuate the purposes of the Act to give conclusive effect to the grievance award, and, on that basis, we shall dismiss the complaint in its entirety.<sup>93</sup>

The starkest contrast of the *Atlantic Steel* decision it is the fact that the NLRB actually acknowledges that fact that curbing profane utterances is in keeping with the goal of establishing effective labor-management relations under the NLRA (as an analogue to the FLRA).

The stark contrast of the development of the robust language or debate doctrine under the Federal versus private is further underscored by the decision in *Marico Enterprises, Inc. and Local I-J, SIEU, AFL-CIO*, 283 NLRB 726 (1987), where discharge of an employee for an obscene finger gesture was upheld by the

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<sup>90</sup> *Id.* at 816.

<sup>91</sup> *Id.* at 816-17.

<sup>92</sup> *Id.* at 814.

<sup>93</sup> *Id.* at 816-17.

NLRB.<sup>94</sup> In this case, a confrontation between the employee and the President of Marico Enterprises, Jules Cohen, was triggered by an Immigration and Naturalization Service (INS) raid on the workplace.<sup>95</sup> The employee (Pauyo) represented other employees in the workplace, where they accused Mr. Cohen of actually calling the INS to the workplace, as an alleged pretext for stifling union activity.<sup>96</sup> The situation escalated to the point that employees were engaging in almost riotous activity, with Pauyo seemingly an instigator and a representative for similarly-situated employees (both purportedly engaging in union activity and potentially affected by the INS raid) to Mr. Cohen.<sup>97</sup> The confrontation between Pauyo, employees, and Mr. Cohen escalated over the course of a couple of days, with the relationship between Pauyo and Cohen deteriorating as time went on.<sup>98</sup> The situation deteriorated to the point that Cohen requested that Pauyo leave the premises, to which Pauyo replied he would leave only if fired.<sup>99</sup> It was just before this time that Pauyo made an obscene finger gesture in the form of a “bird” at Cohen.<sup>100</sup> The combination of the “bird” shot at Cohen, along with Pauyo’s intransigence in refusing to leave the workplace when requested to do so by Cohen, compelled the NLRB to uphold the ALJ’s decision to reaffirm the employer’s decision to terminate Pauyo.<sup>101</sup> A key statement in the NLRB’s decision to uphold the ALJ’s decision is as follows: “The Board found the discharge lawful as the employee ‘brazenly flouted’ his supervisor’s direction, which constituted ‘the ultimate challenge to Respondent’s authority.’ I find the instant situation analogous.”<sup>102</sup> In addition, the NLRB notes, essentially that the Union representative’s refusal to obey a management order to “cease and desist” took the conduct beyond that protected by law:

The Board found that the steward’s continued intransigence was not a part of the *res gestae* of the grievance discussion. Rather the order to stop shouting was a reasonable and lawful order that should have been obeyed, and his refusal to do so was not related to [grievant’s] protected processing of the grievance.<sup>103</sup>

The refusal to “cease and desist,” despite the message apparently having reached management’s ears is important to the management maintenance of good order and discipline part of the balance, where an employee, even where engaging in

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<sup>94</sup> Marico Enters., Inc. and Local 1-J, SIEU, AFL-CIO, 283 NLRB 726 (1987).

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

<sup>96</sup> *Id.* at 726-28.

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

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

<sup>99</sup> *Id.* at 730.

<sup>100</sup> *Id.*

<sup>101</sup> *Id.* at 732.

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

<sup>103</sup> *Id.* at 731.

protected activity, may not engage in conduct that loses the protection of the statute (refusal to obey an order after the position of the union representative has already been made known to management). *Marico Enterprises* stands not just as a stark counter-example to the decision in the *Grissom* case because of the relatively minor language and/or conduct disciplined for, but it also highlights the fact that the FLRA simply failed to take into account the fact that, despite requests to tone down the outburst and note that the language and conduct was inappropriate in the *Grissom* case, the FLRA simply ignores these and allows the Union to effectively “walk all over” management, which is not a part of the labor-management relationship contemplated under law.

Dove-tailing the NLRB’s analysis of the circumstances, to determine whether conduct and language falls outside of the protection of Section 7 of the NLRA, is the NLRB’s decision in *Hotel Ramada of Nevada and Professional, Clerical, and Miscellaneous Employees, Teamsters, Local 995, AFL-CIO (Hotel Ramada)*, 2002 WL 121804 (N.L.R.B. Div. of Judges) (2002).<sup>104</sup> The judge hearing the case found that the rude and discourteous conduct during a discussion with a supervisor was to be sustained in a decision that split findings between the employer and the Union.<sup>105</sup> The language and conduct made the subject of the robust language or debate aspect of the *Hotel Ramada* case occurred over the course of months.<sup>106</sup> The derogatory comments made were about the supervisor’s breath and oral hygiene and of failure to maintain a satisfactory relationship between employees and supervisors, and, in particular, where Union representative responded to the supervisor’s question if the Union representative was “through for the day” to discuss a work matter; the Union representative replied “It’s none of your business.”<sup>107</sup> In the formulation of the final decision, the judge stated that the Union lost protection of Section 7 rights (NLRA) where the connection to union activity was “speculative,” and where the rude comments made about the management official was “concerted” (over an extended period of time):

Also, it is clearly the Board’s position that there is no violation of the Act when a known union supporter is disciplined for a disrespectful verbal attack on a management official where the nexus of the concerted action is both remote and highly speculative. *The Broadway*, 267 NLRB 385, 407 (1983). The Board has further held that even an employee who is engaged in concerted protected activity, by opprobrious conduct, lost the protection of the Act.

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<sup>104</sup> *Hotel Ramada of Nev. and Prof’l, Clerical, and Miscellaneous Emps., Teamsters, Local 995, AFL-CIO*, 2002 WL 121804 (N.L.R.B. Div. of Judges) (2002).

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

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

*Atlantic Steel Co.*, 245 NLRB 814, 816 (1979); also see *Marico Enterprises, Inc.*, 283 NLRB 726, 732 (1987).<sup>108</sup>

Also significant in the judge's decision are the following facts that "pulled" the employee's conduct out of the protection of the Act, even where the employee was engaged in activity ostensibly aimed at protecting the interests of the bargaining unit:

While there were clearly personality problems between Burgos [employee] and supervisors Hogan, Fusco, and Simmons, it is equally as clear that Burgos used every opportunity to turn collective-bargaining issues into personal issues by demeaning and insulting behavior towards management. Simply put, Burgos went out of his way to be rude. He appeared to enjoy causing problems, totally unrelated to any legitimate union activity. Union activity cannot be used as a shield to protect him from improper conduct, unrelated to that of union activity, for which the Respondents had a right to discipline.<sup>109</sup>

This is a radically different line of reasoning from that in the *Grissom* case, where the "contextual" analysis is completely lacking, as noted above, and where the *Grissom* Board simply accords a poorly-justified protection of the Union members for their language and conduct, without a single consideration that the activity (because of personal motivation or animus) may bring it outside of the protection of the FLRA (as with the NLRA). Further, and as noted with the cases above, the NLRA is willing to enforce professional behavior and decorum with private sector Union employees, where the FLRA is not (with a group of employees that have a lot more in the way of benefits and protections and far less to lose).

The NLRB's analysis of language and conduct under the robust language or debate doctrine has continued, as reflected in the NLRB's decision in *Daimler Chrysler Corp. and UAW, Local 412 (Unit 53) (Daimler Chrysler)*, AFL-CIO, 344 NLRB 1324 (2005).<sup>110</sup> In the *Daimler Chrysler* case, the Union official, in the process of attempting to make arrangements for a grievance investigation on 25 March 1999, called a non-bargaining unit employee and "asshole" and stated "bullsh--, I want the meeting now."<sup>111</sup> The Union official, as he then attempted to leave the area and in response to a request to stay, asked "is that an order?"<sup>112</sup> The Union official then declared loudly "fu[--] this sh[--]" and that he did not "have to put up with this bullsh[--]."<sup>113</sup> The exchange took place in a non-managerial "cubicle farm" that

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

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

<sup>110</sup> *DaimlerChrysler Corp. and UAW, Local 412 (Unit 53), AFL-CIO*, 344 NLRB 1324 (2005).

<sup>111</sup> *Id.* at 1328.

<sup>112</sup> *Id.*

<sup>113</sup> *Id.* at 1329.

a number of other workers (both managerial and non-managerial), with approximately three that could hear the conversation, according to the *Daimler Chrysler* opinion.<sup>114</sup> The Union official's demeanor was described as "intimidating."<sup>115</sup> The *Daimler Chrysler* Board noted as the governing law on robust language or debate, the following:

Where an employee engages in indefensible or abusive misconduct during otherwise protected activity, the Employee forfeits the Act's protection. Whether the Act's protection is lost depends on a balancing of four factors: (1) the place of the discussion between the employee and employer; (2) the subject matter of the discussion; (3) the nature of the employee's outburst was, in any way, provoked by the employer's unfair labor practice. See *Atlantic Steel Co.*, 245 NLRB 814 (1979); see also *Trus Joist Macmillan*, 341 NLRB 369, 371 (2004) (applying *Atlantic Steel* factors to find employee use of profanity and lewd gestures removed from statutory protection). Applying these factors, we find that [the employee's] March 25 conduct cost him the Act's the protection.<sup>116</sup>

The NLRB then examines the language and context within the *Atlantic Steel* test, as articulated both in the quote above and as articulated in the above discussion of the *Atlantic Steel* case.<sup>117</sup> In examining the first factor in the *Atlantic Steel* test, the NLRB notes that it weighs against protection of the employee's conduct, where the discussion took place amidst a "cubicle farm" containing a number of managerial and non-managerial employees.<sup>118</sup> The NLRB furthers its rationale, where it notes: "In such a place, [the employee's] sustained profanity would reasonably tend to affect workplace discipline by undermining the authority of the supervisor subject to his vituperative attack."<sup>119</sup> The NLRB notes that the second *Atlantic Steel* factor weighs in favor of protecting the employee's speech, where it "took place in the normal course of [the employee's] exercise of his grievance-investigation duties, which are protected."<sup>120</sup> The NLRB then notes that the third *Atlantic Steel* factor weighs against protection under the Act, where the employee "was insubordinate and profane" during the meeting or encounter.<sup>121</sup> The NLRB also notes that, in finding that the third factor weighs out of favor of the employee, that the fact "the profanity involved more than a single spontaneous outburst" is a factor essentially

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<sup>114</sup> *Id.* at 1328-29.

<sup>115</sup> *Id.* at 1329.

<sup>116</sup> *Id.* at 1329.

<sup>117</sup> *Id.*; *Atlantic Steel Company and Chastain*, 245 NLRB 814, 816 (1979).

<sup>118</sup> *DaimlerChrysler*, 344 NLRB at 1329.

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

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

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

in aggravation of the employee's language and conduct during the episode.<sup>122</sup> As to the provocation required to prove the fourth factor of the *Atlantic Steel* test, the NLRB found that the facts weighed out of favor of the employee's protection under the NLRA for his language and conduct during the incident.<sup>123</sup> The supervisor had simply first told the Union official/employee that the grievance investigation meeting "take place the following week" and then asked the Union official/employee to return after his initial "tirade."<sup>124</sup> In this instance the NLRB declared: "we find that [the employee] lost the protection of the Act by his misconduct during the March 25 encounter with [the employer/supervisor]."<sup>125</sup> The examples, outlined above, show a pattern of conduct much milder than that observed in the *Grissom* case, and the NLRB cases actually found the speech and conduct in each of the above instances (even though they were much milder than that in *Grissom* and where private sector Unions have much more to protect or at stake for membership) not protected under any robust language or speech doctrine.

### C. NLRB versus FLRA Application of the Robust Language/Debate Doctrine

The "stark" difference between the NLRB's treatment and the FLRA's treatment of the robust language or debate doctrine begs a question as to *how* the two adjudicative entities justify the different results, especially where the statutory rights are very similar if not nearly identical. The differentiation between the application of similar laws under similar balancing tests for the robust language or debate doctrine, with the FLRA and the NLRB, are stark. While the FLRA in the *Grissom* case hardly takes the context of the language and conduct into account, beyond paying "lip service" to the fact that "context" is a consideration under its own rule. In addition, where the NLRB actually considers seriatim the factors in the balancing test to determine if the language and conduct is protected or not, the FLRA (in the *Grissom* case) states that it is at liberty to pick and choose which factors it will consider in its own balancing test to arrive at a decision. This is demonstrated by the FLRA's remark in *Grissom* that actually states (as to the application of the factors in the "balancing test"): "However, the foregoing factors need not be cited or applied in any particular way in determining whether an action constitutes flagrant misconduct."<sup>126</sup> The FLRA in *Grissom* follows this up by a reference to a case where the "Authority denied agency's exceptions contending that an arbitration award was contrary to law because the arbitrator did not apply all of the *Defense Mapping Agency* factors."<sup>127</sup> In addition, the NLRB sets the "bar" much lower (as far as tolerance of profane, vulgar, vituperative language and conduct), where the FLRA (in the *Grissom* case) seems to find sustained misconduct, even in the face

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<sup>122</sup> *Id.* at 1329-30.

<sup>123</sup> *Id.* at 1330.

<sup>124</sup> *Id.* at 1328, 1330.

<sup>125</sup> *Id.* at 1330.

<sup>126</sup> *Dep't of the Air Force v. AFGE (Grissom)*, 51 FLRA 7, 12 (Aug. 18, 1995).

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

of supervisory or managerial *requests* to end the same, somehow protected activity under the FLRA, as an exercise of representational rights under the robust language or debate doctrine. This ability to use the robust language or debate doctrine as a shield and as a sword (where Union representatives can use vulgar and even threatening language or engage in similar conduct, and management cannot do the same for fear of the filing of an Unfair Labor Practice or being “hailed before” the FLRA) places individuals in supervisory or managerial positions at a distinct disadvantage, where they are obligated to endure foul language, threats, and other conduct that undermines good order and discipline in the workplace, where managerial or supervisory employees cannot reciprocate for fear of running afoul of agency codes of conduct or even the provisions of 5 U.S.C. § 7102, where there is no “give as good as you get” provision for foul-mouthed, threatening, and obnoxious Union officials or representatives.<sup>128</sup> The subsequent development of the robust language or debate doctrine, as noted in the cases listed at footnote 75 and as discussed in greater detail below, demonstrate that the *Grissom* opinion is not a “flash-in-the-pan” occurrence or an aberrant opinion in FLRA robust language or debate doctrine; it is a watershed moment which has formed the basis of the FLRA’s treatment of the robust language or debate doctrine that has given Federal sector Unions a “pass” on profane and thuggish behavior, which puts Federal sector management at an artificial and uncalled-for disadvantage. This observation is driven home when we survey how the robust language or debate doctrine has evolved since *Grissom* in the overview of the development of the robust language or debate doctrine since the decision in the *Grissom* case and even because of the *Grissom* case. The “context” for the conclusion that the *Grissom* case is an inappropriate extension of the rights under the robust language or debate doctrine to Unions is the fact that Federal sector employees enjoy protections and benefits that are “enviable” for private sector employees: guaranteed salaries, guaranteed holidays and paid leave, guaranteed procedures to protect employees in the event of reductions-in-force (to the extent practicable), guaranteed appeal rights for discipline via the provisions of the labor contracts and the Merit Systems Protection Board, etc. Where the private sector employees are held to a higher standard and enjoy far less in the way of rights and benefits than their Federal sector counterparts, it is strange that Federal sector employees are accorded the ability to annoy, harass, and intimidate managers and supervisors, where they have far less to lose in the process and have far less in the way of legitimate fear of loss of benefits and employment than their private sector counterparts.

#### IV. CONSISTENCY WITH THE CURRENT STATE OF THE ROBUST LANGUAGE OR DEBATE DOCTRINE WITH THE ORIGINAL INTENT OF THE 1978 CSRA

In addition to the inconsistency of the development of the robust language or debate doctrine within the standards stated by the FLRA, the highly similar standards

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<sup>128</sup> See Marksteiner, *supra* note 80.

under the NLRA, and the standards of protected versus unprotected speech (and even speech criminalized under state laws), the robust language or speech doctrine under and stemming from the *Grissom* case are “out of sync” with the original intentions of Executive Order 11491 (progenitor and place-holder of the Civil Service Reform Act of 1978) and the Civil Service Reform Act of 1978.<sup>129</sup> The provisions of Executive Order are instructive as to original intent of Executive Order 11491, where the resolution of the Executive Order states: “WHEREAS the participation of employees should be improved through the maintenance of constructive and cooperative relationships between labor organizations and management officials.”<sup>130</sup> The resolution reflects a goal behind the proposed reform (including the formulation of labor-management relationships) that includes a *cooperative relationship* between labor and management, as opposed to one side using the law to hijack and ambush the other for undue advantage. The codification of the Civil Service Reform Act culminated in the passage of Public Law 95-454, which would put into effect the provisions of the Civil Service Reform Act of 1978 (Act).

Within the provisions of the Act, there was recognized a need for reform, which included the following:

Both the Public and those in Government have a right to the most effective possible civil service; that is, one in which employees are hired and removed on the basis of merit and *one which is accountable to the public through its elected leaders.* (Emphasis added.) ...

Employees were selected and advanced on the basis of competence rather than political or personal favoritism. Protection of the merit principle in Federal employment has been accomplished through the enactment of numerous laws, rules, and regulations. Although the Civil Service System has largely succeeded in safeguarding merit principles, *there have been frequent attempts to circumvent them, some of which have been successful.* (Emphasis added.) ...

Many managers and personnel officers complain that the existing procedures intended to assure merit and protect employees from arbitrary management actions have too often become the refuge of the incompetent employee. When incompetent and inefficient employees are allowed to stay on the work rolls, it is the dedicated and competent employee who must increase his workload so that the public may be benefitted. The morale of even the best motivated employee is bound to suffer under such a system. The system’s rigid procedures—providing almost automatic pay increases for all

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<sup>129</sup> See generally Executive Order 11491; see also generally The Civil Service Reform Act of 1978, P.L. 95-454.

<sup>130</sup> See Executive Order 11491 (1969).

employees—makes it as difficult to reward the outstanding public servant as it is to remove an incompetent employee.<sup>131</sup>

While the impetus behind the CRA of 1978 was to ensure accountability of elected public servants, the current problem, which is the subject of this paper, is a shortfall in accountability of Union elected officials in carrying out their duties (often in questionable manners, as noted above). The problem of circumventing merit principles and even being forced to accept and maintain incompetent or poorly-performing employees on the rolls, is a function of unbridled union activity, as noted above.<sup>132</sup> Unions, with the added benefit of questionable NLRA law actually are in the position of duplicating the *worst* of sins committed by supervisors and managers in the 19th century, where they further their own self-protectionist and purely employee-centric goals (regardless of objective merit) through intimidation, vile and vulgar language, and vituperative conduct toward Federal sector managerial and supervisory employees.

Specifically, the Senate Report on the Civil Service Reform Act of 1978 notes what should be the “hallmark” of effective labor-management relations:

S. 2640 incorporates into law the existing Federal Employee Relations Program. At the same time, S. 2640 recognizes the special requirements of the Federal Government and the paramount public interest in the effective conduct of the public’s business. It ensures Federal Agencies and right to manage Government operations efficiently and effectively.

The basic, well-tested provisions, policies, and approaches of Executive Order 11491, as amended, have provided *a sound balanced basis for cooperative and constructive relationships between labor organizations and management*. Supplemented by the Federal Labor Relations Authority to administer the program, and expanded arbitration procedures for resolving individual appeals, these measures will *promote effective labor-management relationships in federal operations*. (Emphasis added.)<sup>133</sup>

In other words, the original intent of the Civil Service Reform Act of 1978, as far as labor-management relations go, was to ensure a *balance* between the parties as a part of a regime of *effective labor-management relationships in federal operations*. Where it may be argued that management enjoyed a “home field advantage” before the passage of the Civil Service Reform Act of 1978, the opposite has become true since that time, as noted above, with unions often controlling the workplace,

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<sup>131</sup> The Civil Service Reform Act of 1978, P.L. 95-454, 95th Congress pp. 2-3 (1978).

<sup>132</sup> See Marksteiner, *supra* note 80.

<sup>133</sup> See P.L. 95-454, p. 13.

where the robust language and debate doctrine has contributed to a situation where Federal managers and supervisors simply cannot manage, due to the perversion of the robust language or speech doctrine, post *Grissom*. The insulting, opprobrious, and intimidating language and actions faced by Federal sector managers and supervisors are scarcely the “balance of power” contemplated *ab initio* by the authors and proponents of the Civil Service Reform Act of 1978, where the result has been Union officials taking advantage the robust language or debate doctrine to the point that Federal sectors managers and supervisors are essentially paralyzed by the FLRA’s overextension of the robust language or speech doctrine in favor of Federal sector labor unions.

## V. DEVELOPMENT OF THE ROBUST LANGUAGE OR DEBATE DOCTRINE POST-*GRISSOM*

### A. Where the *Grissom* Test Fits Into Jurisprudence

As of *Grissom*, the FLRA has adopted a standard to determine whether robust language or debate is lawful.<sup>134</sup> As noted above, this standard includes the following “train of thought” or “analytical path.”<sup>135</sup> The FLRA, in the process to determining if Union representatives have engaged in “flagrant misconduct” that exempts otherwise protected speech from protection under the robust language or debate doctrine, balances the employee’s rights to engage in protected activity, which “permits leeway for impulsive behavior... against the employer’s right to maintain order and respect for its supervisory staff on the jobsite.”<sup>136</sup> The FLRA notes, in striking this balance, that it examines what it has determined to be the following relevant factors: (1) the place and subject matter of the discussion; (2) whether the employee’s outburst was impulsive or designed; (3) whether the outburst was in any way provoked by the employer’s conduct; and (4) the nature of the intemperate language or conduct.<sup>137</sup> The FLRA then notes that, according to its case law, “the foregoing factors need not be cited or applied in any particular way in determining whether an action constitutes flagrant misconduct.”<sup>138</sup> There are actually two means of the language in the robust language or debate doctrine being unprotected: (1) the language is outside of the context of representational activity; or (2) the language, while a part of representational activity is of such a nature to constitute “flagrant misconduct” and lose the protection of the statutory rights under 5 U.S.C. § 7102.<sup>139</sup>

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<sup>134</sup> See Dep’t of the Air Force v. AFGE (*Grissom*), 51 FLRA 7, 11-12 (Aug. 18, 1995).

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

<sup>136</sup> See *id.* at 11; citing Dep’t of Def. Def. Mapping Agency Aerospace Ctr., St. Louis, Mo., 17 FLRA 71 (1985) (quoting Department of the Navy, Puget Sound Naval Shipyard, 2 FLRA 54 (1979)).

<sup>137</sup> See *Grissom*, 51 FLRA at 12; citing *Defense Mapping Agency*, 17 FLRA at 80-81.

<sup>138</sup> See *Grissom*, 51 FLRA at 12.; citing Cf. U.S. Dep’t of Defense, Def. Logistics Agency and AFGE, Local 2693, 50 FLRA 212, 217-8 (1995).

<sup>139</sup> See Federal Bureau of Prisons, Internal Affairs and AFGE, Local 709, 53 FLRA 1500 (1998).

In addition to the standard used by the FLRA in robust language and debate cases, a decision by the U.S. Court of Appeals, District of Columbia Circuit is instructive as to the effective application of the *Grissom* Board and its progeny.<sup>140</sup> The *315th Airlift Wing* case provides the following insight into “flagrant misconduct” and the line that the FLRA is observing to determine if Unions representatives are “out of line” and subject to punishment for misconduct:

Granted, the language of § 7102(1) is ambiguous. Potentially, there could many possible interpretations of what it means “to act for a labor organization...[and] to represent the views of the labor organization.” But it is not reasonable to suppose that Congress considered it permissible and immune from consequence for an employee to commit an assault and battery against a co-worker while ranting, raving, and out of control. No employee, including a union official acting in a representational capacity has the right to put another in fear of being struck or to commit a battery in order to “present the views of the labor organization” and “engage in collective bargaining.” 5 U.S.C. § 7102. If the FLRA’s “flagrant misconduct” standard permits such misconduct, as the FLRA held it did here, then that standard is an unreasonable interpretation of the limits of § 7102.<sup>141</sup>

The *315th Airlift Wing* case further notes of the FLRA justification that: “To defend its surprising decision, the Authority can only argue that its “flagrant misconduct” standard provides a reasonable interpretation of § 7102... we note the Authority has offered us little to justify the standard itself.”<sup>142</sup> Further, the Court notes: “While reciting the formulation that the right to engage in protected activity permits ‘leeway for impulsive behavior,’ the Authority does nothing to tie that vague proposition to its conclusory standard other than to describe the standard as ‘long-held.’”<sup>143</sup> The *315th Airlift Wing* court further observes:

In sum, we agree with Chairman Cabaniss [dissenting opinion] that “if the Authority rally intends to follow a test that could condone an assault and battery situation by not declaring it to be outside the boundaries of protected activities,” then it is time for the FLRA to find a new test. *Charleston Air Force Base 57* FLRA at 83 (dissent of Chairman Cabaniss). Physical intimidation and touching amount to assault and battery, during the course of otherwise protected activity, is not condoned or immunized by the federal labor laws,

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<sup>140</sup> Dep’t of the Air Force, *315th Airlift Wing v. FLRA (315th Airlift Wing)*, 294 F.3d 192 (D.C. Cir., 12 Jul 02).

<sup>141</sup> *Id.*

<sup>142</sup> *Id.*

<sup>143</sup> *Id.*

and any interpretation permitting such activity is inherently unreasonable and due no deference. As we stated in a related context, we “understand that labor negotiations produce occasional intemperate outbursts and, in a specific context, such *language* may be protected,” however, it “defies explanation that a law enacted to facilitate collective bargaining and protect employees’ right to organize prohibits employers from seeking to maintain civility in the workplace.” *Adtranz*, 253 F.3d 27-8 (emphasis added). Here, we face not just intemperate language, but assaultive [which can include verbal assaults], tortious, possibly criminal behavior. As Chairman Cabaniss concluded, “improper physical contact, with or without threatening gestures constituting an assault” does nothing to further the goal of “facilitat[ing] communication between parties.” *Charleston Air Force Base*, 57 FLRA at 84 (dissent of Chairman Cabaniss). Indeed, “it is preposterous” to suggest as the FLRA seems to, “that employees are incapable of organizing a union or exercising their statutory rights...without resort to abusive or threatening language” or without a physical response. *Adtranz*, 253 F.3d at 26. To hold otherwise is not only error, but it is “remarkably indifferent,” *id.* at 27, to the basic need of employers to maintain decorum, not to mention the very safety of other employees. *See, e.g.*, Jerry Goldstein, *Workplace Violence v. Employee Rights*, MD. B.J. Jan. – Feb. 2002, at 46 (“Nearly 1,000 workers are murdered and 1.5 million are assaulted in the workplace each year.”).<sup>144</sup>

The observations of the court in the *315th Airlift Wing* case provide a “backdrop” for the development of the robust language or debate doctrine under FLRA case law, post-*Grissom*. While the *315th Airlift Wing* opinion seeks to place a common-sense limit to what is permissible under the robust language or debate doctrine, the actual development of the doctrine under FLRA case law (post-*Grissom*) does nothing to heed the observations on the subject by the *315th Airlift Wing* court. Instead, after the decision in *Grissom*, the FLRA has accorded the case an almost “talismanic” status in the excuse of increasingly outrageous Union conduct, under the shield of “protected activity” or “protected speech.”

There are a couple of significant points to take up before discussion of the post-*Grissom* robust language or debate doctrine. The “flagrant misconduct” standard, which becomes the key standard (possibly more precisely the “lynchpin”) for determining whether Union conduct is protected under statute or not (within the context of representational activities) has come to be a poorly-understood and poorly-applied standard, where the Board, as seen below, takes into account only crudity, without consideration of action and sets the bar for “flagrant” misconduct so high, that it is scarcely reachable, save actual physical assault, with fifteen minutes

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

of profanity sufficient to garner an “R” rating, and does not take into account that even speech without profanity in front of a couple of employees is sufficient to have a deleterious effect on good order and discipline, unless the exchanges take place in some sort of vacuum or “cone of silence.” The definition of “flagrant” includes “very bad; too bad to be ignored.”<sup>145</sup> Synonyms for “flagrant” include: blatant, conspicuous, egregious, glaring, obvious, patent, etc.<sup>146</sup> Nowhere in the definition of “flagrant” does the number of times of verbal assault or amount of crudity enter into the determination of whether the misconduct is “flagrant” (and not protected) or not. This sentiment is reflected in a dissenting opinion filed by FLRA Board Member Thomas M. Beck in the FLRA’s opinion in *FAA and National Air Traffic Controllers Association*, 64 FLRA 410 (2010). Specifically, Mr. Beck notes:

When it enacted the Federal Service Labor-Management Relations Statute, Congress did not intend to immunize against discipline federal employees who, in the workplace, during the time of work, say to their supervisors “fu[---] you.” Consequently, unlike my colleagues, I conclude that the Union president’s use of profanity, directed at his supervisor, in the workplace, during work time, was misconduct that is not protected by our Statute. . . I would find that the Judge erred by focusing his analysis solely on whether the president’s actions amounted to “flagrant” misconduct. *See* Judge’s Decision at 10. “Flagrant” misconduct is a sufficient—but not the only—basis upon which a union representative may lose his protections under §§ 7102 and 7116(a). *Dep’t of the Air Force, 315th Airlift Wing v. FLRA*, 294 F.3d 192, 201 (D.C. Cir. 2002). When an employee—even one who happens to be a union representative—engages in misconduct of any kind, his conduct, by definition, “exceed[s] the boundaries of protected activity.” *Id.* at 201-2; citing *Dep’t of the Air Force, Grissom Air Force Base, Indiana (Grissom)*, 51 FLRA 7, 11 (1995) (quoting *U.S. Air Force Logistics Command, Tinker Air Force Base, Oklahoma*, 34 FLRA 385, 389 (1990)). To conclude otherwise is to conclude Congress intended, through the protections afforded by our Statute, to subsidize workplace misconduct so long as it does not reach “flagrant” proportions. . . .<sup>147</sup>

Another problem with both *Grissom* and the post-*Grissom* decisions noted below (which include at least a significant majority of post-*Grissom* decisions that cite *Grissom* as the standard for all or part of the robust language or debate doctrine), is that they almost all focus just on the words spoken as compared to the profanity in *Grissom*, as opposed to the determination of *misconduct*, which includes a much

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<sup>145</sup> *Flagrant*, MERRIAM-WEBSTER DICTIONARY, <http://www.merriam-webster.com/dictionary/flagrant> (last visited Nov. 16, 2015).

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

<sup>147</sup> *FAA and Nat’l Air Traffic Controllers Ass’n*, 64 FLRA 410, 417 (2010).

larger set of actions, to include physical intimidation. Almost exclusively, the FLRA ignores this fact in the formulation of the decisions noted below.

## B. Post-*Grissom* Cases and Developments

The Authority, in *Marine Air-Ground Combat Center, Twenty-Nine Palms, California and AFGE, Local 2018 (29 Palms)*, 1997 WL 114361 (1997), stands as an early example of the application of the *Grissom* case standard.<sup>148</sup> In the *29 Palms* case, the Union representative received a three-day suspension for disregarding a limitation of the use of a Government fax machine, after being instructed not to use it for other-than-Government use.<sup>149</sup> The FLRA notes that the initial warning came on the heels of the individual's personal use of the fax machine, but the FLRA notes that the cross-application to union business of the prohibition was far from clear and would have been more appropriately handled by the grievance process.<sup>150</sup> Nevertheless, the FLRA acknowledges that the "case rests almost entirely on a finding of whether or not [the Union representative's] actions constituted insubordination . . ."<sup>151</sup> While the FLRA acknowledges the "balancing test" between "leeway for impulsive behavior . . . against the employer's right to maintain order and respect for its supervisory staff at the jobsite," the FLRA notes (with noting more in the way of justification) that "it *does not appear* to the undersigned that [the Union representative's] conduct was so flagrant as to require discipline."<sup>152</sup> The FLRA "hangs its hat," using the *Grissom* precedent to justify that the Union representative's misconduct (defiance of an order not to use the fax machine until the issue was resolved) was not "flagrant misconduct."<sup>153</sup> That is open defiance of an order to use a fax machine for personal uses and (temporarily) not for Union purposes until the issue was settled, is not flagrant where insubordination (absent the foul language and ranting in the *Grissom* case) does not *appear* to be as egregious to the FLRA in the wake of *Grissom*. Unfortunately, this does not address that "flagrant misconduct" that works against management's ability to maintain good order and discipline *does* include actions that would undermine the authority of management, such as outright defiance to an order.

The FLRA, in *Air Force Flight Test Center and AFGE Local 1406 (Flight Test Center)*, 52 FLRA 1455 (1998), again examines the robust language or debate issue in the context of a meeting over a Union representative's leave issues.<sup>154</sup> The incident unfolded as follows:

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<sup>148</sup> *Marine Air-Ground Combat Ctr., Twenty-Nine Palms, Calif. and AFGE, Local 2018*, 1997 WL 114361 (1997).

<sup>149</sup> *Id.* at \*10.

<sup>150</sup> *Id.* at \*13-4.

<sup>151</sup> *Id.* at \*13.

<sup>152</sup> *Id.* (emphasis added).

<sup>153</sup> *Id.* at \*16.

<sup>154</sup> *Air Force Flight Test Ctr. and AFGE Local 1406*, 52 FLRA 1455 (1998).

[The supervisor] was seated at her desk during the incident, which lasted about 15 minutes. During much of it [the incident] the [Union representative] was standing, on the opposite side of her 30-inch wide desk. As the altercation ended, [the Union representative] shook his finger at [the supervisor] “again” and stated, “you know what Sandy, I used to be your friend but now you are nothing but a hypocrite.” At that point, [the Union representative] was “basically leaning over [her] desk pointing his finger right in [her] face.” He appeared to [the supervisor] to be in a rage.”

[The supervisor’s supervisor and another employee] arrived then (approximately 7:30 am) and observed the final moment of the incident through the window, although they were unable to hear any of the conversation. [The supervisor’s supervisor] observed the [Union representative] appear “very upset” and “mad.” [The supervisor] had a “worried” or “scared” look. [The supervisor’s supervisor] estimated that [the Union representative’s] pointing finger to be “less than 18 inches..., no farther than 10 inches” from [the supervisor’s] face.

Their arrival startled [the Union representative] and caused him to step back. [The supervisor] still had a “worried” look on her face. As [the supervisor’s supervisor] recalled, “[s]he just looked upset.”<sup>155</sup>

The FLRA cites the full balancing test, with the elements to be weighted, as with the *Grissom* case to set up its analysis.<sup>156</sup> The FLRA then inexplicably notes that “even insubordinate behavior must be examined according to the broader ‘flagrant misconduct’ standard in order to determine whether it is of ‘such an outrageous and insubordinate nature as to remove it from the Statute’ under the *Grissom* analysis.”<sup>157</sup> The FLRA states: “In a nutshell, Respondent views his behavior as ‘threatening, intimidating, and belligerent.’ However, these labels do little to place this behavior in its appropriate positions on the spectrum of protected-to-excessive conduct.”<sup>158</sup> The FLRA engages in what can only be described as prevarication to fill space and justify its opinion, which includes the observation that the Union representative’s conduct would not be insulated from criminal statutes.<sup>159</sup> All of this prevarication, to include a “nod” to the fact that the Union representative’s behavior was probably criminal, the FLRA concludes its opinion with: “One can only hope that if for no better reason that its slim prospects for achieving the desired results, the fact that certain intemperate behavior is deemed to be protected will not make it any more

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<sup>155</sup> *Id.* at 1461.

<sup>156</sup> *Id.* at 1462-63.

<sup>157</sup> *Id.* at 1464.

<sup>158</sup> *Id.*

<sup>159</sup> *Id.* at 1465.

desirable as a tactic. I conclude that Respondent [the Agency] has violated sections 7116(a)(1) and (2) of the State and recommend that the Authority issue the following order [that the Air Force cease and desist disciplining the employee, etc.].<sup>160</sup> In addition to the bizarre train of logic that leads the FLRA to conclude that the Union representative's conduct was protected, the conclusion actually negates the whole rule that robust language or debate serves the purpose to further Union ends, where the opinion concludes that the course of action probably did little to further Union aims and goals.

The FLRA, in its decision in *Defense Contract Management Agency and AFGE 3953*, 59 FLRA 223 (2003), contemplates a case in which a Union representative was suspended for two days for the following scene, as described by the ALJ who originally heard the case:

[The Union representative] interrupted [the supervisor], embarked on two, long, loud, rambling, angry monologues, "bad mouthed" [the supervisor], the agency, threatened to "get" [the supervisor], threatened to sue [the supervisor, refused to heed [the supervisor's] repeated requests that he calm down, and used profanity, although the profane tirades lasted about fifteen minutes and was heard by employees working outside the conference room.<sup>161</sup>

Citing the balancing test and elements to be examined in the balancing test, as articulated in the *Grissom* case, the FLRA reversed the ALJ's ruling that the Union representative's actions consisted of flagrant and unprotected misconduct.<sup>162</sup> The FLRA "glosses" over the test articulated, where it notes that the meeting took place in a private office (and where it may have been heard, there was no demonstrated effect on or interference with the workplace.<sup>163</sup> The FLRA then finds the actions impulsive, militating against "flagrant misconduct."<sup>164</sup> Where the ALJ had found the outburst not provoked by the supervisor by the FLRA disagrees, citing that supervisor had been accused of lying.<sup>165</sup> This is at odds with the FLRA's own earlier observations, where the stated purpose of the meeting was for "clarification," and the FLRA produces no evidence of the supervisor making any statement that she accused the Union representative of lying, etc.<sup>166</sup> Finally, the FLRA notes the "broad leeway" granted Union representatives and previous opinions to include *Grissom* to maintain the circular and unsubstantiated conclusion: "Nothing in the [Union

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<sup>160</sup> *Id.* at 1466.

<sup>161</sup> *Defense Contract Management Agency and AFGE 3953*, 59 FLRA 223, 224 (2003).

<sup>162</sup> *Id.* at 226.

<sup>163</sup> *Id.* at 227. Note: The first prong of the test is place and nature of the discussion, not a requirement of proof of subjective effect on the workplace.

<sup>164</sup> *Id.*

<sup>165</sup> *Id.*

<sup>166</sup> *See generally id.*

representative's] affected the employer's right to maintain order and respect for its supervisory interests towards a finding of flagrant misconduct."<sup>167</sup> Where the incident took place within "earshot" of a number of people, it is difficult to see how the incident would not have had an effect on the ability to maintain discipline, where a Union representative excoriated a supervisor with impunity.

Where a Union Vice President responded to a Base Exchange (BX) Manager's refusal to talk at the time he wanted, during a crisis, the Union Vice President shouted in the middle of a store, intimidating the BX Manager, and even stuck his foot in her door as she attempted to retreat to her office.<sup>168</sup> This prompted the BX Manager to call the Base Security Police to have the Union Vice President removed from the premises.<sup>169</sup> The Union Vice President received a two-day suspension for the incident.<sup>170</sup> The Union cites the *Grissom* test for "flagrant misconduct" to justify its position, and in a case, where the issue of whether the misconduct was protected or not, the FLRA "punts" the case back to the Arbitrator, citing "confusion" over whether the Arbitrator was resolving a dispute under the parties' agreement and for a further development of what the FLRA deemed "insufficient facts."<sup>171</sup> The author finds it ironic that the FLRA declines to decide on a case due to an asserted lack of clarity as to whether the dispute was under the contract and a stated lack of clarity of facts, where the Union Vice President's actions were in the middle of a Base Exchange and resulted in subjective fear sufficient to cause the Manager to retreat to her office and feel compelled to call Base Security Forces to remove the Union Vice President from the premises.

In a somewhat different set of circumstances, the *Grissom* test was used at least in part to justify and allow for "disruption of a legitimate investigation" by a Union Local President.<sup>172</sup> During a VA Administrative Board of Investigation, the Union Local President badgered and screamed at a bargaining unit employee to leave and not testify in the Investigation, despite the fact that the employee had waived her right to be represented by the Union.<sup>173</sup> The VA initially proposed a five-day suspension, which it mitigated to a "paper suspension" (issued a Letter of Alternative Discipline in Lieu of a real suspension without pay).<sup>174</sup> The FLRA applied the *Grissom* case test and concluded that the actions of the Local Union President (an attempt at obstructing an investigation) was not "flagrant misconduct" sufficient to lose protection of the Statute, where there existed "precedent permitting union officials

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<sup>167</sup> *Id.*

<sup>168</sup> AFGE, Local 2586 and U.S. Air Force, 97th Air Mobility Wing, Altus AFB, Okla., 59 FLRA 700 (2004).

<sup>169</sup> *Id.*

<sup>170</sup> *Id.*

<sup>171</sup> *Id.* at 701.

<sup>172</sup> AFGE, Local 2145, and Dep't of Veterans Affairs Med. Ctr., Richmond, Va. 64 FLRA 121.

<sup>173</sup> *Id.*

<sup>174</sup> *Id.*

to use intemperate, abusive or insulting language when performing representation duties.<sup>175</sup> As noted above, the FLRA repeatedly misuses the “flagrant misconduct” standard to find that Union representatives’ actions were protected because they did not involve cursing, overt physical violence, etc.<sup>176</sup> In actuality, the case stands for the proposition that somehow interference with an Agency investigation is somehow protected activity under the robust language or debate doctrine.

In an air control tower, with no less than ten other air traffic controllers in attendance, a Union Local President was clearly heard to say “fu[--] you, I don’t give a fu[--],” where the supervisor had told the Union Local President the he did not have an immediate answer on staffing levels in the air control tower.<sup>177</sup> The Union President was escorted from the air control tower by a security guard.<sup>178</sup> Using previous case law, to include the *Grissom* case, the FLRA ordered the Agency to cease and desist from removing Union officials from the facilities (there was no other punishment).<sup>179</sup> In support of its position, the FLRA runs through the four-element test to determine the balance for “flagrant misconduct.”<sup>180</sup> The FLRA notes that there is no dispute that the dispute took place in a public area, with other employees around.<sup>181</sup> The FLRA then determines that the outburst was impulsive, militating towards protection.<sup>182</sup> The FLRA ignores the third factor (whether the outburst was provoked), however the FLRA *does* acknowledge the fact that the supervisor merely responded to the manning question by the Union President by simply stating he wanted to wait before making the decision until he had more information.<sup>183</sup> As to the fourth factor (nature of the intemperate language or conduct), the FLRA simply minimizes the language or conduct by saying it was not as egregious as that in the *Grissom* case (and others), so it must not be bad.<sup>184</sup> This analysis represents the maturity of the FLRA’s view of case law concerning robust language or debate: if it is not as bad as with *Grissom* (without regard to the impact on the workplace), it must not be “flagrant misconduct” and fall outside the protection of the Statute. In sum, this means that employees, who happen to be Union officials, can get away with objectively egregious conduct (to include harassment and intimidation), and use the FLRA’s robust language or debate doctrine as both a “shield and a sword.” As if the development of a line of case law that allows for Union representatives to engage in vulgar, vile, obnoxious, threatening, and intimidating conduct, which

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<sup>175</sup> *Id.*

<sup>176</sup> *See Section V.*

<sup>177</sup> Department of Transportation, FAA and NATCO, 64 FLRA No. 66 (2010).

<sup>178</sup> *Id.*

<sup>179</sup> *Id.*

<sup>180</sup> *Id.*

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

<sup>182</sup> *Id.*

<sup>183</sup> *Id.*

<sup>184</sup> *Id.*

makes maintaining good order and discipline in the workplace more difficult, the FLRA has actually even extended the robust language or debate doctrine to allow for extension of behavior outlawed under the provisions of Title VII of the Civil Rights Act of 1964 and has been used to allow for employees as Union representatives to lie or create falsehoods with impunity.

### C. Post-*Grissom* Case Law and EEO Law

Title VII of the Civil Rights Act of 1964 stands for the proposition that American citizens shall not be subject to discrimination based on their race, color, sex, national origin, or religion by the acts of others, to include employers.<sup>185</sup> This includes discrimination via discrete, discriminatory acts, via subjecting workers to a “hostile working environment,” etc.<sup>186</sup> The instance in which the *Grissom* case is a perfect case-in-point, where the Union was allowed (and the FLRA found) that sexist, abusive language was acceptable under FLRA legal precedent, whether the prohibitions under Title VII existed or not.<sup>187</sup> The FLRA has continued, under *Grissom* case law, to “thumb its nose” at the prohibitions against discrimination and/or discriminatory acts, where the “choice of forum” made was redress via the FLRA, vice the EEO process. In *U.S. Department of Justice, Bureau of Prisons Medical Center, Fort Worth, Texas and AFGE 1298*, 2000 WL 35566241 (2000), an ALJ found that a reference to a supervisor (in front of other Union employees and that employee’s supervisory chain) as a “fu[–]ing bit[–]” was protected, where it took place during a meeting over grievances.<sup>188</sup> The Union’s First Vice President was suspended for five days for the utterance, which the Union grieved, invoked arbitration, and won in arbitration.<sup>189</sup> The ALJ hearing the case cited to the test and standard used in the *Grissom* case and found that the outburst was spontaneous and that the response was provoked by the supervisor, where management simply did not react to Union evidence brought to light during the meeting.<sup>190</sup> The FLRA does not discuss the circumstances of the meeting and the fact that it took place in front of other, Union employees and the supervisor’s supervisory chain-of-command.<sup>191</sup> Perhaps most shocking is the justification that “fu[–]ing bit[–]” is not tantamount to “flagrant misconduct” and even hints at the FLRA’s disdain for Title VII protections, where it states: “The instant case, however, does not involve either life-threatening conduct or racial epithets...”<sup>192</sup> The FLRA simply minimizes the use of the word “bit[–]” from an FLRA perspective, where it finds it apparently endemic in the

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<sup>185</sup> See 42 U.S.C. § 2000e-4.

<sup>186</sup> *Id.*

<sup>187</sup> See generally *Dep’t of the Air Force v. AFGE (Grissom)*, 51 FLRA 7 (Aug. 18, 1995).

<sup>188</sup> *U.S. Dep’t of Justice, Bureau of Prisons Med. Ctr., Fort Worth, Tex. and AFGE 1298*, 2000 WL 35566241 (2000).

<sup>189</sup> *Id.*

<sup>190</sup> *Id.*

<sup>191</sup> See generally *id.*

<sup>192</sup> *Id.*

workplace at the facility.<sup>193</sup> In other words, the FLRA effectively condones sexually harassing language in the workplace, where it does not find it to be violative of law (Title VII or otherwise) and therefore not “flagrant misconduct.” The *Bureau of Prisons Medical Center* “saga” does not end there. The same ALJ heard a second case involving the same supervisor and issued a decision on the *same day* as the previous case. In *U.S. Department of Justice, Federal Bureau of Prisons Medical Center, Fort Worth, Texas*, 2000 WL 1781583 (2000), the same supervisor, during negotiations involving a local supplemental agreement, was subjected to having a finger pointed in her face being told “listen here you fu[---]ing bit[---].”<sup>194</sup> The ALJ cites the same set of tests, to include the use of the *Grissom* case as a standard.<sup>195</sup> In this instance, the ALJ accuses the management team (not the supervisor in particular) of “not being saints,” where they used the words “sh--” and “damn” and snide remarks to one Union negotiator.<sup>196</sup> The supervisor, for her part, was said to be “constantly interrupting.”<sup>197</sup> The ALJ, inexplicably, embarks on the following diatribe as a justification for his decision for the Union (despite the illegality of under Title VII and follow-on “flagrant misconduct” analysis that should have followed):

Respondent argues that the use of the term “bit[---]” in this case has gender connotations which should not be tolerated. It has been found that racial epithets constitute flagrant misconduct. The rationale in *VA* is that racial epithets carry vilification of an individual by reference to an entire group by race rather than a particular course of action. Since there is a clearly expressed public policy against racial discrimination in the workplace and racial stereotyping tends to undermine that policy, it was found that racial epithets do not fall within the protections of the Statutes. There were no life-threatening situations or racial epithets in this case.

There is a similarly expressed policy against sexual discrimination in the workplace and sexual stereotyping tends to undermine that policy, and sexual epithets could fall outside the protection of the Statute. The undersigned, however was unable to find any case holding that sexual epithets do not fall within the protection of the Statute...<sup>198</sup>

The ALJ finishes the paragraph by quibbling over whether ethnic, racist or sexist epithets, under differing circumstances, would constitute illegal behavior under Title

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<sup>193</sup> *Id.*

<sup>194</sup> U.S. Dep’t of Justice, Bureau of Prisons Med. Ctr., Fort Worth, Tex. and AFGE 1298, 2000 WL 35566241 (2000).

<sup>195</sup> *Id.*

<sup>196</sup> *Id.*

<sup>197</sup> *Id.*

<sup>198</sup> *Id.*

VII of the Civil Rights Act of 1964 and would, therefore, be flagrant misconduct.<sup>199</sup> But for a case cite he cannot find (even where he acknowledges that racist epithets do not fall under the protection of the Statute), the ALJ decides that a situation that is tantamount to a sexually hostile working environment is not “flagrant misconduct” under the laws of the FLRA. This is essentially a case of willful ignorance of well-established civil rights law by an ALJ in a hearing under FLRA law, where the use of the epithet goes unaddressed simply because the issue is not being addressed before the Equal Opportunity Employment Commission (EEOC) or the court. The ALJ essentially states that, where the ALJ does not *enforce* Title VII law, he will not find the use of the word objectively wrong, and *especially* where its use may be illegal (and therefore objectively constitute “misconduct”) under a body of law he happens not to enforce. However, even ignoring other, established law by allowing conduct and refusing to use the impermissibility of the language and/or conduct that would be illegal as an example of “flagrant misconduct” under FLRA law is made worse by the fact that some post-*Grissom* case law actually stands for the proposition that lying or creating falsehoods is protected by the FLRA robust language or debate doctrine.

#### D. Post-*Grissom* Case Law and Protection of the “Right” to Lie

The FLRA, in *United States Department of Energy, Oak Ridge, Tennessee and Office and Professional Employees International Union, Local 268*, 57 FLRA 343 (2001), noted that the Union filed an incident report as follows:

Subsequently, the Union officials filed a threat of violence incident report concerning the confrontation at the SSD. The incident report alleged, as relevant here, that the Director “was violently waving his arms around in a threatening manner while yelling.” Judge’s Decision at 32. The incident report also indicated that the Union officials “left [SSD] for fear of [their] safety and physical well being,” and that they were afraid that the Director “would [have] become violent himself or have one of the persons in the area that carry a pistol shoot [them].”

After completing an investigation into the incident report, the Threat Assessment Team found that the Director did not threaten the Union officials and recommended that the Union officials be disciplined for deliberate misuse of the threat assessment policy. Thereafter, the Shop Chairman was suspended for five days for five separate counts of alleged misconduct, including “deliberately misrepresenting material facts in the incident report.”<sup>200</sup>

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<sup>199</sup> *Id.*

<sup>200</sup> U.S. Dep’t of Energy, Oak Ridge, Tenn. and Office and Prof’l Employees International Union, Local 268, 57 FLRA 343 (2001) (alteration in original).

In setting up its analysis, the FLRA used the same “balancing test,” as articulated in *Grissom* (and cited to *Grissom*).<sup>201</sup> The FLRA actually cites previous cases where lying was found to be “protected activity,” as partial justification for the decision, along with a justification that the misconduct was not as egregious as that found in *Grissom*.<sup>202</sup> The FLRA, therefore, concludes the following:

In striking the balance between the statutory right of the Shop Chairman to engage in protected activity, on the one hand, and the Respondent’s right to maintain order and respect for its supervisory staff on the other, we conclude that the scale here tips—however slightly—against a finding of flagrant misconduct.<sup>203</sup>

That is to say that a lie, which is obvious, blatant, conspicuous, egregious, etc. is a protected right of the Union under FLRA case law that somehow outweighs the Government’s right to the truth in the pursuit of its mission.

The Union misrepresented facts to the FLRA, via a letter in which a Local made false statements to the FLRA in response to an FLRA inquiry into charges against the U.S. Air Force.<sup>204</sup> In *Willow Grove*, as before, the FLRA found that the Union’s right to lie (even in the course of answering an FLRA inquiry) was protected (and therefore not “flagrant misconduct”) where the Union’s interest in lying out-weighed the Agency’s right to the truth in its defense and in the execution of its mission.<sup>205</sup>

In fairness, more recent FLRA cases which cite to and use the test utilized by the *Grissom* case have found for the Agency. In *AFGE and U.S. Department of Health and Human Services, National Institute of Environmental Health Sciences, Research, Triangle Park, North Carolina*, 65 FLRA No. 117 (2011), the FLRA found that the Agency had just cause to suspend (14 days) an employee (Union Local Vice President) for an e-mail sent to several people which contained “False and/or Malicious Statements Which Harm or Destroy the Reputation, Authority, or Official Standing of an [Agency] Official.”<sup>206</sup> The FLRA upheld a two-day suspension of a Union Local Executive Vice President, where the Agency alleged (despite previous counselings) the Union official continued to engage in “foul language” and “disrespectful behavior.”<sup>207</sup> The FLRA upheld a three-day suspension against

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<sup>201</sup> *Id.* at 344.

<sup>202</sup> *Id.* at 345.

<sup>203</sup> *Id.* at 347.

<sup>204</sup> NAGE, Local R3-32 and U.S. Air Force, 913th Air Wing, Willow Grove Air Station, Pa. (*Willow Grove*), 61 FLRA 127-28 (2005).

<sup>205</sup> *Id.* at 131-32.

<sup>206</sup> *AFGE and U.S. Dep’t of Health and Human Services, Nat’l Inst. of Env’tl. Health Sciences, Research, Triangle Park, North Carolina (Triangle Park)*, 65 FLRA 117 (2011).

<sup>207</sup> *AFGE, Local 1164 and Soc. Sec. Admin., Somerville, Mass. (SSA Somerville)*, 64 FLRA

a Union Steward, where he was found to have engaged in threatening behavior and “harassed and intimidated” a Human Resources Specialist.<sup>208</sup> The “common thread” that runs through *Triangle Park*, *SSA Somerville*, and *Warner-Robins ALC* is the continued reliance on the *Grissom* case.<sup>209</sup> While this is a short-term “gain,” as long as the *Grissom* case remains “on the books” it is a standard subject to gross misuse, as the FLRA changes members, and these members reflect different agendas and political philosophies. The best way to “right” the problem caused by the misapplication of the *Grissom* test is to permanently deal with the *Grissom* test, is deal with it as hinted at above by former Member Beck.<sup>210</sup> That is the question to be answered *infra*.

#### E. A Potential Way Ahead: Reverse the *Grissom* Case and Its Progeny Through a New or Subsequent Decision

As noted in Member Beck’s dissent above, the recognition of the robust language or debate doctrine, as it currently exists, essentially “subsidize[s] workplace misconduct so long as it does not reach flagrant proportions,” as recognized under FLRA case law.<sup>211</sup> The conflict demonstrated, not only with the Beck dissent, but with more recent case law that, while it does not overturn *Grissom*, it represents the potential beginnings of a “sea change” in the interpretation of the test under *Grissom*.<sup>212</sup> FLRA Chairman Cabaniss even calls for finding a new test, where the *Grissom* test “intends to follow a test that could condone an assault and battery situation by not declaring it to be outside the boundaries of protected activities.”<sup>213</sup> This level of conflict over the *Grissom* test and its application shows that there is a perceived need for change and even goes so far as to show at least the beginnings of a “sea change” in the robust language and/or debate doctrine and/or its application. An important distinction to be noted is the fact that the dissents and decisions noted above do not, in any way, overturn or repudiate the *Grissom* test or its use. The decisions and dissents that are “counter-*Grissom*” are, at best, musings that the power given to the Unions under the robust language or debate doctrine is outside the balance contemplated by Executive Order 11491 and the provisions of 5 U.S.C.

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No. 107 (2010).

<sup>208</sup> AFGE, Local 987 and U.S. Dep’t of the Air Force, Warner Robins Air Logistics Center, Robins Air Force Base, Ga. (*Warner-Robins ALC*), 63 FLRA No. 119 (2009).

<sup>209</sup> See *Triangle Park*, 65 FLRA 117; *SSA Somerville*, 64 FLRA No. 107; and *Warner Robins ALC*, 63 FLRA No. 119.

<sup>210</sup> See *Air Force Flight Test Ctr. and AFGE Local 1406*, 52 FLRA 1455 (1998).

<sup>211</sup> See *Id.*

<sup>212</sup> See *Dep’t of the Air Force, 315th Airlift Wing v. FLRA* (hereinafter *315th Airlift Wing*), 294 F.3d 192 (D.C. Cir., 12 Jul 02); *FAA and Nat’l Air Traffic Controllers Ass’n*, 64 FLRA 410, 417 (2010); *AFGE, Local 2586 and U.S. Air Force, 97th Air Mobility Wing, Altus AFB, Okla.*, 59 FLRA 700 (2004).

<sup>213</sup> *Dep’t. of the Air Force, 315th Airlift Wing v. FLRA*, 294 F.3d 192, 200 (D.C. Cir. Jul. 12, 2002) (Court agrees with Chairman Cabaniss’ dissent in *Dep’t of the Air Force, 315th Airlift Wing, Charleston Air Force Base, N.C. and AFGE*, 57 FLRA 80, 83 (2001)).

§ 7102 under the Civil Service Reform Act of 1978. The dissents and decisions do not overturn the *Grissom* test or the imbalance it creates or the disruption it causes. Simply put, the test has to be directly addressed by a case overturning the application of the test, as used by *Grissom*, or by providing a new test to determine if speech and/or action is protected or not, as suggested by Chairman Cabaniss. The establishment or change of the rule, via adjudication, continually depends on an adjudicatory body to interpret or re-interpret the test or “rule of law,” based on given facts (which are both imperfectly perceived and/or construed). With that in mind, the FLRA must conscientiously engage in the process with an eye towards the establishment of a clear, permanent, new rule that will withstand the test of time and attempts to manipulate it for nefarious purposes.

## VI. CONCLUSION

The case for nullification of the FLRA robust language or debate doctrine includes four main arguments. First, the FLRA’s decision in *Department of the Air Force v. AFGE (Grissom)*, 51 FLRA 7 (Aug. 18, 1995), was poorly-founded on the case law and previous jurisprudence it cites. Second, the development of FLRA robust language or debate case law accords Federal sector unions the ability to engage in vulgar, obnoxious, and insubordinate conduct under the “false flag” of representational rights, where private and non-Federal sector labor unions do not enjoy the same latitude, and Federal sector employees enjoy much more in the way of *guaranteed* rights, benefits, and both personal and representational guarantees that private and non-Federal sector employees do not. Third, the development of the FLRA’s robust language or debate doctrine runs counter to the original intentions behind both the Civil Service Reform Act of 1978 and the provisions of 5 U.S.C. § 7102. Fourth, the *Grissom* decision has subsequently developed into a series of cases that effectively justify vulgar, obnoxious, and insubordinate conduct under the “false flag” of preserving the representation rights under 5 U.S.C. § 7102, which continues to “dog” the balance of labor-management relationships to this day. All of these serve to highlight the inappropriateness of the robust language or debate doctrine as it has developed under FLRA case law, especially since the *Grissom* decision. All of these also serve to highlight the need for change in the robust language or debate jurisprudence under the FLRA, through overrule and nullification and replacement of the current rule with a more effective, more equitable rule and test to determine the balance of the interests of the union versus management.

SERVING TWO MASTERS: A SCHEME FOR ANALYZING  
RELIGIOUS ACCOMMODATION REQUESTS IN THE MILITARY

MAJOR ADAM E. FREY\*

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\* Major Adam E. Frey, Judge Advocate, United States Air Force (J.D., Ave Maria School of Law (2003); B.S., Secondary Education, Villanova University (2000)), is assigned to the Civil Law Division, Air Force Legal Operations Agency. He is a member of the Pennsylvania and New Jersey Bars. The views expressed are those only of the author and do not represent the official policy or position of the Department of the Air Force, the Department of Defense, or any other U.S. Government agency.

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## I. INTRODUCTION

Few constitutional issues create as much confusion for the military commander as those related to the First Amendment, particularly when the issue involves the religious practices of an individual. The American military is designed around uniformity and mission accomplishment, and these twin goals inevitably run counter to the desires and personal practices of the individuals who make up the armed forces. Here, the corporate military walks a fine line balancing unit conformity against individual morale, and mission accomplishment against public support. Military units are expected to be uniform and cohesive, so allowing individual exemptions to policy risks creating unit tension where the majority must conform to a particular rule but a single member does not due to unique faith needs. However, refusing any religious accommodation in the name of conformity could breed resentment or resistance in individual members. Allowing ad hoc or individualized exemptions to standard practice or the larger mission can likewise create public policy concerns over where these exemptions should stop, as the extent to which individual religious practices can be accommodated is poorly defined and may be inconsistently applied across the force.

At the same time, prohibitions on the practices of a larger faith community risks public questions over why an organization dedicated to defending the Constitution would be so unwilling to permit individual religious practices among its ranks. The public might perceive that religious adherents are unwelcome in the military, or tolerated only insofar as they are required to sacrifice the faith that defines them.

Take, for example, a recent incident at the United States Air Force Academy in which a cadet leader was alleged to have written a Bible verse on his publicly-displayed personal whiteboard. He was asked to remove it due to complaints from other cadets. The Military Religious Freedom Foundation took the position that a cadet in a leadership role was imposing his religious beliefs on subordinate students in violation of the First Amendment's Establishment Clause.<sup>1</sup> Supporters of the cadet leader argued that the verse was an expression of his individual religious beliefs, and that the Academy's request to remove the verse infringed on the cadet's own First Amendment liberties.<sup>2</sup> Whatever the ultimate merits of the case, both sides believed that their First Amendment rights were at stake, while Academy leadership was caught in the middle.

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<sup>1</sup> Bryant Jordan, *Religious Debate Intensifies on Academy Whiteboard*, MILITARY.COM (Mar. 19, 2014), <http://www.military.com/daily-news/2014/03/19/religious-debate-intensifies-on-academy-whiteboards.html>.

<sup>2</sup> Todd Starnes, *What's Going on at Air Force Academy? God's Word Vs. Pentagon's Word*, TOWNHALL.COM (Mar. 14, 2014), <http://townhall.com/columnists/toddstarnes/2014/03/14/whats-going-on-at-air-force-academy-gods-word-vs-pentagons-word-n1809152/page/full>.

Meanwhile, as national demographics shift and the military becomes more diverse, commanders should expect a rise in religious practices outside Judeo-Christian traditions. Some of these observances may conflict with military policies and command expectations; one prominent example is the recent Sikh challenge to standardized uniform and grooming regulations. Current standards require identical clothing among same-gender members and “professional” upkeep of hair, while males must maintain a clean-shaven appearance. The Sikh faith, however, demands that its members grow a beard and wear a turban as articles of faith. As one Sikh website describes it, “When a Sikh man or woman dons a turban, the turban ceases to be just a piece of cloth and becomes one and the same with the Sikh’s head.”<sup>3</sup> Unsurprisingly, Sikhs in the U.S. military have continuously challenged or sought exemptions to the military’s requirement that males be clean-shaven, wear standard military covers while outdoors and remove their headgear while indoors or in a no-salute zone.<sup>4</sup> The Army recently granted an exemption for some Sikh members in early 2014, allowing an exemption for turbans and other religious headgear “so long as they do not interfere with good order and discipline.”<sup>5</sup>

The Sikh accommodation coincided with the release of the updated Department of Defense Instruction (DODI) 1300.17, *Accommodation of Religious Practices Within the Military Services*.<sup>6</sup> Although the changes to the Instruction tend to focus on uniform and grooming accommodations, it also more broadly speaks to allowing military members to maintain religious practices when they do not interfere with military duties or the broader concerns of morale, good order, and discipline.

The purpose of this article is to analyze how the commander and his judge advocate should consider and apply DoDI 1300.17 when a subordinate raises a request for accommodation from established military policy. It begins by reviewing the larger legal context that frames the DoDI: the Free Exercise Clause of the First Amendment and the federal Religious Freedom Restoration Act (RFRA), as they have been applied to military service. After this overview, it then turns to the current version of DoDI 1300.17 and explains how an accommodation request should be evaluated. Secondly, this article examines various religious practices that might conflict with military requirements, and explores why the believer might adhere to them even under pain of military discipline. This article ultimately recommends that commanders favor reasonable accommodation when possible, not just because the

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<sup>3</sup> *Sikh Theology Why Sikhs Wear a Turban*, THE SIKH COALITION, <http://www.sikhcoalition.org/sikh-theology-why-sikhs-wear-a-turban> (last visited Nov. 6, 2015).

<sup>4</sup> *Sikhs Challenge U.S. Army’s Ban on Turbans, Beards*, FOXNEWS.COM (June 14, 2009), <http://www.foxnews.com/story/2009/06/14/sikhs-challenge-us-army-ban-on-turbans-beards>.

<sup>5</sup> David Alexander, *Pentagon Relaxes Rules on Religious Clothing and Appearance in Military Uniforms Allowing Turbans, Head Scarves, and Yarmulkes*, THE HUFFINGTON POST (Jan. 23, 2014, 9:08 AM), [http://www.huffingtonpost.com/2014/01/23/pentagon-religious-clothing\\_n\\_4651050.html](http://www.huffingtonpost.com/2014/01/23/pentagon-religious-clothing_n_4651050.html).

<sup>6</sup> U.S. DEP’T OF DEF., INSTR. 1300.17, ACCOMMODATION OF RELIGIOUS PRACTICES WITHIN THE MILITARY SERVICES (February 10, 2009, Inc. Change 1, Effective Jan. 22, 2014) [hereinafter DoDI 1300.17].

new DoDI requires it, but also as a means of maintaining morale and order among religious adherents who would otherwise face conflict between their god(s) and their commander.

On a cautionary note, the reader of this article might ask why accommodations are necessary at all given that most military members serve without a conflict between their faith and their military duties. Since such accommodations apply only to the perceptively small population of orthodox religious within the military, it may seem as though unquestioning compliance should be the expectation. However, the current accommodations process, which is intended to protect that minority population, is a result of the RFRA; this law was created by Congress and is overseen by the federal courts. Just as military subordinates are expected to comply with their superiors and their policies, so is the military itself answerable to the various branches of the government.

While subordination of the individual to the military is the norm, the government does not expect that rule to be an absolute. In at least one historical instance, Congress created a statutory amendment to uniform regulations in response to an incident where an airman was denied the use of the traditional Jewish head covering.<sup>7</sup> Even as recently as 2013, when Congress passed its annual National Defense Authorization Act, it included clauses requiring protection from retaliation for members who express their sincerely-held beliefs with respect to homosexuality, and for chaplains who decline to perform any ritual contrary to his or her beliefs.<sup>8</sup> These clauses were clearly a pre-emptive protection for military members who have a religious objection to same-sex marriage even after the military began to open its ranks to members of the LGBT community.<sup>9</sup>

Congress' actions are often a function of their accountability to the public which elects them. Often the public is—rightly or wrongly—concerned about the degree to which the military allows freedom of religion among its ranks. It is telling when media outlets publish articles with headlines like “It’s Time to Let Jews,

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<sup>7</sup> *Goldman v. Weinberger*, 475 U.S. 503 (1986), led to Congress amending the military’s religious apparel rules in the National Defense Authorization Act for Fiscal Years 1988 and 1989, Pub. L. No. 100-180, § 508(a)(2), 101 Stat. 1086 (1987), which became codified at 10 U.S.C. § 774.

<sup>8</sup> National Defense Authorization Act for Fiscal Year 2013, Pub. L. 112-239, § 533(b), 126 Stat. 1632 (2013).

<sup>9</sup> The “Don’t Ask, Don’t Tell” prohibition on openly homosexual service in the military ended on September 20, 2011. The first same-sex marriage to occur on a military base occurred less than a year later in June 2012. Erik Ortiz, “*With Repeal of ‘Don’t Ask, Don’t Tell,’ Couple Says ‘I Do’ In First Gay Union on U.S. Military Base*,” N. Y. DAILY NEWS (July 19, 2013), <http://www.nydailynews.com/news/national/repeal-don-don-couple-gay-union-u-s-military-base-article-1.1117483>. Within a year after the first same-sex marriage celebrated on a military installation, members of Congress introduced legislation to protect chaplains who, for reasons of faith, did not want to preside over same-sex marriages. See, e.g., Military Religious Freedom Act, H.R. 914, 113th Cong. (2013). Portions of the text of H.R. 914 are notably similar to the protections that appear in the National Defense Authorization Act for Fiscal Year 2013, *supra* note 8.

Muslims, and Sikhs Join the Military”<sup>10</sup> despite the military having no categorical exclusion of those groups. The layperson’s argument is that military policies which do not allow expressions of faith—even seemingly benign ones such as beards or articles of clothing—are a de facto exclusion of those groups. On their face, military policies appear to allow anyone to serve as long as they meet standards, but a skeptical public may question why Western standards remain acceptable while Eastern ones do not. Additionally, rules which limit religious cultural expression may be perceived as contrary to the military’s claimed respect for diversity.

In sum, while the military has a presumptively justified need for command and control over its uniformed members, that authority risks becoming problematic when it conflicts with the nation’s traditional respect for religious liberty. It is therefore in the military’s interest to carefully consider whether an accommodation request should be granted. While the denial of an accommodation may be proper under existing law, military leadership should carefully consider whether it has sufficiently good reason to do so in light of the needs of the individual as well as larger public and judicial concerns over the protection of the religious conscience.

## II. THE LANDSCAPE OF MILITARY RELIGIOUS ACCOMMODATION

### A. The Free Exercise Clause

The First Amendment to the United States Constitution famously tells us that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof....”<sup>11</sup> The Free Exercise Clause is among the most readily-invoked rules when military members face perceived religious restrictions. During a recent debate over protecting religious rights in the military, Representative Louie Gohmert, R-Texas, stated that the government was “going to lose members of the military that cannot serve if their First Amendment rights are not going to be protected with regard to religion.”<sup>12</sup> Courts interpreting the Free Exercise Clause have ruled that the First Amendment’s prohibitions are not absolute and that the government’s interests must be weighed against the religious practice asserted. Certainly, the mere profession of religious beliefs cannot be regulated by

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<sup>10</sup> Simran Jeet Singh, “*It’s Time to Let Jews, Muslims, and Sikhs Join the Military*,” THE DAILY BEAST (May 10, 2013, 4:45 AM), <http://www.thedailybeast.com/articles/2013/05/10/it-s-time-to-let-jews-muslims-and-sikhs-join-the-military.html>. This perception is not limited to minority faith groups. For example, Republican Presidential candidate Mike Huckabee has claimed that the current military environment is openly hostile to Christians who benignly express their faith during their duties. Editorial, “*No Comment Necessary: Military ‘Openly Hostile’ to Christians, Says Huckabee*,” N. Y. TIMES (Apr. 20, 2015, 1:07 PM), <http://takingnote.blogs.nytimes.com/2015/04/20/no-comment-necessary-military-openly-hostile-to-christians-says-huckabee/>.

<sup>11</sup> U.S. CONST. amend. I.

<sup>12</sup> Corrie Mitchell, *Conservatives Say Religious Freedom Is ‘Under Attack’ in Military*, FAITHSTREET.COM (July 10, 2013), <http://www.faithstreet.com/onfaith/2013/07/10/conservatives-say-religious-freedom-is-under-attack-in-military/20885>.

the government,<sup>13</sup> nor can the government ban a particular religious practice solely because it is a religious practice. As the Supreme Court has said, “[i]t would doubtless be unconstitutional, for example...to prohibit bowing down before a golden calf.”<sup>14</sup>

However, even when government rules and regulations do not directly target religion, they may have an incidental effect on a religious practice. For example, recreational drug use tends to be universally prohibited, yet certain faith groups use narcotics in religious practice. The Supreme Court most recently dealt with this issue in 1990 in *Employment Division of Oregon v. Smith*, in which Native American plaintiffs contested the state’s ban on peyote as applied to its use in their religious rituals.<sup>15</sup> The *Smith* court rejected the notion that conviction and conduct were equally protected by the First Amendment, acknowledging that while other state legislatures had legalized sacramental peyote use, the First Amendment did not compel all states to do so.<sup>16</sup>

*Smith* represented a seismic shift in First Amendment law, because the Court determined that the traditional “strict scrutiny” or “compelling interest” standard for whether a statute unconstitutionally burdened a religion no longer applied. Prior to that ruling, it was generally accepted that in order to survive a Free Exercise challenge, the government had to show that it had a compelling interest in the challenged law as well as no less burdensome means to achieve that interest.<sup>17</sup> After *Smith*, it appeared that the Court would grant a great deal of deference to an otherwise facially valid statute even if religious practice was incidentally burdened. The Court later ruled that the Free Exercise clause could effectively be invoked only where a statute was not neutral and indeed targeted a specific religious practice: in such cases, the “compelling interest”<sup>18</sup> test would apply. In *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, the Court struck an ordinance which banned animal sacrifice, finding that the city’s justification for the ordinance (animal welfare, public health, and the protection of the public) targeted only practitioners of Santeria while impliedly exempting Judaism, and that the ordinance was therefore neither neutral nor generally applicable.<sup>19</sup>

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<sup>13</sup> *Sherbert v. Verner*, 374 U.S. 398, 402 (1963).

<sup>14</sup> *Emp’t Div., Dep’t of Human Res. of Or. v. Smith*, 494 U.S. 872, 877-878 (1990).

<sup>15</sup> The Court noted that a Free Exercise claim is stronger when brought in conjunction with other constitutional protections, such as free speech or freedom of the press. *Id.* at 881-882.

<sup>16</sup> *Id.* at 890.

<sup>17</sup> See, e.g., *Sherbert*, 374 U.S. at 402-03.

<sup>18</sup> A precise definition of the “compelling interest” remains elusive. As one appellate court wrote, “It is difficult to divine precisely what makes an interest ‘compelling,’ but a few reliable metrics exist. The interest cannot be ‘broadly formulated’—the test demands particularity.... The ‘compelling’ nature of the interest is contingent on its context.... And the interest must be ‘of the highest order,’... meaning it cannot leave ‘appreciable damage to [a] supposedly vital interest unprohibited.’” *Gilardi v. U. S. Dep’t of Health & Human Serv.*, 733 F.3d 1208, 1220 (D.C. Cir. 2013).

<sup>19</sup> *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993).

Concerns over whether a policy that affects military personnel can overcome either the *Smith* or *Lukimi Babalu* standards can be reduced by the Court's ruling in *Goldman v. Weinberger*.<sup>20</sup> *Goldman* involved a relatively minor deviation from military uniform policy: a yarmulke worn by an orthodox Jewish psychologist, which at the time was not officially sanctioned by uniform regulations. The plaintiff was an Air Force psychologist whose wear of the yarmulke was unchallenged for the first nine years of his service. It was only after Captain Goldman testified at a court-martial that someone complained that he was not within uniform standards, at which point he was ordered to stop wearing it on duty. Captain Goldman refused to comply and received a reprimand, leading him to bring suit against the Department of Defense.

The concurring opinion by Justice Stevens referred to the matter as “an especially attractive case for an exception from the uniform regulations that are applicable to all other Air Force personnel.”<sup>21</sup> He even went so far as to acknowledge that “Captain Goldman’s military duties are performed in a setting in which a modest departure from the uniform regulation creates almost no danger of impairment of the Air Force’s military mission. Moreover...there is reason to believe that the policy of strict enforcement against Captain Goldman had a retaliatory motive—he had worn his yarmulke while testifying on behalf of a defendant in a court-martial proceeding.”<sup>22</sup>

The Supreme Court nevertheless resisted this “attractive case for an exception,” finding that military members’ First Amendment rights are subordinate to the unique need of the armed forces for obedience and uniformity. Rather than addressing the case through the pre-*Smith* standard of review, the Court simply “deferred” to the military’s judgment. As the Court explained:

Our review of military regulations challenged on First Amendment grounds is far more deferential than constitutional review of similar laws or regulations designed for civilian society. The military need not encourage debate or tolerate protest to the extent that such tolerance is required of the civilian state by the First Amendment; to accomplish its mission the military must foster instinctive obedience, unity, commitment, and esprit de corps....The essence of military service “is the subordination of the desires and interests of the individual to the needs of the service.”...

These aspects of military life do not, of course, render entirely nugatory in the military context the guarantees of the First Amendment....But “within the military community there is simply not

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<sup>20</sup> *Goldman v. Weinberger*, 475 U.S. 503 (1986).

<sup>21</sup> *Id.* at 510-11.

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

the same [individual] autonomy as there is in the larger civilian community.”...In the context of the present case, when evaluating whether military needs justify a particular restriction on religiously motivated conduct, courts must give great deference to the professional judgment of military authorities concerning the relative importance of a particular military interest.... Not only are courts “ill-equipped to determine the impact upon discipline that any particular intrusion upon military authority might have,”...but the military authorities have been charged by the Executive and Legislative Branches with carrying out our Nation’s military policy. “[J]udicial deference... is at its apogee when legislative action under the congressional authority to raise and support armies and make rules and regulations for their governance is challenged.”<sup>23</sup>

The court ultimately deferred to the military’s need for “a sense of hierarchical unity by tending to eliminate outward individual distinctions except for those of rank,” finding that the uniform requirement directly supported “[t]he inescapable demands of military discipline and obedience to orders.”<sup>24</sup> Dismissing Goldman’s argument that the yarmulke was harmless, the Court deferred to the military’s judgment that uniformity needed to be enforced.<sup>25</sup> Even Justice Stevens’ sympathetic concurrence recognized that uniformity requires subordination of all religious beliefs to military needs, and that neither the Court nor the military should be making distinctions among which religious exemptions are acceptable within military parameters.<sup>26</sup>

Post-*Goldman*, the courts—whether civilian or military—have been unsympathetic to the argument that a neutral regulation which incidentally limits the religious practice of military members might violate the Free Exercise clause. Although a *Goldman*-type case has not since reached the Supreme Court, military courts occasionally encounter the Free Exercise argument, and these cases are almost uniformly resolved against the member.<sup>27</sup> Except in extremely rare circumstances,<sup>28</sup> the First Amendment remains a very weak legal instrument against military policy.

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<sup>23</sup> *Id.* at 507-08.

<sup>24</sup> *Id.* (internal citations omitted).

<sup>25</sup> *Id.* at 509-10.

<sup>26</sup> *Id.* at 512-513. Note that in the year following *Goldman*, Congress amended the statutes dealing with wear of the uniform to allow for the wear of religious apparel, with an exception for a Secretarial prohibition where the apparel would interfere with duties or is otherwise “not neat and conservative.” 10 U.S.C. § 774.

<sup>27</sup> See, e.g., *U.S. v. Webster*, 65 M.J. 936, 947-48 (A. Ct. Crim. App. 2008), in which a Muslim soldier refused to deploy to Iraq out of concern that he would be required to kill other Muslims, contrary to his faith. In a lengthy opinion responding to Webster’s Free Exercise objections, the Army Court of Criminal Appeals invoked *Goldman* in emphasizing deference to the Army’s decision to deploy him over his religious objections.

<sup>28</sup> One of these rare examples is *Hartman v. Stone*, 68 F.3d 973, 985 (6th Cir. 1995). In that case, the Appellate Court found that an Army Regulation which prohibited religious instruction provided

## B. The Religious Freedom Restoration Act

Congress responded to the *Smith* case by passing the Religious Freedom Restoration Act (RFRA).<sup>29</sup> The Congressional statutory findings specifically cited *Smith*, stating that “the Supreme Court virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion,”<sup>30</sup> and that Congress intended to restore the Court’s prior “compelling interest” test as applied in the earlier cases of *Sherbert v. Verner*<sup>31</sup> and *Wisconsin v. Yoder*.<sup>32</sup> The RFRA mandates that courts apply a heightened level of scrutiny to government action that interferes with religious exercise “even if the burden results from a rule of general applicability.”<sup>33</sup> The law prohibits any federal entity from burdening a religious exercise unless “it demonstrates that application of the burden to the person...is in furtherance of a compelling governmental interest; and...is the least restrictive means of furthering that compelling governmental interest.”<sup>34</sup> “Government” is defined broadly by the RFRA to include “a branch, department, agency, instrumentality, and official (or other person acting under color of law) of the United States,”<sup>35</sup> so the military services are unquestionably covered by the Act. Congress also made the Act retroactively applicable to any Federal law or policy enacted prior to its passage.<sup>36</sup>

Despite the RFRA’s more stringent requirement that even neutral religious laws must further a “compelling interest” and be the least restrictive way to further that compelling interest, the statute apparently did not alter the standard applicable to military members. Because *Goldman* was decided prior to *Smith*, the *Goldman* court applied the earlier, heightened First Amendment standard when it ultimately

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during base-sanctioned Family Child Care services violated the Free Exercise Clause. However, the notable distinction in *Hartman* is that the Army’s policy did not directly impact members who were subject to military authority, but instead applied to military families who provided privatized day care services in their on-base homes. *Id.* While the Court acknowledged *Goldman*, 475 U.S. at [503] and its high degree of deference to military authority, it found that the Army had “wandered far afield” since privatized child care by non-military members had a very tenuous connection to combat and military readiness.

<sup>29</sup> Religious Freedom Restoration Act of 1993, 42 U.S.C. §§ 2000bb—1, (1993).

<sup>30</sup> *Id.* at § 2000bb(a)(4).

<sup>31</sup> *Sherbert v. Verner*, 374 U.S. 398 (1963).

<sup>32</sup> *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

<sup>33</sup> RFRA, *supra* note 29, at § 2000bb-1(a).

<sup>34</sup> *Id.* at § 2000bb-1(b). Note that the Supreme Court found the RFRA inapplicable to the states in *City of Boerne v. Flores*, 521 U.S. 507 (1997). To date, no court has decided whether the RFRA would apply to a state National Guard unit acting solely in a State capacity, but there is a substantial risk that a court would find so due to the intertwined nature of the state and federal National Guards. *See In Re Sealed Case*, 551 F.3d 1047 (D.C. Cir. 2009), finding that the federal Privacy Act applied to a state National Guard unit given the ongoing federal recognition of and involvement in the state units.

<sup>35</sup> 42 U.S.C. § 2000bb-2(1).

<sup>36</sup> *Id.* at § 2000bb-3(a).

deferred to military needs. It is unsurprising, then, that the few instances in which an RFRA challenge is brought in a military proceeding, the military has typically prevailed.

A rare but recent example occurred in *Hasan v. United States*, in which the 2009 Fort Hood shooter challenged a requirement that he appear at his court-martial clean-shaven in compliance with Army regulations.<sup>37</sup> Hasan appeared at a pretrial hearing in a full beard and ignored the trial judge's warning to shave, citing religious obligations.<sup>38</sup> Hasan further petitioned for a religious accommodation through military command channels, which was ultimately denied.<sup>39</sup> The trial judge considered the RFRA but ultimately ordered that Hasan either appear clean-shaven in court or that the government forcibly shave him.<sup>40</sup>

Hasan then petitioned the Army Court of Criminal Appeals, arguing that the trial judge's shaving order violated the RFRA.<sup>41</sup> In an unpublished opinion, the appellate court granted deference to the trial judge and weighed the RFRA application heavily in the government's favor. The Court first deferred to the trial judge's finding that Hasan had not clearly demonstrated that he wore the beard "because of a sincerely held religious belief," which is a threshold requirement for application of the RFRA.<sup>42</sup> In the judge's opinion, it was "equally likely the accused is growing the beard at this time for purely secular reasons and is using his religious beliefs as a cover."<sup>43</sup> The Appellate Court then found that even if Hasan's belief were sincere, the government had an overriding interest in having him appear clean-shaven, and that it was the least-restrictive means under the circumstances.<sup>44</sup> The Court not only referenced the *Goldman* court's rationale that the military's need for "discipline, unit cohesion, and morale," should weigh heavily in the analysis<sup>45</sup> but it also found that Hasan's beard "denigrates the dignity, order, and decorum of the court-martial and is disruptive under the current posture of the case."<sup>46</sup> The court noted that because the charges included thirty-two specifications for attempted murder and another thirteen for premeditated murder, appearing in court wearing the beard risked unduly prejudicing Hasan before the panel in what was already an extremely sensitive case: "In no case is the need to exclude matters prejudicial to the accused more compelling

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<sup>37</sup> *Hasan v. U.S.*, ARMY MISC Nos. 20120876, 20120877, 2012 CCA LEXIS 399 (A. Ct. Crim. App. Oct. 18, 2012).

<sup>38</sup> *Id.* at \*1.

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

<sup>40</sup> *Id.* at \*1-2.

<sup>41</sup> *Id.* at \*2.

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> *Id.* at 3.

<sup>45</sup> *Id.* at 4, quoting *Goldman v. Weinberger*, 475 U.S. 503, 507-508 (1986).

<sup>46</sup> *Id.* at 4.

than one in which the accused faces a potential sentence to death.”<sup>47</sup> Nor were there any less-restrictive means by which to carry out the judge’s goal: Hasan could either appear shaven or unshaven, and no alternative means were possible.

In other words, despite the RFRA’s revival of the pre-Smith standard for Free Exercise analysis, it provides little relief for a military member seeking an exemption to duty or policy in the name of religion.<sup>48</sup> At best, it means that a member challenging policy or orders will need to overcome *Goldman’s* extreme deference to the military’s needs.

The first of two successful RFRA challenges occurred before the D.C. Circuit in *Rigdon v. Perry*.<sup>49</sup> In that case, all three military branches barred their chaplains from urging congregants to contact their Congressional representatives about supporting the Partial Birth Abortion Ban Act. The services did so under varying theories. For the Air Force, the prohibition was based on their interpretation of Department of Defense and Air Force regulations which prohibited military members from using their authority and military status while engaging in partisan political activities.<sup>50</sup> The Navy applied similar theories, but ultimately issued the bar under the authority of the Deputy Chief of Chaplains.<sup>51</sup> The Army invoked the bar under its interpretation of the Anti-Lobbying Act.<sup>52</sup>

At odds with the services’ interpretation of the law was the faith mandate of the chaplains who were subjected to the bans.<sup>53</sup> The named plaintiff, Lt. Col. Rigdon, was a Catholic chaplain who believed that his religious leadership had mandated that he speak out in favor of the “Project Life Postcard Campaign” as part of his homily during Sunday services.<sup>54</sup> Due to the Air Force’s directive, Lt. Col.

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

<sup>48</sup> However, it should be noted that the Court of Appeals for the Armed Forces later ordered the trial judge removed from the case due to a lack of impartiality. The appellate court reached this determination based on a number of factors, including the fact that the judge had ordered the forcible shaving when Army regulations placed the burden of meeting grooming standards on command, not the judge. The appellate court never reached the issue of whether the shaving violated the RFRA. *Hasan v. Gross*, 71 M.J. 416 (C.A.A.F. 2012).

<sup>49</sup> *Rigdon v. Perry*, 962 F.Supp. 150 (D.D.C. 1997).

<sup>50</sup> *Id.* at 152-153.

<sup>51</sup> *Id.* at 153.

<sup>52</sup> *Id.*, citing 18 U.S.C. § 1913 (1994).

<sup>53</sup> *Id.* at 154-55. There were other named plaintiffs in the suit, including an Air Force rabbi, and several religious congregants who believed the policies interfered with their ability to obtain counseling. The justiciability of their claims was in question, but the court never resolved their individual claims since the justiciability of the priest and rabbi’s claims were established. *Id.* at 155, n.5.

<sup>54</sup> *Id.* at 154.

Rigdon believed that he was not free to speak about moral issues which coincided with legislation “for fear of disciplinary action.”<sup>55</sup>

*Rigdon* concerned multiple issues, including whether the Department of Defense’s internal regulation on political activities by military members applied to a chaplain speaking to a congregation.<sup>56</sup> When it reached the RFRA issue, however, the court found that the military services had violated the chaplains’ religious liberties. First, the policies imposed a “substantial burden” on the chaplains’ religious beliefs, that is, their ability to speak out on an issue which they considered of fundamental importance in their belief systems.<sup>57</sup> Second, the court found that the military services failed the second prong of the RFRA: they did not use the least restrictive means of furthering a compelling interest. Although the court acknowledged the importance of a “politically-disinterested military,” the government failed to show that the interest was furthered by restricting the speech of chaplains who were acting in a solely religious capacity during their religious ministry.<sup>58</sup>

Because the *Rigdon* court never invoked *Goldman*, it may be difficult on its face to reconcile the two cases. While Captain Goldman sought a religious exemption to a broad uniform policy permitting him to wear his yarmulke, Father Rigdon’s case involved the scope of religiously-motivated speech in the context of military-sanctioned religious services offered by chaplains. *Goldman* concerned the on-duty, in-uniform conduct of a clinical psychologist, while *Rigdon* examined the special case of chaplains, who exist within the military as representatives of their respective faith traditions and are expected to minister to their congregants from a specifically religious perspective. A third consideration is that *Rigdon* involved the suppression not only of religious practice, but also of speech, whereas *Goldman* was strictly limited to a practice. In analyzing what types of religious speech were permissible under the military’s interpretation of political rules, the court considered the military’s behavior to be a “viewpoint-based” distinction and found that the suppression of Rigdon’s speech to be “muzzling of religious guidance.”<sup>59</sup> The court declined to split hairs over when a chaplain’s speech was “political” versus “religious” and ruled for the plaintiffs.<sup>60</sup>

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<sup>55</sup> *Rigdon v. Perry*, 962 F.Supp. 150 (D.D.C. 1997).

<sup>56</sup> *Id.* at 156-160.

<sup>57</sup> *Id.* at 161. The court rejected any notion that encouraging congregants to contact Congress was an “important component” of the faith. Indeed, the court relied on precedent that the judiciary should not be involved in determining what practices were or were not important to individual faiths. *Id.*, citing *Thomas v. Review Bd. of Ind. Emp’t Sec. Div.*, 450 U.S. 707, 714 (1981), *W. Presbyterian Church v. Bd. of Zoning Adjustment of D.C.*, 862 F.Supp. 538, 545–46 (D.D.C. 1994); *Sasnett v. Sullivan*, 91 F.3d 1018, 1022 (7th Cir.1996).

<sup>58</sup> *Rigdon*, 962 F.Supp. at 161-62. Earlier in the opinion, the court rejected any notion that military congregants were a “captive audience” of chaplains during their sermons or that the chaplains were acting under color of their rank or military office while in their religious capacity.

<sup>59</sup> *Id.* at 163-64.

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

Until recently, any other RFRA challenge to policy would presumably have favored the military.<sup>61</sup> Given that the *Goldman* court based its ruling on the compelling needs of “uniformity” and “subordination of the individual to the unit,” a generalized and neutral policy which only incidentally burdened religion would likely have prevailed even when it infringed upon the most innocuous of religious practices. However, the level of deference was seemingly weakened by the June 2015 decision in *Singh v. McHugh*.<sup>62</sup>

*Singh* involved a Sikh applicant to an Army Reserve Officer Training Corps program. His full entry into the program necessitated that he formally enlist; however, enlistment required that Singh abide by the Army’s grooming and appearance policies. As a practicing Sikh, Singh sought to keep with his faith’s practice of wearing a turban and allowing his hair and beard to grow. He sought a religious accommodation from the Army’s policies, but was denied the exemption.<sup>63</sup> Singh therefore petitioned a United States District Court to allow him to enlist under the theory that the Army’s denial of his accommodation substantially burdened his Sikh practices in violation of RFRA.

The District Court sided with Singh; in fact, it took a dimmer view of the notion that “military deference” serves as an all-powerful shield which prevents any review of a military action that limits religious practice. One of the issues in the case was whether the Court should even apply the RFRA’s restored “strict scrutiny” standard in light of *Goldman* deference.<sup>64</sup> In the Court’s view, Congress’

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<sup>61</sup> *Hartman v. Stone*, 68 F.3d 973, 978 (6th Cir. 1995)., also involved an RFRA challenge, but the court found that the RFRA did not apply since the Army’s regulations were not “neutrally and generally applicable.” In the court’s view, the Army’s actions went beyond being neutral and generally applicable, so it was able to bypass the RFRA and go directly to a First Amendment analysis. *Id.* Similarly, a criminal defendant raised the RFRA in *U.S. v. Webster*, 65 M.J. 936, 947-48 (A. Ct. Crim. App. 2008), in claiming that an order to deploy to Iraq violated his belief that he was prohibited from killing other Muslims, but the appellate court chose to interpret the claim as one of a First Amendment violation instead. The court relied heavily on the *Goldman* standard of deference to the military’s needs. *Id.* at 945-46. Despite labeling the case as a First Amendment matter, the court still applied the “substantial burden” and “compelling interest” standards of the RFRA and found that, under the circumstances, Webster’s religious beliefs were not burdened and the military had a heavy interest in ensuring its soldiers deployed to fight its wars. *Id.* at 947. Additionally, under the circumstances of the case, the Army used the least restrictive means possible, such as by attempting to allow him to serve in non-combat positions. *Id.* at 947-48.

<sup>62</sup> *Singh v. McHugh*, No. 14-cv-1906, 2015 U.S. Dist. LEXIS 76526 (D.D.C. June 12, 2015).

<sup>63</sup> One issue in Singh’s pursuit of an accommodation was whether it could even be granted prior to enlistment. Early in the case, the Army’s position was that Singh was not eligible to request the accommodation because he was not yet a military member. Instead, the Army took the position that Singh needed to enlist, comply with policy, and then seek the accommodation. *Id.* at 21. Singh desired to obtain the accommodation even prior to the enlistment and that the restriction on his faith’s grooming practice was effectively a bar to enlistment. On this issue, the Court sided with Singh. Despite the Army’s objection that the accommodation process only applied to actual and not prospective military members, the facts revealed that the Army had processed (and denied) the accommodation request anyway. *Id.* at 36-37.

<sup>64</sup> *Id.* at 42-43.

passage of the RFRA signaled a clear statutory intent to hold all federal agencies, including the military, to the heightened standard. It relied on recent Supreme Court precedent which rejected “a degree of deference that is tantamount to unquestioning acceptance.”<sup>65</sup> While still acknowledging the military’s knowledge and expertise on the matter, the Court rejected the notion that the commander’s “mere say-so” entitled the Army to summary judgment in the case.<sup>66</sup>

*Singh* is, of course, only a single district court decision. It is unknown as of this writing whether the Army will appeal the decision, or whether similar successful challenges will occur. It also remains to be seen whether other federal courts will agree with and adopt the District Court’s reduced view of *Goldman* deference with respect to the RFRA.<sup>67</sup>

### C. Department of Defense Instruction 1300.17

In addition to RFRA, military officials evaluating accommodation requests must consider Department of Defense Instruction 1300.17, “Accommodation of Religious Practices Within the Military Services,” (DoDI 1300.17) which broadly establishes how the military is to process RFRA-type accommodation requests.<sup>68</sup> While this Instruction has existed in various forms for more than twenty years, it is the most recent version of this regulation with which this article is concerned, and it too seems to heavily favor military conformity over religious accommodation, though it leaves ultimate discretion to the commander and/or military policymakers.

The DoDI “places a high value on the rights of members of the Military Services to observe the tenets of their respective religions or to observe no religion at all. It protects the civil liberties of its personnel and the public to the greatest extent possible, consistent with its military requirements.”<sup>69</sup> However, the Instruction also reaffirms the primacy of mission accomplishment, using the familiar language of the *Goldman* court:

DoD has a compelling government interest in mission accomplishment, including the elements of mission accomplishment such as military readiness, unit cohesion, good order, discipline, health, and safety, on both the individual and unit levels. An essential part of unit cohesion is establishing and maintaining uniform military grooming and appearance standards.<sup>70</sup>

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<sup>65</sup> *Id.* at 49, quoting *Holt v. Hobbs*, 135 S. Ct. 853, 864 (2015).

<sup>66</sup> *Id.* at 50-51.

<sup>67</sup> The specifics of why the Court ruled in *Singh*’s favor are discussed later in this article. *See*, text accompanying notes 250-265.

<sup>68</sup> DoDI 1300.17, *supra* note 6, at ¶ 2.a.

<sup>69</sup> *Id.* at ¶ 4.a.

<sup>70</sup> *Id.* at ¶ 4.c.

Having said that, the DoDI states that it “will accommodate individual expressions of sincerely held beliefs (conscience, moral principles, or religious beliefs) of service members...unless it could have an adverse impact on military readiness, unit cohesion, and good order and discipline.”<sup>71</sup> The statement that the military “will accommodate” requests implies a presumption of approval, although the Instruction repeatedly maintains an exception for “mission accomplishment, including military readiness, unit cohesion, good order, discipline, health and safety, or any other military requirement.”<sup>72</sup> In many respects, the DoDI is simply a restatement of the RFRA with a procedural framework for processing requests for accommodation through military channels. The standards for review are otherwise unchanged:

In accordance with [the RFRA], requests for religious accommodation from a military policy, practice, or duty that substantially burdens a Service member’s exercise of religion may be denied only when the military policy, practice, or duty:

- (a) Furthers a compelling governmental interest.
- (b) Is the least restrictive means of furthering that compelling governmental interest.<sup>73</sup>

In other words, RFRA is only triggered in the military if a service member’s religious exercise is “substantially burdened.” What constitutes a “substantial burden” may vary from case to case since there are so many variable religious practices. The standard for a “substantial burden” seems to be whether a particular religion either mandates or prohibits a specific activity, and if so, whether the government is forcing its believers to act contrary to that religious practice.<sup>74</sup> This determination is highly fact-dependent, and courts examine the specific facts of the case closely to determine whether there is a “substantial burden.”<sup>75</sup> Notwithstanding the existence of a substantial burden, military policy will likely overcome the member’s needs based on the long list of established military interests.

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<sup>71</sup> *Id.* at ¶ 4.b.

<sup>72</sup> *Id.* at ¶ 4.e.

<sup>73</sup> *Id.* at ¶ 4.e(1).

<sup>74</sup> *Thomas v. Review Bd.*, 450 U.S. 707, 718 (1981) (“Where the state conditions receipt of an important benefit upon conduct proscribed by a religious faith, or where it denies such a benefit because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs, a burden upon religion exists. While the compulsion may be indirect, the infringement upon free exercise is nonetheless substantial.”).

<sup>75</sup> *See, e.g., Henderson v. Kennedy*, 253 F.3d 12, 16 (D.C. Cir. 2001), which held that a Christian group which wanted to sell t-shirts on the National Mall was not substantially burdened by a policy which banned all t-shirt sales, because the record contained no evidence that any faith group has a specific tenet of preaching by selling t-shirts at that location.

The Instruction poses additional procedural requirements beyond the RFRA and case law. For example, it states that requests for accommodation “will be resolved in a timely manner,” though no specific time limits are provided.<sup>76</sup> It also states that a military member’s expression of religious beliefs may not be used as the basis of any adverse action or other negative career action—though presumably an expression of religious beliefs in an improper *manner* could still be actionable.<sup>77</sup>

It is critical for commanders and legal practitioners to realize that the DoDI specifically deals with “requests” for accommodation rather than a presumptive surrender to the individual member’s needs. That is, the member cannot produce his or her religion as a trump card which automatically negates any command order or policy. The regulation uses the word “request” or a variant thereof over thirty times in nine pages. Orders and policy are the norm and must presumptively be followed; it is incumbent upon the religious adherent to request an exception to policy and to allow command to consider it. In the interim, the member is obligated to comply with policy unless and until an exception is granted.<sup>78</sup>

Because the DoDI creates no new substantive law, commanders and lawyers should best understand it as creating a process for religious accommodation rather than adding a tighter level of review. The first step leaves it to the military to determine whether denying the request would substantially burden the member’s exercise of religion. If the policy does not substantially burden religious practice, then the commander need only weigh accommodation against mission accomplishment. If mission accomplishment outweighs the member’s needs, then the request may be denied.<sup>79</sup>

However, if the denial would substantially burden religious exercise, then the RFRA analysis applies.<sup>80</sup> In that situation, the Instruction requires that the commander determine the appropriate waiver authority and send the accommodation request to that authority. In other words, if the accommodation requires a waiver from a local policy or an order by the immediate commander, then the accommodation request can be handled at the immediate level.<sup>81</sup> However, policies that are determined at a higher level—such as dress and grooming standards—must be sent to the Service Secretary or their identified designee.<sup>82</sup>

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<sup>76</sup> DoDI 1300.17, *supra* note 6, at ¶ 4.e.

<sup>77</sup> *Id.* at ¶ 4.d.

<sup>78</sup> *Id.* at ¶ 4.g.

<sup>79</sup> *Id.* at ¶ 4.e(2).

<sup>80</sup> *Id.* at ¶ 3.e, 4.e(1). DoDI 1300.17 earlier defines “substantially burdens” as “significantly interfering with the exercise of religion as opposed to minimally interfering with the exercise of religion.”

<sup>81</sup> *Id.* at ¶ 4.f(1).

<sup>82</sup> *Id.* at ¶ 4.f(2).

Reviewing authorities should keep two other elements of the Instruction in mind. First, although the Instruction seemingly favors accommodation, it is so heavily peppered with exceptions that the default is to deny it. The notion that requests “will be approved” is qualified by a requirement that accommodation not adversely impact the military’s compelling interests.<sup>83</sup> Those “compelling interests” are identified as follows:

DoD has a compelling government interest in mission accomplishment, including the elements of mission accomplishment such as military readiness, unit cohesion, good order, discipline, health, and safety, on both the individual and unit levels. An essential part of unit cohesion is establishing and maintaining uniform military grooming and appearance standards.<sup>84</sup>

The remainder of the Instruction devotes a great deal of attention to the military’s interests in good order, discipline, and conformity.

The party approving accommodation must give “careful consideration” to the effect of “any compelling interest.” It reminds us that

the military is a specialized community within the United States, governed by a discipline separate from that of the rest of society, the importance of uniformity and adhering to standards, of putting unit before self, is more significant and needs to be carefully evaluated when considering each request for accommodation of religious practices.<sup>85</sup>

Nor is any particular accommodation to be considered as setting a precedent for approval of all similar requests; decisions are to be made on a case-by-case basis. In theory, approving a faith-based request for accommodation does not mean that a similar request must be granted to an adherent of a different faith.<sup>86</sup> This rule was not written so as to create an Establishment Clause issue, but to remind commanders that a request “must be considered based on its unique facts.”<sup>87</sup> For example, just because the military approves turbans for Sikhs does not mean that it must approve yarmulkes for Jews. Rather, the turban and the yarmulke must be analyzed individually for their impact on conformity, unit discipline and cohesion, and their effect on the member’s religious exercise;<sup>88</sup> there may be reasons that one type of religious

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<sup>83</sup> *Id.* at ¶ 4.e.

<sup>84</sup> *Id.* at ¶ 4.c.

<sup>85</sup> *Id.* at ¶ 4.h.

<sup>86</sup> *Id.* at ¶ 4.i.

<sup>87</sup> *Id.*

<sup>88</sup> *Id.* The procedures in the Enclosure to DoDI 1300.17 provide a list of factors to be evaluated in granting accommodation requests, which includes “Previous treatment of the same or similar

headgear could interfere with mission accomplishment while another might not. Cohesion, discipline, and mission accomplishment come first, and requests are to be individually evaluated in light of these obligations.

Note that by policy, the grant of any accommodation is likely going to be temporary and conditional. If a request is granted, the DoDI requires the member to be informed of the specific elements of that approval.<sup>89</sup> An accommodation is, per the Instruction, not a standing matter, and the request must be renewed following a significant change in circumstances including a change in duty station, assignment, or deployment.<sup>90</sup>

It is important to note that the DoDI is largely concerned with requests for accommodation in clothing, appearance, and grooming standards. The instruction is by no means exclusive to dress and appearance issues, as it does reference “practice” in references to “worship practices, holy days, and Sabbath or similar religious observance requests”<sup>91</sup> as well as medical practice waivers.<sup>92</sup> However, it devotes greater attention towards the issue of deviations from uniform and appearance standards.<sup>93</sup> This is not to suggest that the DoDI ignores non-appearance based issues, such as daily prayer or dietary concerns. It does mean that the Instruction’s guidance on non-appearance based religious practices is more nebulous, or perhaps more within the commander’s discretion. The commander does not need to consider, for example, whether a daily prayer ritual interferes with functionality of the uniform or the use of military equipment because by nature it does not. Instead, the commander needs only to determine how the request impacts good order and discipline, the impact on the mission, and any other factors.<sup>94</sup>

In sum, DoDI 1300.17 gives no greater religious protections to military members than the RFRA; it simply incorporates its standards. Although the DoDI states that requests for accommodation “will be approved,” that preference towards approval is qualified and requires the approving authority to consider the broader impact that approval would have on the military’s needs. At best, the DoDI establishes a firm process to allow members to request religious accommodation through their chain of command, with a presumption that the commander must consider certain factors, but keep at the forefront is the military’s “compelling interest” in

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requests, including treatment of similar requests made for other than religious reasons.” *Id.* at Enc. ¶ 1.e. In light of paragraph 4.i.’s requirement to evaluate each request on its own facts, the phrase “previous treatment same or similar requests” is probably meant to be read narrowly—for example, previous treatment of all yarmulke requests versus all headgear requests in general.

<sup>89</sup> *Id.* at ¶ 4.j.

<sup>90</sup> *Id.*

<sup>91</sup> *Id.* at Enc. ¶ 4.a.

<sup>92</sup> *Id.* at ¶ 4.c.

<sup>93</sup> *Id.* at ¶¶ 3.a-d, 4.c, 4.f.(1), Enc. ¶¶ 5-10.

<sup>94</sup> *Id.* at Enc. ¶ 1.

maintaining standardization, discipline, and subordination of the individual to the group and the mission.

### III. THE MENTALITY OF RELIGIOUS ADHERENCE

Having reviewed the First Amendment and the RFRA as they pertain to the military, as well as DoDI 1300.17, it seems that there is little expectation that a religious adherent can be guaranteed an accommodation if requested. Even if it is granted, the member must seek renewal upon changing assignment, which may result in bureaucratic frustration at having to apply again, as well as facing the risk of a seemingly inconsistent result between commands. The DoDI is the most liberal of those three standards in encouraging accommodation for the religious member, but it, too reminds the commander that the good of the organization and the mission come first. Since the scales tip so heavily in favor of military conformity, why should the approving authority ever bother to grant a religious exemption?

First, there are a few items in the DoDI that weigh in favor of the member which the approving authority should remember to consider. While the DoDI favors uniformity over individualism,<sup>95</sup> it does require authorities to consider “the effect of approval or denial on the Service member’s exercise of religion”<sup>96</sup> and “[t]he religious importance of the accommodation to the requester.”<sup>97</sup> It is the “effect of...denial” and “the religious importance” that the remainder of this article is concerned with.

Regardless of whether an approving authority agrees with any particular faith, or the concept of faith in general, it is critical to understand the tremendous dual obligations of an orthodox religious observer serving in the military. At the core of the issue is that the believer is dedicated to a “higher power” in whatever form, and the believer’s relationship to that power risks competing with their duty of loyalty to the military. As Jesus said, “No one can serve two masters. He will either hate one and love the other, or be devoted to one and despise the other.”<sup>98</sup> Commanders need to recognize that their devoutly religious subordinates are caught in the pull between “two masters”: their god and the military. Despite command’s justified need for the military to come first, the believer may not always be able to reconcile that prioritization with their creed.

It is also critical to realize that military members are uniquely situated in comparison to their civilian counterparts who encounter conflicts between their employment and their religion. In the civilian world, an employee who is unable to comply with an employer’s requirements is typically free to resign. Many military

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<sup>95</sup> *Id.* at ¶ 4.h.

<sup>96</sup> *Id.* at ¶ 4.i.

<sup>97</sup> *Id.* at Enc. ¶ 1.b.

<sup>98</sup> *Matthew* 6:24 (New American Bible Revised Edition).

members do not have that option: if they are under lawful orders and a continuing service obligation, compliance is expected. A military member in an irreconcilable religious conflict could certainly request to leave the service, but unless and until separation is approved, the member may have no meaningful choice.

This portion of this article will focus on two areas which deciding officials should consider in analyzing deep religious beliefs. Religions tend to have two aspects which drive the conflict with military duties: what I call the “compliance” and “persecution” clauses of religion.<sup>99</sup> That is, in the first aspect, religious adherents have a perceived duty to their god to comply with certain rules or practices, and many of these requirements are uncompromising articles of faith for which noncompliance results in divine punishment. In the second aspect, many religions have a cultural recognition that persecution for their beliefs is part and parcel of their faith, and in some sense, being persecuted validates what they believe. Commanders should be aware of the extent to which a military order or policy conflicts with these two “clauses” when evaluating an individual’s request for religious accommodation.

#### A. The “Compliance Clause”

Religions often carry certain customs and codes that dictate the behavior of its followers.<sup>100</sup> The nature and scope of the rules of every religion worldwide are beyond the scope of this article given the diversity and nature of religions worldwide. It is certainly worth mentioning that demographically, the various Christian faiths dominate the U.S. military’s population. Surveys taken between 2008 and 2009 found that most military members aligned with some Christian denomination, most predominantly as Catholics or Baptists.<sup>101</sup> Jews and Muslims are represented by one percent or less of the military, as are other faiths such as Pagans or Eastern religions.<sup>102</sup> As a result, this article will naturally refer more often to the Abrahamic faiths (Judaism, Christianity, and Islam) in discussing the nature of religion, but the reader should be advised that this is for illustrative purposes only and non-Abrahamic faiths should be given equal analysis when issues involving them arise.

The Abrahamic faiths (Judaism, Christianity, and Islam) have their rules rooted in a covenant with an ultimate divine being. Put simply, the Abrahamic concept of a covenant could be described as God providing divine favor to the

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<sup>99</sup> The views expressed here are based on the author’s own research and do not presume to speak authoritatively for any religion.

<sup>100</sup> For example, Judaism refers to its “Halakhah,” the overall body of religious codes and customs contained in scripture, scholarly texts, and customs. *Encyclopedia Judaica: Halakhah*, JEWISH VIRTUAL LIBRARY, [http://www.jewishvirtuallibrary.org/jsource/judaica/ejud\\_0002\\_0008\\_0\\_08206.html](http://www.jewishvirtuallibrary.org/jsource/judaica/ejud_0002_0008_0_08206.html) (last visited Nov. 27, 2015).

<sup>101</sup> See generally Charlotte Hunter & Lyman Smith, *MILITARY LEADERSHIP AND EDUCATION & RELIGION’S ROLE IN THE U.S. MILITARY MISSION 3* (2010), available at [http://www.deomi.org/eoeoeresources/documents/Training\\_for\\_Religious\\_Awareness\\_Hunter\\_and\\_Smith.pdf](http://www.deomi.org/eoeoeresources/documents/Training_for_Religious_Awareness_Hunter_and_Smith.pdf).

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

people, while the people give reverence to God through devotion, ritual practices, and/or certain moral behavior.<sup>103</sup>

## 1. Judaism

Multiple covenants appear in the Jewish scriptures, such as the one that was set after the Deluge,<sup>104</sup> the one between Abraham and God to multiply his descendants,<sup>105</sup> and the one in which God established a monarchy for David's descendants.<sup>106</sup> Of concern to the individual Jewish observer, however, is the Mosaic covenant established at Mount Sinai which is referenced throughout the Torah.<sup>107</sup> From these books come the Ten Commandments and the additional laws, rituals, dietary practices, and other observances that appear in the Books of Leviticus and Deuteronomy. Collectively, the Torah's rules are known as the "Mitzvot," a total of 613 regulations including moral practices and dress and dietary prescriptions.<sup>108</sup>

In addition to the Torah and the Mitzvot, some Jews also follow the Talmud, an ancient collection of Jewish teachings which elaborate on the Torah and explain how the rules and customs are to be followed in everyday life.<sup>109</sup> Additionally, Judaism involves certain customary practices which do not appear in the scriptures but are nonetheless considered essential to the Jewish identity, such as the wearing of the yarmulke or "kippah."<sup>110</sup> Commanders might expect their more orthodox Jewish subordinates to display a combination of moral practices (such as not working on the Sabbath or observing specific holy days<sup>111</sup>) and behavioral ones (such as eating kosher food, or maintaining certain grooming,<sup>112</sup> dress and dietary practices<sup>113</sup>).

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<sup>103</sup> Gary A. Herion, *Covenant*, in EERDMANS DICTIONARY OF THE BIBLE, 288, 288-92 (2000).

<sup>104</sup> *Genesis* 8:21 (New American Bible Revised Edition).

<sup>105</sup> *Genesis* 15 (New American Bible Revised Edition).

<sup>106</sup> *2 Samuel* 7 (New American Bible Revised Edition).

<sup>107</sup> In non-Jewish religions, the Torah is more commonly known as the first five books of the Bible: Genesis, Exodus, Leviticus, Numbers, and Deuteronomy. *Torah*, in EERDMANS DICTIONARY OF THE BIBLE, 1321 (2000).

<sup>108</sup> *Jewish Concepts: Mitzvot*, JEWISH VIRTUAL LIBRARY, <http://www.jewishvirtuallibrary.org/jsource/Judaism/mitzvot.html> (last visited Nov. 5, 2015). The article notes that some of the mitzvot are impossible to observe in the present day, such as rituals that must be carried out in Solomon's Temple which has not existed since 70 A.D.

<sup>109</sup> Note that Judaism has various branches and not all of these observe the mitzvot to the same extent as others. Reform Judaism is considered the most liberal of the branches and does not follow traditional practices and customs with the same rigor as the other branches. *Reform Judaism: The Tenets of Reform Judaism*, JEWISH VIRTUAL LIBRARY, [http://www.jewishvirtuallibrary.org/jsource/Judaism/reform\\_practices.html](http://www.jewishvirtuallibrary.org/jsource/Judaism/reform_practices.html) (last visited Sept. Nov. 5, 2015).

<sup>110</sup> *Jewish Practices & Rituals: Kippah (Yarmulke)*, JEWISH VIRTUAL LIBRARY, <http://www.jewishvirtuallibrary.org/jsource/Judaism/Kippah.html> (last visited Nov. 5, 2015).

<sup>111</sup> *See generally Leviticus* 23 (New American Bible Revised Edition).

<sup>112</sup> *See, e.g., Leviticus* 19:27 (New American Bible Revised Edition).

<sup>113</sup> *See, e.g., Leviticus* 19:26 (New American Bible Revised Edition).

Orthodox-leaning Jews believe that they are required to remain strictly obedient to the Torah as a condition of their relationship with God. In the scriptures, the nature of the covenant was identified as “the blessing and the curse” to the Israelite people as a whole. Obedience to the law would result in blessings to the people as a whole; disobedience would result in exile.<sup>114</sup> The importance of this obedience is illustrated by the Book of Deuteronomy’s litany of 98 curses which result from disobedience.<sup>115</sup>

Judaism has varying perspectives on the divine benefits of obedience. Some interpretations of Judaism apply the blessings and curses on the micro level, envisioning an earthly “reward and punishment” system for religious fidelity; on an individual level, God will reward good behavior and punish the bad.<sup>116</sup> Judaism is largely neutral on the question of whether a benevolent afterlife is promised to the pious,<sup>117</sup> and there is disagreement on whether Judaism promises a divine resurrection at the end of time.<sup>118</sup> Judaism is instead concerned with the immediacy of this world and the need to follow God’s laws while in it.

The degree to which a Jewish member is allowed to deviate from his covenantal obligations, particularly when they conflict with civil obligations, is of course debated. Among the Orthodox, there is a Jewish precept related to martyrdom known as “Kiddush HaShem,” or “sanctification of the name” (of God), while the inverse principle is “Hillul ha-Shem,” or “defamation of the name.”<sup>119</sup> Although not directly appearing in the Jewish Bible, rabbinical teaching has interpreted this concept of sanctification to include “three cardinal laws” which can never be violated: the prohibitions on idolatry, sexual immorality, and murder.<sup>120</sup> Under this interpretation, a Jew is required to die rather than violate one of these three commandments.<sup>121</sup> To die rather than to transgress these cardinal rules is an act which sanctifies God’s name; to violate those laws rather than die defames God.<sup>122</sup>

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<sup>114</sup> *Deuteronomy* 30:15-20 (New American Bible Revised Edition).

<sup>115</sup> *Deuteronomy* 28:15-69 (New American Bible Revised Edition).

<sup>116</sup> *Reward and Punishment*, JEWISH VIRTUAL LIBRARY, [http://www.jewishvirtuallibrary.org/jsource/judaica/ejud\\_0002\\_0017\\_0\\_16693.html](http://www.jewishvirtuallibrary.org/jsource/judaica/ejud_0002_0017_0_16693.html) (last visited Nov. 5, 2015).

<sup>117</sup> *Jewish Concepts: Afterlife*, JEWISH VIRTUAL LIBRARY, <http://www.jewishvirtuallibrary.org/jsource/Judaism/afterlife.html> (last visited Sept. 4 2014).

<sup>118</sup> *Resurrection*, JEWISH VIRTUAL LIBRARY, [http://www.jewishvirtuallibrary.org/jsource/judaica/ejud\\_0002\\_0017\\_0\\_16664.html](http://www.jewishvirtuallibrary.org/jsource/judaica/ejud_0002_0017_0_16664.html) (last visited Nov. 5, 2015). Jewish scriptures outside the Torah alluded to a rewarded resurrection, such as in *Daniel* 12:2-3, *Isaiah* 26:19, and *2 Maccabees* 7.

<sup>119</sup> *Kiddush Ha-Shem and Hillul Ha-Shem*, JEWISH VIRTUAL LIBRARY, [http://www.jewishvirtuallibrary.org/jsource/judaica/ejud\\_0002\\_0012\\_0\\_11109.html](http://www.jewishvirtuallibrary.org/jsource/judaica/ejud_0002_0012_0_11109.html) (last visited Nov. 5, 2015).

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

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

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

Beyond those three cardinal rules, however, Judaism looks to the Biblical statement that one should keep God's laws "and live by them."<sup>123</sup> Thus, an observant Orthodox Jew may disregard the mitzvot only where doing so is necessary "to preserve life." A threat to "life" seems to be the limit at which the mitzvot may be violated; threats short of life (such as imprisonment) are insufficient to disregard one's religious obligations. However, even that exception is subject to an exception: Jews are also required to choose death over a mitzvot transgression in cases of grave public scandal or in a case of national crisis in which Judaism is being actively oppressed.<sup>124</sup>

## 2. Christianity

The various Christian religions, although acknowledging their spiritual development from Judaism, generally do not follow the Torah in the strict sense that Jewish sects do. Christianity originates in Judaism, but believes that the God of the Jewish Bible became incarnate in the person of Jesus of Nazareth, who fulfilled earlier Jewish expectations that a messianic figure would appear on Earth.<sup>125</sup> Christianity is still rooted in a covenant relationship with God, but holds that the Mosaic covenant was replaced by the self-sacrifice of Jesus at his crucifixion made in reparation for the sins of mankind.<sup>126</sup> His sacrifice therefore provides human beings with a renewed opportunity for eternal life if the believer repents from sin and commits himself to the Christian lifestyle.

The sources of Christian belief and how it is applied to daily living inevitably varies, because the United States contains numerous established faith branches that identify as "Christian." The Hartford Seminary's Institute for Religion Research currently notes that some 217 Christian denominations in the U.S. have been identified, the largest in membership being the Catholic Church, the Southern Baptist Convention, the United Methodist Church, and the Church of Jesus Christ of Latter-day Saints.<sup>127</sup> Additionally, Hartford also identifies some 35,000 "nondenominational churches" which operate independently of any higher body.<sup>128</sup>

Among Christians, commanders are therefore likely to encounter a similar and yet inconsistent body of beliefs about moral behavior and on what authority those believers rely. Catholics believes that its bishops are the authoritative successors

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<sup>123</sup> *Leviticus* 18:5.

<sup>124</sup> *Kiddush Ha-Shem*, *supra* note 119.

<sup>125</sup> *Jewish Concepts: The Messiah*, JEWISH VIRTUAL LIBRARY, <http://www.jewishvirtuallibrary.org/jsource/Judaism/messiah.html> (last visited Nov. 5, 2015).

<sup>126</sup> *Matthew* 26:26-30.

<sup>127</sup> *Fast Facts about American Religion*, HARTFORD INSTITUTE FOR RELIGION RESEARCH, [http://hirt.hartsem.edu/research/fastfacts/fast\\_facts.html](http://hirt.hartsem.edu/research/fastfacts/fast_facts.html) (last visited Nov 5, 2015).

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

to Jesus' apostles whom he empowered to teach in his name.<sup>129</sup> They believe in the equal and joint authority of the Church's spiritual hierarchy and sacred scripture, the latter of which is interpreted by the former.<sup>130</sup> In contrast, the Protestant churches historically came into being by rejecting the authority of the Catholic Church. In turn, these denominations may reject the notion of apostolic succession or a divinely established institutional church, or else interpret it differently.<sup>131</sup> Others may have some notion of apostolic succession, but largely base their beliefs solely on the Bible with a particular focus on the Gospels in the New Testament.<sup>132</sup>

Because Christianity relies on the Jewish scriptures less as a moral source and more as a historical one,<sup>133</sup> most Christian faiths lack the dietary, dress, and grooming standards that are seen in the other Abrahamic religions.<sup>134</sup> Rather, commanders might encounter more devout Christian subordinates who take issue with military requirements when they conflict with an exclusively moral issue. For example, while many Christian branches do not observe the Jewish Sabbath, they do observe an equivalent day of rest and worship on Sunday. Others take issue with swearing an oath under any circumstances due to a literal interpretation of certain Biblical language.<sup>135</sup> To address this issue, many military oaths such as that used in courts-martial allow an alternative "affirmance" to accommodate this type of believer.<sup>136</sup>

The full denominational differences between the various Christian sects are well beyond the scope of this article. The larger point is to illustrate that commanders may encounter a variety of bases for a subordinate's particular Christian beliefs. Generally speaking, Christian believers are motivated by a combination of two factors: a desire to order one's life according to the teachings of Jesus,<sup>137</sup>

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<sup>129</sup> CATECHISM OF THE CATHOLIC CHURCH §§ 77-79 (1994).

<sup>130</sup> *Id.* at § 82.

<sup>131</sup> See, e.g., *Question and Answer: Apostolic Succession and Protestantism*, THE ORTHODOX PRESBYTERIAN CHURCH, [http://www.opc.org/qa.html?question\\_id=341](http://www.opc.org/qa.html?question_id=341) (last visited Nov. 5, 2015).

<sup>132</sup> See, e.g., A.L. Barry, *What About...the Bible*, THE LUTHERAN CHURCH—MISSOURI SYNOD, <http://lcms.org/Document.fdoc?src=lcm&id=1081> (last visited Nov. 5, 2015).

<sup>133</sup> Graeme Goldsworthy, *Is the Old Testament for Christians?*, NEW HORIZONS (January 2001) available at [http://www.opc.org/new\\_horizons/NH01/0001b.html](http://www.opc.org/new_horizons/NH01/0001b.html) (last visited Nov. 23, 2015).

<sup>134</sup> This will vary among Christian denominations. For example, the Roman Catholic Church has formally stated that the new law of Christ eliminated "the ritual and judicial observances of the Old Law." CATECHISM OF THE CATHOLIC CHURCH §§ 1972 (1994). In scripture, the New Testament features numerous instances of Jesus altering the Levitical laws of the Old Testament, such as the dietary restrictions (*Matthew* 15:1-20); the rules on divorce (*Matthew* 5:31-32; 19:1-12); and working on the Sabbath (*Matthew* 12:1-14). The New Testament letters of St. Paul also clarify that Christians are not required to follow the rigor of the Levitical law including the custom of circumcision. See generally *Romans* 2-4.

<sup>135</sup> *Matthew* 5:34 (New American Bible Revised Edition).

<sup>136</sup> MANUAL FOR COURTS-MARTIAL, United States, Part II, Rules for Courts-Martial § 807(a).

<sup>137</sup> See, e.g., *1 Corinthians* 11:1 ("Be imitators of me, as I am of Christ.").

and a desire to avoid hell and attain eternal life in heaven.<sup>138</sup> The struggle when an individual Christian comes into conflict with civil authority is that the believer wants to please his God and/or avoid eternal damnation, thus conforming to civil authority is likely subordinate to that theological goal.

It is worth noting that unlike Judaism, most Christian branches believe in an afterlife with the dual fates of eternal paradise for the just and eternal damnation for the wicked. Hell is, of course, often portrayed as a grim fate of eternal fire, although some churches focus on the spiritual aspect of Hell as an eternal separation from God.<sup>139</sup> In the Christian mind, disobeying a civil authority may be necessary, because whatever earthly consequence results is far outweighed by the presumed eternal consequence to the believer.

As Christian churches are so varied, so too will be their teachings on how a believer should resolve conflicts with civil authority. Roman Catholicism offers some degree of flexibility on this issue, reasoning that obedience to one's government is presumptively required under the Fourth Commandment.<sup>140</sup> As a classic example, a Catholic would likely be excused from traditional Sunday worship and rest obligated by the Second Commandment if military duties required it.<sup>141</sup> However, even the church's acknowledgment of civil authority has an upper limit:

The citizen is obliged in conscience not to follow the directives of civil authorities when they are contrary to the demands of the moral order, to the fundamental rights of persons or the teachings of the Gospel. Refusing obedience to civil authorities, when their demands are contrary to those of an upright conscience, finds its justification in the distinction between serving God and serving the political community. "Render therefore to Caesar the things that are Caesar's, and to God the things that are God's." "We must obey God rather than men"<sup>142</sup>

The Missouri Synod of the Lutheran Church provides a similar analysis to that of Catholics, holding that the civil law should be obeyed and the civil process or public demonstrations used when an injustice occurs.<sup>143</sup> However, where a clear

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<sup>138</sup> See, e.g., *Romans* 2:5-8 ("God...will repay everyone according to his works: eternal life to those who seek glory, honor, and immortality through perseverance in good works, but wrath and fury to those who selfishly disobey the truth and obey wickedness.").

<sup>139</sup> See, e.g., CATECHISM OF THE CATHOLIC CHURCH § 1033.

<sup>140</sup> CATECHISM OF THE CATHOLIC CHURCH § 2238. Note that many Christian faiths disagree on the correct content and numbering of the Ten Commandments. For Roman Catholics, the Fourth Commandment is identified as the obligation of obedience to one's parents and other authorities.

<sup>141</sup> *Id.* at § 2181.

<sup>142</sup> *Id.* at § 2242, quoting *Matthew* 22:21, *Acts of the Apostles* 5:29.

<sup>143</sup> *Civil Obedience and Disobedience: A Report of the Commission on Theology and Church Relations of the Lutheran Church—Missouri Synod*, THE LUTHERAN CHURCH—MISSOURI SYNOD

conflict between one's obligations to God and civil authority occurs, Lutherans "are to obey God rather than man when a civil law conflicts with a clear precept of God, being willing, at the same time, to accept as a part of their cross bearing the punitive consequences of their action."<sup>144</sup>

In a contrast, the Evangelical Presbyterian Church issued a pastoral letter heavily discouraging civil disobedience. The EPC's teaching is that it "must be as a last resort" and only after much soul-searching and research, and with a heavy preference towards civil appeals over violence.<sup>145</sup> However, the EPC relies on a quote from theologian Kenneth Kantzer that "[i]t is rarely good for a Christian to disobey even a bad law. That is why the Scripture so frequently urges Christians to obey even governments and laws that create trouble for them."<sup>146</sup>

These examples, however, come from traditional established churches. American Christianity has seen a rise in "nondenominational" churches: smaller, independent groups which claim no allegiance to the major organized branches. The Hartford Institute notes that at the end of the last decade, there may have been up to 35,000 of such churches, and that their combined numbers would represent the third-largest congregation in the nation.<sup>147</sup> These churches may have their own individual perspectives on when its congregants are expected to violate the law. Furthermore, individual believers who consider themselves Christian but identify with no specified denomination may reach their own conclusions on when civil disobedience is required, relying on some combination of scripture and their own logic.

This discussion is not intended to confound commanders or their lawyers, but only to illustrate that American Christianity is widely varied, and little consistency should be expected among requests for accommodation. Some Christians may, for example, display difficulty in working on the Sabbath and may interpret their beliefs as making an exception for military need.<sup>148</sup> Others, however, may believe that the Sabbath rest is absolute and will be unwilling to deviate even in the face of military orders.<sup>149</sup> Some may present a body of organized doctrinal thought on why

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available at [www.lcms.org/Document.fdoc?src=lcm&id=367](http://www.lcms.org/Document.fdoc?src=lcm&id=367) (last visited Nov 5, 2015)[hereinafter *Civil Obedience and Disobedience*].

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

<sup>145</sup> *Pastoral Letter: Civil Disobedience*, EVANGELICAL PRESBYTERIAN CHURCH [www.epc.org/.../pastoral-letters/PastoralLetter-CivilDisobedience.pdf](http://www.epc.org/.../pastoral-letters/PastoralLetter-CivilDisobedience.pdf) (last visited Nov 5, 2015)[hereinafter *Pastoral Letter: Civil Disobedience*].

<sup>146</sup> *Id.*, quoting Kenneth Kantzer, *Christians Must Obey the Laws—But Which Ones?* CHRISTIANITY TODAY 26.13, Aug. 6, 1982, 10-12.

<sup>147</sup> *Nondenominational & Independent Congregations*, HARTFORD INSTITUTE FOR RELIGION RESEARCH, <http://hrr.hartsem.edu/cong/nondenom.html> (last visited Nov. 5, 2015).

<sup>148</sup> The Roman Catholic Church proscribes working on Sundays, but acknowledges a necessary exception for "public services." CATECHISM OF THE CATHOLIC CHURCH § 2187.

<sup>149</sup> While not directly calling for civil disobedience, the Seventh-Day Adventist Church seemingly

they need a religious exemption,<sup>150</sup> and there may be a command chaplain available to identify whether the request is consistent with that body of faith. Others may be relying on as little as their personal interpretation of a specific Bible verse.

### 3. Islam

Like Judaism and Christianity, Islam traces its spiritual ancestry back to Abraham, and views major religious figures such as Moses and Jesus as true prophets of God. It acknowledges Judaism and Christianity's view of the world as being in a fallen state traceable to the initial disobedience of Adam, but also believes that mankind can enter into a state of reconciliation with God. Indeed, the name "Islam" translates as "submission" (to the will of God), and holds Abraham in esteem as a prophet who lived his life in a state of "Islam" to God's guidance.<sup>151</sup>

However, Islam defines its ultimate beginnings as a distinct faith founded on the experiences and teachings of Muhammad.<sup>152</sup> Tradition holds that Muhammad experienced a vision of God and consequently began preaching the tenets of Islam in the city of Mecca.<sup>153</sup> A later vision led him to break off from the Jewish and Christian traditions and form a new faith.<sup>154</sup> Muslims believe that in comparison to prior major religious figures, Muhammad is the last and greatest of God's messengers.<sup>155</sup>

Muslims also believe that the Koran ("the recitation") is the sacred record of Muhammad's teachings.<sup>156</sup> Just as Jews and Christians believe their Bibles to be the sacred and inspired word of God, so do Muslims view the Koran as the "divine, the eternal and literal word of God."<sup>157</sup> As with the Jewish and Christian Bibles, some Muslims take the words of the Koran to be infallible and the source of all Islamic belief and practice.<sup>158</sup> Additionally, Muslims rely on a secondary text, the Hadith, a recording of Muhammad's customs or "Sunna."<sup>159</sup> Just as the Talmud provides

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calls for avoidance of breaking the Sabbath rest to the maximum extent possible when conflicting with military or civil obligations. *Sabbath Observance: Purpose and Perspective*, SEVENTH-DAY ADVENTIST CHURCH <https://www.adventist.org/en/information/official-statements/documents/article/go/0/sabbath-observance/> (last visited Nov. 24, 2015).

<sup>150</sup> See CATECHISM OF THE CATHOLIC CHURCH § 2238, *Civil Obedience and Disobedience*, *supra* note 143, *Pastoral Letter: Civil Disobedience*, *supra* note 145.

<sup>151</sup> Beth Davies-Stofka, *Islam: Beginnings*, PATHEOS.COM, <http://www.patheos.com/Library/Islam/Origins/Beginnings.html> (last visited Nov. 5, 2015).

<sup>152</sup> Beth Davies-Stofka, *Islam: Sacred Texts*, PATHEOS.COM, <http://www.patheos.com/Library/Islam/Origins/Scriptures.html> (last visited Nov. 5, 2015).

<sup>153</sup> Davies-Stofka, *Islam: Beginnings*, *supra* note 151.

<sup>154</sup> *Id.*

<sup>155</sup> Koran 33:40.

<sup>156</sup> Davies-Stofka, *Islam: Sacred Texts*, *supra* note 152.

<sup>157</sup> *Id.*

<sup>158</sup> *Id.*

<sup>159</sup> Available at <http://sunnah.com/>.

additional interpretation of Jewish custom, the Hadith records additional teachings and history of Muhammad which forms the basis for modern Sharia Law and the expected behavior of the followers of Islam.<sup>160</sup>

As with Judaism and Christianity, Islam has a multitude of sub-denominations. The two most prominent are the Shi'a and the Sunni, which stem from an early cultural disagreement as to whom Muhammad's proper successor should have been.<sup>161</sup> Again, the specific distinctions among these branches is beyond the scope of this article, except to caution commanders that their Muslim subordinates may present a variety of interpretations of their Islamic obligations.

Islam maintains a similar notion of an afterlife to that of Christianity: that the world will undergo a final judgment at which God will resurrect the dead and judge their deeds. The good will attain paradise, while the wicked will face an eternal fire.<sup>162</sup> However, Islam—like other religions—is not an exclusive “reward and punishment” system. Muslims believe that following God fulfills the purpose for which they were created, and that goodness is its own reward.<sup>163</sup>

Speaking generally, adherence to Islam is based on five “pillars” which the believer must follow. These are: pledging the faith; daily ritual prayer; charity to the poor; fasting during the month of Ramadan; and making a pilgrimage to the city of Mecca (where Muhammad began his preaching) during one's lifetime.<sup>164</sup> The ritual prayer obligation is the one which could most obviously conflict with military duties, as a Muslim is obligated to pray five times daily in the direction of Mecca: before dawn, at noon, in the mid-afternoon, at sunset, and at night.<sup>165</sup> Prayer is to be preceded by both a physical and mental cleansing.<sup>166</sup> Muslims are also obligated to attend a Friday noon communal prayer.<sup>167</sup> Ritual fasting could also have an indirect effect on military duties, as the believer is obligated to abstain from food and liquids between dawn and dusk and may suffer from fatigue as a result.<sup>168</sup>

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<sup>160</sup> Davies-Stofka, *Islam: Beginnings*, *supra* note 151.

<sup>161</sup> Beth Davies-Stofka, *Islam: Early Developments*, PATHEOS.COM, <http://www.patheos.com/Library/Islam/Historical-Development/Early-Developments/> (last visited Nov. 5, 2015).

<sup>162</sup> Beth Davies-Stofka, *Islam: Ultimate Reality and Divine Beings*, PATHEOS.COM., <http://www.patheos.com/Library/Islam/Beliefs/Ultimate-Reality-and-Divine-Beings.html> (last visited Nov. 5, 2015).

<sup>163</sup> Beth Davies-Stofka, *Islam: Human Nature and the Purpose of Existence*, PATHEOS.COM, <http://www.patheos.com/Library/Islam/Beliefs/Human-Nature-and-the-Purpose-of-Existence> (last visited Nov. 5, 2015).

<sup>164</sup> Beth Davies-Stofka, *Islam: Worship and Devotion in Daily Life*, PATHEOS.COM, <http://www.patheos.com/Library/Islam/Ritual-Worship-Devotion-Symbolism/Worship-and-Devotion-in-Daily-Life.html> (last visited Nov. 5, 2015).

<sup>165</sup> *Id.*

<sup>166</sup> *Id.*

<sup>167</sup> *Id.*

<sup>168</sup> *Id.*

Commanders should be aware that like Jews, their orthodox Muslim subordinates may feel compelled to maintain certain dress, grooming, and dietary practices. For example, just as Jews are bound by the kosher rules of the Torah, so are Muslims bound to only eat “halal” (lawful) foods and cannot eat that which is “haram” (not permitted).<sup>169</sup> Similarly, some Muslims practice certain dress and appearance requirements such as growing a beard or wearing religious headgear. These will, of course, vary based on the member’s branch of Islam and the individual’s devoutness.

Note that Islam places tremendous cultural value on private contracts, provided that they otherwise meet standards of Islamic justice.<sup>170</sup> Some Muslims believe that contractual obligations carry over to one’s relationship to the state; therefore, Islam requires adherents to obey non-Islamic laws. That is, civil obedience is itself a principle of Islamic doctrine.<sup>171</sup> This principle is based on several Koranic passages in which an adherent is required to “fulfill every covenant” and the general principle that a Muslim should keep his word.<sup>172</sup>

While it is clear that being Muslim carries certain religious restrictions and responsibilities, answers vary on whether an Islamic doctrine could ever require a faithful Muslim to disobey a valid civil law.<sup>173</sup> There appears to be only one case in the military’s criminal system—*U.S. v. Webster*—in which a Muslim soldier unsuccessfully attempted to be excused from deployment to Iraq due to a belief that he could not kill other Muslims.<sup>174</sup> A Muslim chaplain testifying in the case

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<sup>169</sup> Dr. A. Majid Katme, *Faith and Food Fact Files – Muslim View*, BEHALAL.ORG, <http://behalal.org/consumer/faithandfood-fact-files-muslim-view-by-dr-a-majid-katme/> (last visited Nov. 5, 2015).

<sup>170</sup> Mohammed Fadel, *Islam: Principles of Moral Thought and Action*, PATHEOS.COM, <http://www.patheos.com/Library/Islam/Ethics-Morality-Community/Principles-of-Moral-Thought-and-Action> (last visited Nov. 5, 2015).

<sup>171</sup> *Muslim Americans Must Obey U.S. Laws: Nidal Hasan Disobeyed Islamic Doctrine*, VIRTUALMOSQUE.COM (Nov. 9, 2009), <http://www.virtualmosque.com/society/domestic-affairs/muslim-americans-must-obey-u-s-laws-nidal-hasan-disobeyed-islamic-doctrine-at-loonwatch-com/>.

<sup>172</sup> *Id.*

<sup>173</sup> For example, an entry on Islam Today indicates that a Muslim should acquiesce to a host nation’s laws to the extent that it does not require breaking Islamic rules. Sheikh Salman al-Oadah, *Obeying the Law in Non-Islamic Countries*, ISLAM TODAY, <http://en.islamtoday.net/node/604> (last visited Nov. 26, 2015). In another brief article, Dr. Yasir Qadhi sought to “jumpstart the discussion” on how Muslims should confront the challenge of conflicts between law and faith. Dr. Oadhi seems to take a view of avoidance of conflict, noting that Muslims should emigrate where a host nation’s laws become intolerable, or avail themselves of the political process where possible, though he admits that the problem is more complex than the binary choices of civil and religious law—for example, American law may not allow for the commutative justice called for by Islamic law. He summarizes five theories proposed by other academics as to how faithful Muslims should work with civil governments, ranging from obedience to isolation. Dr. Yasir Oadhi, *God’s Law and Man-Made Laws: Muslims Living in Secular Democracies*, MUSLIMMATTERS.ORG, (Mar. 1, 2010) at <http://muslimmatters.org/2010/03/01/gods-law-and-man-made-laws-muslims-living-in-secular-democracies/>.

<sup>174</sup> *U.S. v. Webster*, 65 M.J. 936, (A. Ct. Crim. App. 2008).

maintained that as a matter of faith, killing other Muslims was acceptable under certain circumstances, and that deployment to Iraq was not forbidden, although they might have to serve in a non-combatant capacity.<sup>175</sup> However, the defendant had done his own research and concluded that his faith obligations overcame his military ones.<sup>176</sup> Nonetheless, Webster's First Amendment and other religious liberty challenges to his deployment were dismissed by the courts.<sup>177</sup> However, *Webster* seems to be an outlier case with few parallels that have reached the level of a military appellate court in recent memory. It does not seem that Islamic doctrine conflicts with military requirements on a regular basis.<sup>178</sup>

#### 4. Non-Abrahamic Religions

This article would be remiss if it limited itself to the three major Abrahamic faiths. These were reviewed because statistically, they are the most predominant in the United States and therefore those which commanders will most likely encounter in their ranks. Indeed, a 2008 Pew Research study on religion identified the Abrahamic faiths as the most predominant in America, with Christianity accounting for 78 percent of adult religious affiliation (Judaism and Islam accounting for an additional two percent together).<sup>179</sup> Taking into account the 16 percent of Americans who have no religious affiliation (being atheist, agnostic, or simply not affiliating with a religion), there are still about three percent of Americans who belong to a non-Abrahamic religion.

It would be difficult to present every conceivable religion and its sub-branches, so this section will broadly examine a sampling of other major belief systems and how their requirements might conflict with military obligations. Lawyers and commanders encountering issues related to these religions—particularly Eastern ones—may find analyzing them difficult since many of them are radically different from the Abrahamic traditions. These differences should not affect the final analysis

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<sup>175</sup> *Id.* at 938.

<sup>176</sup> *Id.* at 940.

<sup>177</sup> *Id.* at 944-48.

<sup>178</sup> There are cases involving Muslims such as *Hasan v. Gross*, 71 M.J. 416 (C.A.A.F. 2012) (see text accompanying notes 32-47); *U.S. v. Akbar*, No. 13-7001, Crim. App. No. 20050514 (A. Ct. Crim. App. Aug. 19, 2015) (Muslim soldier who assassinated other American military members in Iraq); or *U.S. v. Anderson*, 68 M.J. 378 (C.A.A.F. 2010) (Muslim sympathizer attempted to provide classified information to the enemy) but these cases did not directly involve a disobedience of military orders due to religious obligations. There have been occasional cases where a sudden convert to Islam declares that he or she will no longer wear their mandated uniform. See, e.g., *U.S. v. Haywood*, 19 M.J. 675 (A.F.C.M.R. 1984).

<sup>179</sup> *U.S. Religious Landscape Survey—Religious Affiliation: Diverse and Dynamic*, PEW FORUM ON RELIGIOUS AND PUBLIC LIFE, (February 2008), <http://religions.pewforum.org/pdf/report-religious-landscape-study-full.pdf>.

of whether an accommodation should be granted, since the First Amendment requires that all religions be treated neutrally<sup>180</sup> and equally.<sup>181</sup>

It is also worth noting that the likelihood of encountering armed forces members who subscribe to certain “minority” faiths is, at present, low. For example, U.S. citizens who subscribe to pacifistic religious beliefs<sup>182</sup> are unlikely to join the military (though a member converting to a pacifist religion during a period of military service is always possible).<sup>183</sup> Other religious groups, while very populous on other continents, are still low in representation in the United States if at all (such as Shintoism, Confucianism, or African religions).

(a) *Buddhism*<sup>184</sup>

A 2009 article on Buddhism in the military indicates that only about 5,300 U.S. military members identified as Buddhist at that time.<sup>185</sup> Unlike the Abrahamic faiths, Buddhism does not revolve around the existence of or relationship to a divine being. Most branches of Buddhism appear to reject the notion of a creator God to whom the individual believer is accountable.<sup>186</sup>

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<sup>180</sup> See *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002) (plurality of the court found that religious schools could receive public vouchers so long as they were treated neutrally with respect to their religious character).

<sup>181</sup> See, e.g., *Ritell v. Briarcliff Manor*, 466 F.Supp.2d 514, 526 (2006) (municipal board “was required to display, or at least permit others to display, the religious symbols of other faiths in the community with equal prominence.”).

<sup>182</sup> For example, Jainism, the Baha’i faith, and certain Christian denominations tend to be pacifist. These religions would either prohibit or strongly presume against military service. See generally Jainism, PATHEOS RELIGION LIBRARY, <http://www.patheos.com/Library/Jainism> (last visited November 28, 2015) (“principles include non-violence in all parts of life (verbal, physical, and mental)”); David Langness, *The Baha’i Teachings on Nonviolence*, BAHAI TEACHINGS.ORG (Feb. 2, 2014), <http://bahaiteachings.org/bahai-teachings-on-violence>, (Feb. 2, 2014) (last visited Nov. 27, 2015); Patheos Religion Library: Society of Friends (Quakers), PATHEOS.COM, [http://www.patheos.com/Library/Society-of-Friends-\(Quaker\)](http://www.patheos.com/Library/Society-of-Friends-(Quaker)) (last visited Nov. 28, 2015); John D. Roth, *History*, Mennonite Church, <http://history.mennonite.net/> (last visited Nov. 28, 2015).

<sup>183</sup> This article avoids discussion of conscientious objectors since there are already long-established procedures for handling those cases. See U.S. DEP’T OF DEF., INSTR. 1300.06, CONSCIENTIOUS OBJECTORS (May 31, 2007), and accompanying military service regulations.

<sup>184</sup> There are at least three major branches of Buddhism: Mahayana, Theravada, and Vajrayana. *Statistics on the Major Branches of Buddhism*, BUDDHANET.NET, [http://www.buddhanet.net/e-learning/history/bstats\\_b.htm](http://www.buddhanet.net/e-learning/history/bstats_b.htm) (last visited Nov. 5, 2015).

<sup>185</sup> Jeff Brady, *Military Buddhist Chapel Represents Tolerance*, NAT’L PUB. RADIO (Oct. 13, 2009, 12:37 AM), <http://www.npr.org/templates/story/story.php?storyId=113501618> (last visited Nov. 5, 2015).

<sup>186</sup> Ven. S. Dhammika, *Good Question, Good Answer* 14-17 (BUDDHA DHARMA EDUC. ASS’N INC., [www.buddhanet.net/pdf\\_file/gqga-5ed.pdf](http://www.buddhanet.net/pdf_file/gqga-5ed.pdf) (last visited Nov. 5, 2015). Some Buddhist sects do believe in supernatural and spiritual beings, but not in the Abrahamic sense of an ultimate creator. Julia Hardy, *Buddhism: Ultimate Reality and Divine Beings*, PATHEOS.COM, <http://www.patheos.com/Library/Buddhism/Beliefs/Ultimate-Reality-and-Divine-Beings.html> (last visited Nov. 5, 2015).

Buddhism is rooted in the notion that the world is full of suffering, but that following a proper code of conduct will end that suffering.<sup>187</sup> Siddhartha Gautama, better known as “the Buddha” himself, was not a supernatural or prophetic figure as in the Abrahamic religions, but merely a man who came to realize these principles.<sup>188</sup> In terms of moral behavior, Buddha’s teachings largely lack the Abrahamic concept of “sin” which offends a creator god and brings some negative consequence. Similarly, they lack the Christian Beatitudes or the rigors of the Jewish mitzvot. Rather than believing that certain specific actions are right and wrong in relation to a covenant, Buddhism is concerned with developing a proper character. One of Buddhism’s four major tenets in ending suffering is to “follow the eight-fold path,” guidelines which purge improper behaviors and character flaws which prevent enlightenment. These include having the right view, intentions, speech, actions, livelihood, effort, mindfulness, and concentration.<sup>189</sup> Behavior that is morally proscribed by most societies, such as lying, theft, and murder, are subsumed into these eight principles.<sup>190</sup>

Buddhists tend to believe in “karma,” literally meaning “action.”<sup>191</sup> Karma can be viewed more as a law of nature than as a punishment-reward system: performing any action is understood as having a good or evil effect on the person and the world.<sup>192</sup> There are variances among the Buddhist sects as to the grander impact of karma upon one’s existence, but a common belief is that the effort to shed bad karma involves a cycle of death, reincarnation, and rebirth until enlightenment is achieved.<sup>193</sup> Some versions of Buddhism recognize a “hell” of sorts between cycles of rebirth for those that were evil in life, but this appears to be a temporary purgation rather than a Christian or Muslim concept of eternal torment.<sup>194</sup>

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<sup>187</sup> *Buddhanet Basic Buddhism Guide: Introduction to Buddhism*, BUDDHANET.NET, [http://www.buddhanet.net/e-learning/intro\\_bud.htm](http://www.buddhanet.net/e-learning/intro_bud.htm) (last visited Nov. 5, 2015). This portion of the article will present general Buddhist concepts without much elaboration on specific distinctions among the branches.

<sup>188</sup> Julia Hardy, *Buddhism: Founders*, PATHEOS.COM, <http://www.patheos.com/Library/Buddhism/Origins/Founders.html> (last visited Nov. 5, 2015).

<sup>189</sup> Bhikkhu Bodhi, *The Noble Eightfold Path: The Way to the End of Suffering*, ACCESS TO INSIGHT.ORG, <http://www.accesstoinight.org/lib/authors/bodhi/waytoend.html> (last visited Nov. 5, 2015). The phrase “right” goes beyond merely meaning “correct,” and apparently has a deeper meaning of “whole” or “complete.” See also John Allen, *Buddhanet Basic Buddhism Guide: The Eight-Fold Path*, BUDDHANET.NET, <http://www.buddhanet.net/e-learning/8foldpath.htm> (last visited Nov. 5, 2015).

<sup>190</sup> Bodhi, *supra* note 189.

<sup>191</sup> Ven. Mahasi Sayadaw, *The Theory of Karma*, BUDDHANET.NET, <http://www.buddhanet.net/e-learning/karma.htm> (last visited Nov. 5, 2015).

<sup>192</sup> Julia Hardy, *Buddhism: Principles of Moral Thought and Action*, PATHEOS.COM, available at <http://www.patheos.com/Library/Buddhism/Ethics-Morality-Community/Principles-of-Moral-Thought-and-Action.html> (last visited Nov. 5, 2015).

<sup>193</sup> Julia Hardy, *Buddhism: Afterlife and Salvation*, PATHEOS.COM, <http://www.patheos.com/Library/Buddhism/Beliefs/Afterlife-and-Salvation.html> (last visited Nov. 5, 2015).

<sup>194</sup> *Id.*

Lay Buddhists typically lack the dress and grooming requirements of the Abrahamic religions.<sup>195</sup> Their dietary practices can vary; some are vegetarian or vegan consistent with their belief in avoiding suffering, while others only refrain from certain foods or have no compulsion against meat whatsoever.<sup>196</sup> Commanders encountering a devout Buddhist subordinate should therefore expect any conflicts with military duties to arise in the context of moral behavior: that is, whether a particular action interferes with his or her sense of karma and the avoidance of suffering. Conflicts over dress and appearance standards or observance of holy days, while not impossible, are less likely than compared with other faiths.

(b) *Hinduism*

Hinduism may be one of the smallest “large” religions represented in the United States military, with one article reporting only 1,000 Hindu military members identified as of 2013.<sup>197</sup> It is not an easily defined religion, as it is really “a collective term applied to the many philosophical and religious traditions native to India.”<sup>198</sup> While many major religions trace their beginnings to a seminal event or person, Hinduism apparently has no known origin or founder.<sup>199</sup>

Unlike the Abrahamic religions, Hinduism has a vast pantheon of up to 330 million gods, although among the most prominent are Brahman (the divine force and creator), Shiva (the destroyer and purifier), and Vishnu (the preserver).<sup>200</sup> The different sub-sects of Hinduism vary in how a human being is to relate to the Brahman in this life. Some versions maintain that proper sacrifice and living one’s social duties is life’s end. Others maintain that there is a reality beyond the Brahman which can only be reached through renouncing of worldly possession and attachment.<sup>201</sup> Like Buddhism, the Hindu traditions maintain a similar belief

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<sup>195</sup> Certainly, Buddhist clergy may have particular dress requirements. Julia Hardy, *Buddhism: Leadership*, PATHEOS.COM, available at <http://www.patheos.com/Library/Buddhism/Ethics-Morality-Community/LeadershipClergy> (last visited Nov. 28, 2015).

<sup>196</sup> Megumi Hirota, Fact Files—Buddhism, FAITHANDFOOD.COM, available at <http://www.faithandfood.com/Buddhism.php> (last visited Oct. 21, 2014).

<sup>197</sup> Deepak Chitnis, *A Military Support Network for Hindu Soldiers in the US Armed Forces*, THE AM. BAZAAR (Oct. 25, 2013), <http://www.americanbazaaronline.com/2013/10/25/military-support-network-hindu-soldiers-us-armed-forces/>.

<sup>198</sup> *Patheos Religion Library: Hinduism*, PATHEOS.COM, <http://www.patheos.com/Library/Hinduism.html> (last visited Nov. 5, 2015).

<sup>199</sup> *Id.* Some Hindu traditions point to a spiritual leader known as Manu as having received the first divine texts from the Gods, and he is viewed as “the progenitor of all future Hindus.” Other significant figures followed in later centuries. Jacob N. Kinnard, *Patheos Religion Library: Hinduism: Founders*, PATHEOS.COM, <http://www.patheos.com/Library/Hinduism/Origins/Founders.html> (last visited Nov. 5, 2015).

<sup>200</sup> Jacob N. Kinnard, *Hinduism: Ultimate Reality and Divine Beings*, PATHEOS.COM, <http://www.patheos.com/Library/Hinduism/Beliefs/Ultimate-Reality-and-Divine-Beings.html> (last visited Nov. 5, 2015).

<sup>201</sup> Jacob N. Kinnard, *Hinduism: Human Nature and the Purpose of Existence*, PATHEOS.COM, <http://www.patheos.com/Library/Hinduism/Beliefs/Human-Nature-and-the-Purpose-of-Existence.html> (last visited Nov. 5, 2015).

in karma and reincarnation.<sup>202</sup> Some Hindu sects maintain that proper meditation and renouncement should lead to release from the cycle of death and rebirth and a final union with Brahman.<sup>203</sup> Yet another path is the proper worship of the Hindu god Krishna which is fulfilled by attention to one's proper duties in life.<sup>204</sup>

Although Hindu sects vary, commanders may be less likely to encounter explicit conflicts between a devout Hindu subordinate's ideology and military obligations. Broadly speaking, Hinduism appears to have few dress, appearance, or ritual behaviors that are comparable to those in the Abrahamic faiths. Rather, there may be cultural issues which will not be easily understood by a military member with limited exposure to Hinduism. For example, many Hindus engage in ritual devotion towards their deities which they may conduct in a private space, so a member may wish to do so in his or her home or living space before the duty day begins.<sup>205</sup> Conceivably, commanders might encounter a Hindu who, like a Buddhist, believes that a particular military duty would conflict with his or her sense of karma.<sup>206</sup>

(c) *Sikhism*

Sikhism is a monotheistic faith which maintains a belief in a single, nameless creator God whose existence is held to have been revealed to the Guru ("teacher") Nanak in the 15th Century.<sup>207</sup> His experience led to him being considered the first Guru, who could legitimately channel the voice of God.<sup>208</sup> Nanak's sayings and compositions contributed to the Sikh scriptures which are known today as the Guru Granth Sahib. A series of Gurus succeeded Nanak and continued to refine the Sikh scriptures until the 18th Century.<sup>209</sup> The Guru Granth Sahib continues to be the source of Sikh belief and practice today.<sup>210</sup>

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[www.patheos.com/Library/Hinduism/Beliefs/Human-Nature-and-the-Purpose-of-Existence.html](http://www.patheos.com/Library/Hinduism/Beliefs/Human-Nature-and-the-Purpose-of-Existence.html) (last visited Nov. 5, 2015).

<sup>202</sup> Jacon N. Kinnard, *Suffering and the Problem of Evil*, PATHEOS.COM, <http://www.patheos.com/Library/Hinduism/Beliefs/Suffering-and-the-Problem-of-Evil.html> (last visited Nov. 5, 2015).

<sup>203</sup> *Id.*

<sup>204</sup> *Id.*

<sup>205</sup> Jacob N. Kinnard, *Hinduism: Rites and Ceremonies*, PATHEOS.COM, <http://www.patheos.com/Library/Hinduism/Ritual-Worship-Devotion-Symbolism/Rites-and-Ceremonies.html> (last visited Nov. 5, 2015).

<sup>206</sup> Jacob N. Kinnard, *Hinduism: Principles of Moral Thought and Action*, PATHEOS.COM, <http://www.patheos.com/Library/Hinduism/Ethics-Morality-Community/Principles-of-Moral-Thought-and-Action> (last visited Nov. 5, 2015).

<sup>207</sup> Rahuldeep Singh Gill, *Sikhism: Beginnings*, PATHEOS.COM, available at <http://www.patheos.com/Library/Sikhism/Origins/Beginnings.html> (last visited Nov. 5, 2015).

<sup>208</sup> *Id.*

<sup>209</sup> Rahuldeep Singh Gill, *Sikhism: Founders*, PATHEOS.COM, available at <http://www.patheos.com/Library/Sikhism/Origins/Founders> (last visited Nov. 5, 2015).

<sup>210</sup> Rahuldeep Singh Gill, *Sikhism: Sacred Texts*, PATHEOS.COM, available at <http://www.patheos.com/Library/Sikhism/Origins/Scriptures.html> (last visited Nov. 5, 2015).

Sikhism teaches ethical behavior, particularly “truthful living,” for the purpose of following the path of Katar, or ethical living.<sup>211</sup> In essence, “Katar” is truth which represents ultimate reality, beyond human understanding.<sup>212</sup> Relatedly, Sikhs believe that their duty is to reflect their deity in their daily lives.<sup>213</sup> Thus, a guiding principle presented early in the Guru Granth Sahib is to “merge with the divine command, walk in its way.”<sup>214</sup> Ultimately, this means “liv[ing] within the divine will. Humans should enjoy life amidst remembrance of Katar and be disciplined by prayer, self-restraint, and moral purity.”<sup>215</sup> It also means avoiding certain human vices: a false sense of importance, lust, anger, greed, clinging, and pride.<sup>216</sup> A Sikh may respond to evil with quiet humility and enduring suffering, but he or she may also actively respond to injustice.<sup>217</sup> As with other Eastern religions, Sikhism believes that positive moral behavior will culminate in a positive afterlife and/or reincarnation, though it equally emphasizes living a positive moral life in the here and now for its own sake.<sup>218</sup>

As with other religions, Sikhism has rituals and rites to which members are expected to conform. For example, Sikhs are expected to recite a hymn, the Jap, before sunrise.<sup>219</sup> Sikhism is particularly notable for its requirement that its members wear a turban (and that males have beards and leave their hair uncut), requirements which have repeatedly come into conflict with the military’s uniform standards.<sup>220</sup> Devoutly orthodox Sikhs may also at all times carry a comb (to keep their hair pristine), and a sword and metal band to commemorate the martial heritage of Sikh culture.<sup>221</sup> All of these observances are embedded in the notion of the Sikh identity,

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<sup>211</sup> Rahuldeep Singh Gill, *Sikhism: Ultimate Reality and Divine Beings*, PATHEOS.COM, <http://www.patheos.com/Library/Sikhism/Beliefs/Ultimate-Reality-and-Divine-Beings.html> (last visited Nov. 5, 2015).

<sup>212</sup> *Id.*

<sup>213</sup> *Id.*

<sup>214</sup> Rahuldeep Singh Gill, *Sikhism: Human Nature and the Purpose of Existence*, PATHEOS.COM, <http://www.patheos.com/Library/Sikhism/Beliefs/Human-Nature-and-the-Purpose-of-Existence.html> (last visited Nov. 5, 2015).

<sup>215</sup> *Id.*

<sup>216</sup> *Id.*

<sup>217</sup> Rahuldeep Singh Gill, *Sikhism: Suffering and the Problem of Evil*, PATHEOS.COM, <http://www.patheos.com/Library/Sikhism/Beliefs/Suffering-and-the-Problem-of-Evil.html> (last visited Nov. 5, 2015).

<sup>218</sup> Rahuldeep Singh Gill, *Sikhism: Afterlife and Salvation*, PATHEOS.COM, <http://www.patheos.com/Library/Sikhism/Beliefs/Afterlife-and-Salvation.html> (last visited Nov. 5, 2015).

<sup>219</sup> Rahuldeep Singh Gill, *Sikhism: Worship and Devotion in Daily Life*, PATHEOS.COM, <http://www.patheos.com/Library/Sikhism/Ritual-Worship-Devotion-Symbolism/Worship-and-Devotion-in-Daily-Life.html> (last visited Nov. 5, 2015).

<sup>220</sup> *Uniform Rule May Keep Religious Americans From Military Service*, NAT’L PUB. RADIO (Mar. 16, 2014, 5:55 PM), <http://www.npr.org/2014/03/16/290685099/uniform-rule-may-keep-religious-americans-from-military-service>.

<sup>221</sup> *Id.*

although they have fallen out of favor among some westernized Sikhs today.<sup>222</sup> Still, it is important for non-Sikhs to appreciate that Sikhs view their dress and appearance requirements as a strict requirement inherent to their Sikh identity.

(d) *Paganism*

Paganism is a broad topic and is used here as an umbrella term for various non-Abrahamic religions which focus on nature, supernatural beings, and/or classical folk heroes and gods and goddesses.<sup>223</sup> Wicca is regarded as the largest component of Paganism,<sup>224</sup> but Pagans also include groups recognizing Greek, Roman, Celtic, and other old religions.<sup>225</sup> Self-identified pagans have become a source of controversy within the military in recent times, perhaps in part because the religion is so atypical of a military that is heavily Christian in population.<sup>226</sup>

Commanders who encounter Paganism for the first time may have difficulty grasping it in relation to other religions. A particular strain of Paganism would likely lack a sacred text akin to the Bible or the Koran.<sup>227</sup> Many Pagan faiths reject the notion of containing all truth within a single text.<sup>228</sup> Some are polytheistic,<sup>229</sup> while others may worship one God or Goddess, or view nature and the God/Goddess as one. As one author describes it, a broad analysis of Paganism “is unsystematic and nearly impossible to summarize effectively.”<sup>230</sup>

The moral code that individual Pagans may follow will also be variable. As one Pagan expert describes it, “Many Pagans would maintain that humans are, both individually and collectively, free to chart their own course, to determine their own purpose. Without a pre-given, “supernatural” way of understanding life’s meaning, or even a consensus within the mythologies of the world, Pagans are free to create their own meaning or sense of purpose.”<sup>231</sup> They may rely on their own individual

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<sup>222</sup> *Id.*

<sup>223</sup> *Paganism*, PATHEOS.COM, [HTTP://WWW.PATHEOS.COM/LIBRARY/PAGAN.HTML](http://www.patheos.com/Library/Pagan.html) (LAST VISITED NOV. 5, 2015).

<sup>224</sup> Carl McColman, *Paganism: Influences*, PATHEOS.COM, <http://www.patheos.com/Library/Pagan/Origins/Influences.html> (last visited Nov. 5, 2015).

<sup>225</sup> *Id.*

<sup>226</sup> Jennifer Willis, *The Plight of Pagans in the Military*, RELIGION & POLITICS (June 20, 2012), <http://religionandpolitics.org/2012/06/20/the-plight-of-pagans-in-the-military/>.

<sup>227</sup> Carl McColman, *Paganism: Sacred Texts*, PATHEOS.COM, <http://www.patheos.com/Library/Pagan/Origins/Scriptures.html> (last visited Nov. 5, 2015).

<sup>228</sup> *Id.*

<sup>229</sup> Carl McColman, *Paganism: Ultimate Reality and Divine Beings*, PATHEOS.COM, <http://www.patheos.com/Library/Pagan/Beliefs/Ultimate-Reality-and-Divine-Beings> (last visited Nov. 5, 2015).

<sup>230</sup> Carl McColman, *Paganism: Sacred Narratives*, PATHEOS.COM, <http://www.patheos.com/Library/Pagan/Beliefs/Sacred-narratives> (last visited Nov. 5, 2015).

<sup>231</sup> Carl McColman, *Paganism: Human Nature and the Purpose of Existence*, PATHEOS.COM, <http://www.patheos.com/Library/Pagan/Beliefs/Human-Nature-and-the-Purpose-of-Existence> (last visited

mythologies to determine proper behavior,<sup>232</sup> but it seems that there may be no given “code” such as the Mitzvot or the Beatitudes which commanders and chaplains can use to understand a Pagan’s beliefs. Similarly, a Pagan faith is unlikely to have a formally organized structure or hierarchy which determines doctrine for the body.<sup>233</sup> This distinction could prove difficult in distinguishing between whether a believer’s request for accommodation is a personal concern or a faith-driven one, as well as determining whether that distinction really makes a difference.

As a result, the kinds of requests for accommodation that a Pagan might present will also vary and may not be grounded in any readily identifiable doctrine. Some may believe in a system of karma and reincarnation and may be motivated by a desire for a positive next life.<sup>234</sup> Others may or may not believe in a final destination for the soul which may or may not be influenced by moral actions in this life.<sup>235</sup>

## B. The “Persecution Clause”

The second issue of which commanders should be cognizant is that religions often face persecution from outside their belief systems. This fact should be obvious to anyone with a basic knowledge of world affairs. What may be less obvious is that in many religions—particularly the Abrahamic ones—the notion of “persecution for the faith” is ingrained within the religion and may be interpreted as a sign of religious heroism.<sup>236</sup> Persecution may not be a cultural phenomenon or an article of faith for every religion. However, with any religion, there is a risk of creating cultural offense in demanding that a believer sacrifice a higher moral calling to the requirements of the military.<sup>237</sup> This may inspire a perception of “martyrdom” in which a believer’s resistance to military duties actually increases because they believe—rightly or wrongly—that their faith is “targeted.”<sup>238</sup>

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Nov. 5, 2015).

<sup>232</sup> *Id.*

<sup>233</sup> Carl McColman, *Paganism: Community Organization*, PATHEOS.COM, <http://www.patheos.com/Library/Pagan/Ethics-Morality-Community/Community-Organization-and-Structure.html> (last visited Nov. 5, 2015).

<sup>234</sup> Carl McColman, *Paganism: Afterlife and Salvation*, PATHEOS.COM, <http://www.patheos.com/Library/Pagan/Beliefs/Afterlife-and-Salvation.html> (last visited Nov. 5, 2015).

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

<sup>236</sup> Erasmus, *The Meaning of Martyrdom: Ways to Bear Witness*, THE ECONOMIST (Oct. 4, 2013), at <http://www.economist.com/blogs/erasmus/2013/10/meaning-martyrdom> (last visited Nov. 28, 2015).

<sup>237</sup> See, e.g., Iknour Singh, *The Army is Making Me Choose Between My Faith and My Country*, ACLU.ORG (Nov. 12, 2014), at <https://www.aclu.org/blog/speakeasy/army-making-me-choose-between-my-faith-and-my-country> (last visited Nov. 28, 2015) (Sikh applicant to Army ROTC program contested the Army’s decision not to grant him a waiver that would allow him to continue to practice his religion’s headgear and facial hair requirements).

<sup>238</sup> For example, journalist Todd Starnes frequently writes articles on this subject which paint a sympathetic picture of religious individuals whose faith obligations come into conflict with the government, creating the impression that religion has been targeted. Not uncommonly, such articles

The reader should be aware that “martyrdom” in this section does not refer to the unfortunate phenomenon of “suicide bombers” or others who have unfortunately linked religious actions with mass violence. Here, martyrdom refers to the larger cultural concept of bearing witness for one’s faith in the form of suffering persecution, often death.<sup>239</sup> For example, Saint Stephen is considered the first Christian martyr after being publicly executed after preaching his faith.<sup>240</sup> It is this basic concept of martyrdom with which the article is concerned.

In denying an accommodation request, the commander risks validating the persecution aspect of the member’s faith by creating the notion that the member is being “persecuted for the faith.” Denial may also result in a public relations issue, as civilian religious adherents may develop the mistaken belief that the military is engaged in systematic religious persecution, which in turn could have an adverse effect on recruiting, public perception, or public support for the military.<sup>241</sup> These factors should not be controlling in light of the need for mission accomplishment and a uniform fighting force that complies with orders, but they should be taken into consideration when evaluating a request.

Christians, for instance, have a plethora of figures and quotations available which support the idea of being persecuted for the faith. One of many examples comes from the Christian Beatitudes which speak of the endurance of being persecuted as a virtue with a divine reward:

Blessed are they who are persecuted for the sake of righteousness, for theirs is the kingdom of heaven. Blessed are you when they insult you and persecute you and utter every kind of evil against you falsely because of me. Rejoice and be glad, for your reward will be great in heaven. Thus they persecuted the prophets who were before you.<sup>242</sup>

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include religious/military conflicts. See, e.g., Todd Starnes, *Navy Chaplain Censored: Don't Pray in the Name of Jesus*, FOXNEWS.COM (Apr.22, 2015), <http://www.foxnews.com/opinion/2015/04/22/navy-chaplain-censored-dont-pray-in-name-jesus.html> (last visited Nov. 28, 2015); Todd Starnes, *Marine court-martialed for refusing to remove Bible verse*, FOXNEWS.COM (May 26, 2015), <http://www.foxnews.com/opinion/2015/05/26/marine-court-martialed-for-refusing-to-remove-bible-verse.html> (last visited Nov. 28, 2015); Todd Starnes, *Airman Punished for Objecting to Gay Marriage in Military Chapel*, FOXNEWS.COM, <http://radio.foxnews.com/toddstarnes/top-stories/airman-punished-for-objecting-to-gay-marriage-in-military-chapel.html> (last visited Nov. 28, 2015).

<sup>239</sup> Edward P. Myers, *Martyr*, in EERDMAN’S DICTIONARY OF THE BIBLE, 863 (2000).

<sup>240</sup> *Acts of the Apostles* 4:1-5:11 (New American Bible Revised Edition).

<sup>241</sup> See, e.g., Penny Starr, *Christians Face Culture of Fear, Intimidation in U.S. Military Today*, CNSNEWS.COM (Nov. 11, 2013, 1:20 PM) <http://www.cnsnews.com/news/article/penny-start/christians-face-culture-fear-intimidation-us-military-today>.

<sup>242</sup> *Matthew* 5:10-12 (New American Bible Revised Edition).

This “persecution language” is replete throughout the Christian New Testament and provides a foundation for Christians throughout history in believing that persecution for the faith is to be expected, and endurance of that persecution will result in divine reward.

The Christian view of persecution is inevitably associated with government.<sup>243</sup> A popular view grounded in the Christian Bible is that persecutions will increase throughout history and culminate in a final worldwide persecution during the rise of an “Anti-Christ” figure in which persons everywhere will be pressured to reject their faith under penalty of death.<sup>244</sup> Thus, believers will be forced to choose between martyrdom or free living but at the expense of sin. The Christian Bible uses a powerful example in the Book of Revelation’s reference to the “mark of the beast,” in which humanity is pressured to swear allegiance to a satanic figure in exchange for being able to participate in the free market.<sup>245</sup>

These observations are not to suggest that any government or command action which has an incidental effect on a faith group contributes to some cosmic apocalyptic battle. It is only to illustrate that many Christians believe on a doctrinal level that there will be an inevitable and final persecution of believers, such that any government-based action which impacts Christian obligations will be viewed in light of that doctrine. In other words, a Christian military member may interpret a commander’s denial of an accommodation as related, in some form, to the idea that Christians are and will be persecuted by the government.

Many Christian faiths view martyrdom—the act of being put to death for uncompromising adherence to one’s faith—as the ultimate expression of fidelity to God.<sup>246</sup> Catholics in particular give special reverence to martyrs, with historic

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<sup>243</sup> For example, the Jehovah’s Witnesses interpret one of the beasts of Revelation to be historical world governments. *What Is the Seven-Headed Wild Beast of Revelation Chapter 13?*, Jehovah’s Witnesses, available at <http://www.jw.org/en/bible-teachings/questions/revelation-13-beast/> (last visited Nov. 23, 2015). The authors of the popular *Left Behind* novels take the perspective that the Christian “end times” would include worldwide government control. Tim LaHaye and Jerry B. Jenkins, *Three Signs of the End*, LEFTBEHIND.COM, available at [http://www.leftbehind.com/02\\_end\\_times/threesigns.asp](http://www.leftbehind.com/02_end_times/threesigns.asp) (last visited Nov. 23, 2015).

<sup>244</sup> See, for example, the Roman Catholic Church’s statement:

Before Christ’s second coming the Church must pass through a final trial that will shake the faith of many believers. The persecution that accompanies her pilgrimage on earth will unveil the ‘mystery of iniquity’ in the form of a religious deception offering men an apparent solution to their problems at the price of apostasy from the truth. The supreme religious deception is that of the Antichrist, a pseudo-messianism by which man glorifies himself in place of God and of his Messiah come in the flesh.

CATECHISM OF THE CATHOLIC CHURCH § 675.

<sup>245</sup> *Revelation* 13:11-17 (New American Bible Revised Edition).

<sup>246</sup> *John* 15:13 “No one has greater love than this, to lay down one’s life for one’s friends.”

Christian figures such as Saints Stephen, Joan of Arc, and Maximillian Kolbe earning a heightened cultural respect. Thus, the Roman Catholic Church views martyrs for the faith as living in direct imitation of Jesus:

Martyrdom is the supreme witness given to the truth of the faith: it means bearing witness even unto death. The martyr bears witness to Christ who died and rose, to whom he is united by charity. He bears witness to the truth of the faith and of Christian doctrine. He endures death through an act of fortitude. "Let me become the food of the beasts, through whom it will be given me to reach God."<sup>247</sup>

The concept of religious persecution is not limited to Christians. Judaism has suffered more than its share of persecution for its own sake, from Greco-Roman oppression to the Spanish Inquisition, from the Holocaust to modern anti-Semitism. Jews acknowledge their historic targeting in their scriptures, such as in their escape from slavery in Book of Exodus, their near-extermination s in the Book of Esther, and their martyrdom for keeping kosher in the story of the Maccabean Revolt. While Judaism does not share Christianity's concept of persecution as an article of faith, it nonetheless has an enculturated sense that Jews are persecuted simply because of who they are.<sup>248</sup>

These stories illustrate the orthodox Jew's belief that adherence to God's law is their primary concern. Although adherence to the kosher rules may seem counterintuitive to most people, this behavior is not about a balancing of values. Rather, it concerns fidelity to God and the covenant, as illustrated through the observance of dietary practices even unto death.<sup>249</sup>

Muslims may not have an explicit doctrinal belief that they will be persecuted for their faith; however, they too have an elevated respect for martyrs. Unfortunately, since the wars in Iraq and Afghanistan began, the notion of Islamic martyrdom is too readily associated with suicide bombings.<sup>250</sup> Outside of that extremist usage, however, the religion has a broader concept of martyrdom akin to the Jewish and Christian concepts, where dying for the faith is considered a virtuous act with divine reward. Called "shahid" in the Islamic tradition, the notion is traditionally associated

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<sup>247</sup> CATECHISM OF THE CATHOLIC CHURCH § 2473-74, quoting *Ephesians* 4:24-25 (New American Bible Revised Edition).

<sup>248</sup> Antony Lerman, *Must Jews Always See Themselves as Victims?*, The Independent (22 Oct. 2011), <http://www.independent.co.uk/news/world/middle-east/must-jews-always-see-themselves-as-victims-1639277.html> (last visited Nov. 30, 2015) (discussing whether too much focus on the negative aspects of Jewish history detracts from the positive and if so, whether this negativity impacts Israel's ability to resolve current conflicts with Palestine).

<sup>249</sup> *2 Maccabees* 7.

<sup>250</sup> Denis MacEoin, *Suicide Bombing As Worship: Dimensions of Jihad*, 16 Middle E. Q. 15-24 (2009), <http://www.meforum.org/2478/suicide-bombing-as-worship> (last visited Nov. 23, 2015).

with Muslim military action based on certain passages in the Koran.<sup>251</sup> For example, “Those who leave their homes in the cause of Allah, and are then slain or die, on them will Allah bestow verily a goodly Provision: Truly Allah is He Who bestows the best provision.”<sup>252</sup> Similar language is found in the Hadiths, promising that those who die as martyrs to the faith will be given a special place in the afterlife.

Although Islam has some unique perspectives on who can be a martyr, it shares Judaism and Christianity’s generalized admiration for persons who are killed by virtue of professing their faith.<sup>253</sup> In that regard, they bear “witness” to their faith just as a Christian or Jew would: “they become models for society because they die representing that which is true and just.”<sup>254</sup> One of Islam’s earliest historic figures, Sumayya bint Khayyat, is also one of its first martyrs and holds a special place of esteem in the religion. She is noted for being one of the earliest converts after Mohammed began preaching, and for her refusal to recant her new faith in the face of death.<sup>255</sup> As such, she is known as a “model” of her faith for her virtues of strength, courage, and faith.<sup>256</sup>

Do other major world religions have the same concept of martyrdom and persecution? The answer, unsurprisingly, is variable. Certainly, most major religious groups have endured some significant form of persecution in their histories, to include members being killed on the basis of their religious identity. Such martyrs may carry a historical admiration for their heroism, although religions vary on whether martyrdom is expected or whether it brings an automatic divine reward. Hinduism, for example, has several notable martyrs, although it is unclear that martyrdom was expected of those adherents or that a better reincarnation is anticipated as a reward.<sup>257</sup>

Martyrdom in various faiths is seen as heroic and virtuous, putting the faith and the relationship with God above all worldly obligations to include one’s own life. Commanders and other deciding officials should be prepared for the

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<sup>251</sup> Shaykh Gibril Fouad Haddad, *Classification of Martyrs*, AS-SUNNAH FOUNDATION OF AMERICA (2012), <http://sunnah.org/wp/2011/01/09/classifications-of-martyrs/> (last visited 24 November 2015).

<sup>252</sup> Koran, Surah 22, Ayah 58.

<sup>253</sup> A. Ezzatti, *The Concept of Martyrdom in Islam*, AL-ISLAM.ORG (1986), <http://www.al-islam.org/al-serat/vol-12-1986/concept-martyrdom-islam/concept-martyrdom-islam> (last visited Nov. 27, 2015).

<sup>254</sup> *Male and Female Martyrs of Islam*, ISLAMIC INSIGHTS (Jan. 28, 2008), <http://islamicinsights.com/religion/history/male-and-female-martyrs-of-islam.html> (last visited Nov. 5, 2015).

<sup>255</sup> Syed Ali Shahbaz, *The First Woman Martyr in Islam, Sumayya Bint Khayyat*, IMAM REZA NETWORK, <http://www.imamreza.net/eng/imamreza.php?id=11308> (last visited Nov. 5, 2015).

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

<sup>257</sup> S.S. Kavitha, *Namma Madurai: What Makes a Martyr?*, THE HINDU (Feb. 29, 2012, 8:02 PM), <http://www.thehindu.com/features/friday-review/history-and-culture/namma-madurai-what-makes-a-martyr/article2945833.ece> (last visited Oct. 21, 2014).

possibility that the religious adherents in the military may possess a certain zeal if they subscribe to their faith's underlying philosophy that all other obligations are subjugated to one's relationship with God. This issue is not highlighted to suggest that religious adherents are dangerous, disciplinary time bombs. There are devoutly religious people who faithfully serve their country without encountering a conflict. This discussion on martyrdom and persecution is only to remind deciding officials that devout religious adherents do have varying upper limits on how much of their religious practice they can sacrifice before, doctrinally, there are required to reject civil authority. The notion of martyrdom illustrates that some are willing to take their faith to the ultimate end—death. Predictably, then, they might be willing to endure lesser civil penalties such as disciplinary action or military discharge if forced to choose between the faith and their military duties.

#### IV. TOWARDS A SCHEME OF FAVORING ACCOMMODATION

None of these considerations are meant to imply that religious believers should be per se exempt from compliance with military orders. To do so would turn the commander-subordinate relationship on its head and be completely contrary to the notion of an ordered and disciplined fighting force. It could open the door to situations where religion is used to justify breaking military obligations,<sup>258</sup> ranging from something as simple as refusing to salute a superior, to those as complicated as refusal to engage in combat—the heart of the military's purpose which should have been obvious to the member when he or she signed up to serve.<sup>259</sup> The authority of the individual commander and the military departments as a whole must remain wholly inviolate in order to for the military to function.

The question that commanders and their lawyers must address is not whether religious exemptions must be granted; in light of *Goldman*, the answer to that question is no.<sup>260</sup> (In the aftermath of *Singh*, the answer is still likely “no,” but the

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<sup>258</sup> *United States v. Cupp*, 1957 WL 4848 (A.F.C.M.R. 1957).

<sup>259</sup> *U.S. v. Webster*, 65 M.J. 936, 947-48 (A. Ct. Crim. App. 2008) (“His attempted self-emancipation from some, or all, of the obligations that he willingly incurred by virtue of that enlistment contract with the United States Government, prior to the termination thereof, may not now be excused upon the basis of subsequently acquired religious beliefs. Quoting *Cupp*, 1957 WL at 572).

<sup>260</sup> *Goldman v. Weinberger*, 475 U.S. 503, 509-510 (1986).

The desirability of dress regulations in the military is decided by the appropriate military officials, and they are under no constitutional mandate to abandon their considered professional judgment. Quite obviously, to the extent the regulations do not permit the wearing of religious apparel such as a yarmulke, a practice described by petitioner as silent devotion akin to prayer, military life may be more objectionable for petitioner and probably others. But the First Amendment does not require the military to accommodate such practices in the face of its view that they would detract from the uniformity sought by the dress regulations.

*Id.*

deciding official should give extra care in articulating a denial.) As a specialized society, the military's interest in maintaining good order and discipline is a powerful counterweight to military members' First Amendment liberties, and it is only in rare circumstances that individual rights can overcome the military's interests in a uniform, disciplined force.

The question to be addressed is whether they *should* be granted. While leadership has a need to preserve authority, it should ask whether authority needs to be preserved for its own sake at the risk of creating a perceived marginalization and ostracization of religious adherents. As stated at the outset of this article, there is some nebulous percentage of the public which suspects that the military is hostile to the religious. While this perception is incorrect and often of little consequence, on occasion Congress and the courts do get involved and force the military to take change the degree of religious liberty allowed within the ranks. Military leaders might consider whether a conflict over a marginal religious issue is worth review by the legislature and judiciary in the long term.

Further, some of the military's standards, particularly those related to standardized dress and appearance, are neither moral matters, nor are they immutable. Religious adherents may have difficulty comprehending why, for example, an exemption cannot be granted to allow a Muslim to wear a beard for religious reasons but exemptions can be granted for personnel with skin conditions that medically preclude shaving.<sup>261</sup> There are at least two purported reasons for the "clean-shaven" rule: to promote a "neat and well-groomed appearance" and also to allow a complete seal on a gas mask.<sup>262</sup> Sikh soldiers who are permitted to wear the beard and turban report that they are able to wear a gas mask with a proper seal over their beard and turban.<sup>263</sup> The Army recently offered a third argument: that the wear of a beard in certain foreign environments could make military members into targets, so the military needs the flexibility to determine if beards are proper in a given situation.<sup>264</sup> This last point, while valid, might be viewed as conjectural by a reviewing court.

This leaves the issue of the "neat and well-groomed appearance," which is a valid concern for the military in desiring to maintain a uniform and professional appearance. The problem comes in articulating exactly why a beard is not "neat and

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<sup>261</sup> U.S. DEP'T OF ARMY, REGULATION 670-1, WEAR AND APPEARANCE OF ARMY UNIFORMS AND INSIGNIA ch. 3-2a.(2)(b) (Mar. 31, 2014); U.S. DEP'T OF AIR FORCE, INSTR. 36-2903, DRESS AND APPEARANCE OF AIR FORCE PERSONNEL, ¶ 3.1.2.3 (Jul. 18, 2011); U.S. DEP'T OF NAVY, PERSONNEL REGULATION 15665I, UNIFORM REGULATIONS, § 2201.2 (July 2011).

<sup>262</sup> See Memorandum in Support of Defendant's Motion to Dismiss and/or for Summary Judgment in *Stern v. Secretary of the Army*, Civil Action No. 10-2077, D.DC, Document 11-1, at 4, 13, 15, 24, 39.

<sup>263</sup> Simran Jeet Singh, *Sikh Officer and Afghanistan Veteran Fights the Army's Ban on Beards*, THE DAILY BEAST (Nov. 8, 2013, 5:45 AM), <http://www.thedailybeast.com/the-hero-project/articles/2013/11/08/sikh-officer-and-afghanistan-veteran-fights-the-army-s-ban-on-beards.html>.

<sup>264</sup> See Memorandum, *supra* note 262, at 13, 15, 24.

well-groomed.” This necessarily is a value judgment about the relative merits of moustaches versus beards, but courts have been deferential in allowing the military services to establish essentially arbitrary rules (moustaches but no beards), so long as they are uniformly applied to all members. An unstated undercurrent of these regulations is that the military wants uniformity in its personnel—a desire that subordinates look, think, and act in relatively the same way in order to foster teamwork, unity, and *esprit de corps*. This desire for uniformity is undermined, however, by the fact that when it comes to dress and appearance standards, exemptions are routinely granted. Shaving waivers are a common practice, so it is not uncommon to find military members on a base with a tightly-trimmed beard.<sup>265</sup> This leaves the impression that conformity is paramount, except where it isn’t.

The above discussion on beards and clothing is not meant to undermine the military’s authority with regard to facial hair, or any other standardization matter of standards. Simply put, the military needs that authority—there may not be time to discuss the merits of the decision. However, the military also needs to be prepared to justify those reasons and to do so well, because they will otherwise be incomprehensible to religious military applicants who feel marginalized by those rules. Worse, the military may find itself required to explain itself in court should it face a civil rights lawsuit concerning the policy. Although pre-*Singh* precedent apparently favored military discipline over religious liberty, the wrong court may have a sympathetic judge who cannot understand why discipline negates a simple beard or head covering—particularly when the new DoD Instruction appears to favor accommodation.

This is essentially what happened in *Singh* in June 2015. The Army attempted to justify the denial of Singh’s request to wear a beard and turban in terms of the organization: that subordination of the individual to the military creates good order and discipline.<sup>266</sup> The Court, however was unpersuaded by an appeal to collectivism due to the fact that RFRA is specifically concerned with protecting individuals.<sup>267</sup> That is, when the Court examined the Army’s “compelling interest” claims under the RFRA, they had to be justified with respect to “the particular claimant whose sincere exercise of religion is being substantially burdened.”<sup>268</sup> So although the Court acknowledged that the Army had a compelling interest in its larger concerns

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<sup>265</sup> A skin condition known as Pseudofolliculitis Barbae, which is common in individuals of African American ancestry, causes a safety or health hazard if the individual shaves. The military routinely grants waivers for individuals with this condition. *See, e.g.*, BUREAU OF NAVY PERSONNEL INSTRUCTION 1000.22B, MANAGEMENT AND DISPOSITION OF NAVY PERSONNEL WITH PSEUDOFOLLICULITIS BARBAE (PFB) (Dec. 27, 2004). In *Singh v. McHugh*, No. 14-cv-1906, 2015 U.S. Dist. LEXIS 76526 (D.D.C. June 12, 2015), the Army acknowledged that it had granted over 100,000 shaving waivers, most being of a temporary nature, but a substantial number of permanent ones as well.

<sup>266</sup> *Singh v. McHugh*, No. 14-cv-1906, 2015 U.S. Dist. LEXIS 76526, 23-26 (D.D.C. June 12, 2015).

<sup>267</sup> *Id.* at 38-39 (“RFRA claims must be considered on an individual basis.”).

<sup>268</sup> *Id.* at 44-45, citing *Holt v. Hobbs*, 135 S. Ct. 853, 863 (2015).

with unit cohesion and discipline, that compelling interest had to be applied “to the person.”<sup>269</sup> The question was whether denying Singh himself the accommodation would have an impact on the Army’s declared compelling interests.

The Army’s case was not helped by the fact that it had already granted numerous exemptions to dress and grooming standards on both medical and religious grounds. Earlier legal precedent established that where the government routinely grants exemptions to a matter in which it has a compelling interest, it will have that much higher a burden in holding a particular individual to that interest.<sup>270</sup> Yet the case demonstrated that the Army regularly granted shaving and headgear exemptions, the former often for medical reasons, and both for religious reasons.<sup>271</sup> Put differently: if it was so important to generally hold soldiers to this standard, why had the Army exempted so many other people from it instead of discharging them?<sup>272</sup> The court did not question the Army’s broader need for subordination, order, and discipline. However, “[t]he fact that the Army is able to tolerate so many idiosyncratic deviations from its grooming regulations further undermines [its] assertion that ‘the even handed enforcement of grooming standards’ is critical to ‘instill the self-discipline necessary for the military member to perform effectively.’”<sup>273</sup>

This is not to suggest that a court will always override the operations needs of the military. *Goldman* deference was not obliterated in the *Singh* decision. This does mean that a court may be more persuaded by a tangible justification that relates to a credible operational need. The *Singh* court recognized that the Army had legitimate authority to order a soldier to be shaved for actual combat purposes.<sup>274</sup> However, it was less convinced by an appeal to operational need where Singh would have been an enlisted ROTC cadet working in an entirely academic environment, who, by policy, would not be called into actual military duties.<sup>275</sup>

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<sup>269</sup> *Id.* at 54 (quoting *Gonzalez v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 430-31 (2006); *accord* *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2779 (2014); *Holt*, 135 S. Ct. at 863.

<sup>270</sup> *Id.*

<sup>271</sup> *Id.* at 58-61, 63-64, 66-67.

<sup>272</sup> *Singh v. McHugh*, No. 14-cv-1906, 2015 U.S. Dist. LEXIS 76526, 58-59 (D.D.C. June 12, 2015).

<sup>273</sup> *Id.* at 62, citing *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 547 (1993); *O Centro*, 546 U.S. at 433.

<sup>274</sup> The fact that the Army had already granted large numbers of grooming and headgear waivers also worked against their argument that the denial met the “no less restrictive means” element of RFRA. Although the court again acknowledged that some future operational need might require practical limitations on dress and appearance, the Army’s current practice demonstrated that no such need existed now. Thus, it found that a temporary accommodation was less restrictive than a permanent denial of one. *Id.* at 77-78.

<sup>275</sup> *Id.* at 59-60. The one positive outcome of this decision is that it was limited solely to the issue of a ROTC cadet. The Court did not rule that it had a larger application to active duty soldiers, including ones not immediately serving in an operational environment.

Hence, deciding officials may want to think deeply about how to read and apply DoDI 1300.17. Below are some areas for consideration—explicitly required by the DoDI—in reviewing a request for accommodation, including a framework for how to analyze each area.

#### A. What is the Military Need From Which the Member is Requesting Accommodation?

If a commander or higher policymaker issues a rule from which a faith group can or will request accommodation, the first step might be to analyze why that rule exists in the first place. What is the military’s need in issuing a particular order? Why does it exist? How does it benefit the force or contribute to the mission? Is the order being issued simply for its own sake, or is there some higher purpose which has a feasible, practical reason for existing?

DoDI 1300.17 actually demands that some of this examination occur: an accommodation is to be granted “unless it could have an adverse impact on military readiness, unit cohesion, and good order and discipline.”<sup>276</sup> Consider that the military’s declared “compelling interests” are “mission accomplishment, including the elements of mission accomplishment such as military readiness, unit cohesion, good order, discipline, health, and safety, both on the individual and unit levels.”<sup>277</sup> Deciding officials need to tie any rule back to one of those elements in order to justify its existence for any reason, whether it impinges on a believer’s faith requirements or not. “Health and safety” requirements may be among the most compelling, as the military can easily point to the requirement that a particular practice is required of everyone due to the risk to the lives and limbs of service members; if they are dead or injured, they will be unable to complete the warfighting mission.

As illustrated by *Singh*, deciding officials should keep in mind that granting any exceptions to their rules will weaken their arguments against similar exceptions in the future.<sup>278</sup> For example, the military branches require members to wear a distinct uniform with variances for different situations (such as dress, utility, and formal uniforms). The justification for a uniform is easily traceable to military traditions, and can be linked to legal requirements such as the Hague Conventions which necessitate that a military force be made distinct from civilians.<sup>279</sup> The specifics behind the uniform requirement—particularly as to why members cannot wear

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<sup>276</sup> DoDI 1300.17, *supra* note 6, at ¶ 4.b.

<sup>277</sup> *Id.* at ¶ 4.c.

<sup>278</sup> The DoDI requires that this be taken into account in the Enclosure, ¶ 1.e, in requiring consideration of “[p]revious treatment of the same or similar requests, including treatment of similar requests made for other than religious reasons.”

<sup>279</sup> See Convention (IV) Respecting the Laws and Customs of War on Land and its Annex: Regulations Concerning the Laws and Customs of War on Land, The Hague, §. I, ch. I, art. 1(2), Oct. 18, 1907, available at <https://www.icrc.org/ihl/INTRO/195>.

religious apparel that does not interfere with health, safety, or identification as an armed service member is less identifiable. A likely reason for the requirement is for the sake of cohesion; that all members dress alike because they are on the same team. The *Goldman* court took this factor into account it noting that at the heart of military service “is the subordination of the desires and interests of the individual to the needs of the service.”<sup>280</sup> The service member’s individuality is subordinated to the greater needs of the force, and the uniform is in some ways symbolic of that requirement. Indeed, these were among the unsuccessful reasons proffered by the Army in *Singh*.<sup>281</sup>

However, the military nonetheless allows regular variances to the uniform with no apparent ill effect. For example, although the military services are historically male-dominated, there has been an increasing acceptance of women in the military with their gradual allowance into more combat-related roles that were traditionally exclusive to men. While men are expected to conform to traditional male dress and appearance standards such as close-cut haircuts and wearing ties in dress uniforms, women have female-specific variances. They can maintain cultural norms traditionally associated with women while in uniform, such as skirts, women’s shoes, conservative earrings and makeup, and longer hair.

We might speculate as to why women’s variances were created. It is likely because it allows women the option of maintaining a “traditional” feminine appearance both while in and out of uniform (which, in turn, probably aids the military in recruiting women). For example, there are social norms which consider close-cropped hair on a woman to be unbecoming, so it follows that women should be allowed to grow their hair so long as they can keep it neat, conservative, and prevent it from interfering with safety. In other words, these variances allow a woman to preserve her feminine identity—if she relates to customary notions of female appearance—while serving in the military.

The difficult question is then: why not allow religious adherents to maintain their identity while in uniform as long as religious garb and appearances are neat, conservative, and do not interfere with health and safety? Why does gender earn a broad policy exemption but religion does not? Common sense suggests that a yarmulke, for example, poses no threat to welfare and minimally distracts from the overall uniform. In the aftermath of *Goldman* and Congress’ subsequent legislative change to uniform standards, it is not unheard of for a Jewish member to wear a yarmulke in uniform today. Although a turban is more obtrusive than a yarmulke, it, too, can be worn in a professional and military manner, as service members

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<sup>280</sup> *Goldman v. Weinberger*, 475 U.S. 503, 508 (1986), citing *Orloff v. Willoughby*, 345 U.S. 83, 91 (1953).

<sup>281</sup> *Singh v. McHugh*, No. 14-cv-1906, 2015 U.S. Dist. LEXIS 76526, 24-26 (D.D.C. June 12, 2015).

have recently been seen wearing a military-style turban.<sup>282</sup> This works out well for yarmulke-wearing Jews and turban-wearing Sikhs, but now a precedent has been set that at least two types of non-regulation headgear are permitted which apparently do not interfere with good order, discipline, health, welfare, and so on.

The military needs to be prepared to clearly articulate its policies in order to explain why it is needed as a general matter of military necessity. Doing so will go a long way in further explaining why a variance for religious reasons is not permissible, or only permissible with limitations. The military must also be prepared to explain why some variances have been granted while others have not, lest it give the impression that it is being stubborn or bigoted towards some religions and not others.

#### B. What is the Nature of the Request Being Made by the Service Member?

This item is also required to be taken into account by the current version of the DoDI,<sup>283</sup> but also bears discussion. Simply put, deciding officials need to consider what the service member wants, not just in the immediate sense but in the larger sense of identifying the heart of the member's concerns. The service member's request needs to be appropriately framed in order to identify alternative means of both satisfying the member's religious scruples and accomplishing the mission.

For example, where a service member requests an exemption from duties on a specific day, the commander should ask for the reasons for the request. If he or she learns that the member only wants to be exempt on a specific day due to it being a religious day of worship,<sup>284</sup> the commander might consider, whether someone else is available to work in the requester's stead, or whether the particular duty might be accomplished before or after the day of obligation has ended. In many cases, this may be impossible. However, if alternatives are available, they should be considered.

#### C. What is the Effect of Denial on the Service Member's Exercise of Religion?

This question apparently ties into the issue of whether the member's exercise of religion is "substantially" burdened which, under the DoD Instruction, means that the military policy "significantly interferes with the exercise of religion."<sup>285</sup> Deciding officials should understand that this question goes beyond the idea that the service member can comply with their religion in their off-duty hours, but while on-duty and in-uniform, the religion "takes a back seat." As a generalized principle, this is

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<sup>282</sup> Matthew Pennington, *U.S. Lawmakers Urge Inclusion of Sikhs in Military*, ARMY TIMES (Mar. 10, 2014, 6:00 AM), <http://www.armytimes.com/article/20140310/NEWS07/303100024/U-S-lawmakers-urge-inclusion-Sikhs-military>.

<sup>283</sup> DoDI 1300.17, *supra* note 6, at ¶ 4.i.

<sup>284</sup> *Id.*, at enc. ¶ 4.a. The Instruction requires granting accommodations for religious holiday observances "to the extent possible consistent with mission accomplishment."

<sup>285</sup> *Id.*, at ¶ 3.e.

true, but a religious adherent may not see things that way and may be unwilling to concede that. Overall, the commander, judge advocate, and any assisting chaplain should thoroughly understand not just the “what” of the request, but the “why.”

Consider also that disciplinary measures will be minimally effective in a situation where a service member fundamentally believes that a higher power requires them to act contrary to religious beliefs. Military punishment, particularly in the courts, is based on a number of factors, including generally deterring the military population from emulating the offender’s crime, and specifically deterring the offender from repeating it.<sup>286</sup> However, specific deterrence seems to be an unlikely accomplishment where the offender is convinced that they are divinely required to disobey even in the face of civil punishment.

However, the issue may not need to go so far. One question to ask would be: what is the religious importance of the accommodation request to the individual? Is the service member asking for something that rises to the level of a “mortal sin”—an action that is fundamentally at odds with the service member’s religious tenets? As an example, a religious physician might be opposed to being ordered to perform an abortion because he or she views the unborn child as human and the act of abortion as murder, which is non-negotiable to many people despite its legality.

Conversely, some religious obligations may be flexible within the individual’s belief system. As a counter-example, many religious faiths require a day of rest and worship on either Saturday or Sunday, yet it is not unusual for military activities to occur on a weekend. However, some of these religions allow for flexibility on the Sabbath requirement where circumstances do not permit it. Catholics permit excusal from the Sunday obligation when either grave reasons exist or adherents are otherwise dispensed by their pastor.<sup>287</sup>

This type of value judgment on the importance of a requestor’s beliefs may seem difficult, but it is nonetheless necessary. The DoDI explicitly requires that the deciding official consider this factor. However, it is probably safe to conclude that it is incumbent on the member requesting accommodation to convey the importance of the request relative to his or her beliefs. If the member fails to adequately express the spiritual seriousness of the matter, then the deciding official may have more leeway to deny the request.

In cases of ambiguity, it may be worthwhile for the commander and the judge advocate to consult a chaplain expert in determining the importance of the accommodation request relative to the believer and his or her belief system. The distinction between the believer and the faith system is important: even those who subscribe to a specific faith system may not entirely agree with everything within

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<sup>286</sup> U.S. v. Varacalle, 4 M.J. 181, 182-83 (C.M.A. 1978).

<sup>287</sup> CATECHISM OF THE CATHOLIC CHURCH § 2181.

it. (A popular comment is that despite the Catholic Church's opposition to abortion and birth control, few of its members agree with that belief in practice.) The possibility exists that the service member may have a belief that goes beyond the formal tenets of their faith.

On the other hand, some religious beliefs may fall on the "low" end of relative importance to the believer's faith system, and deciding officials might take this into account. Again, a thorough understanding of the belief system and the particular request would be helpful. For example, the relative importance of religious garb is going to vary. To orthodox Jews and Sikhs, headgear is of fundamental importance. In comparison, Catholics are also known for wearing religious ornamentation (such as scapulars worn over the shoulders), but the formal teaching of the Church is that these are "pious practices" which are endorsed but not required as a moral matter.

#### D. What is the Effect of Approval or Denial on Mission Accomplishment?

Obviously, this last question will be the deciding official's chief concern, and military considerations are going to naturally outweigh any individual religious concerns. Still, it is the military's responsibility to fully consider what, exactly, it needs to accomplish and why an otherwise valid religious concern needs to be prohibited because of it. Specifically, the deciding official should not just consider what the military's need is, but also the time, place, and manner of the need in light of the request.

The two primary questions that should be asked are: what needs to be done, and why are we doing it? Goals that are directly related to mission accomplishment, including combat and other operational duties, are obviously of paramount importance, and there is little doubt that they will override any individual believer's concerns should they legitimately conflict. A pilot who needs to go on a combat mission but wants to be excused due to the mission falling on the Sabbath is clearly going to be refused. Concerns related to health and safety are also paramount; hence, if there is a legitimate reason to believe that a religious practice could impact health (for example, garb that interferes with the proper wear of protective equipment) or safety (garb which could substantially increase the likelihood that its wearer would be targeted in a hostile country), then these would also be overriding concerns.

However, deciding officials should be cautious against exercising unlimited discretion over religious accommodation—that is, denial for its own sake. For example, they should exercise caution in making a denial in specific circumstances a *carte blanche* reason to deny the same request on all occasions. Denying the wear of a turban in locations where Sikhs are targeted or where there is a ready need for gas masks makes logical sense. Denying it for the same reasons in the United States or other nations where the local populace is friendly to Sikhs does not. If accommodation request is to be denied, it should be for reasons that are logical at the

time, place, and location where the member is located. A blanket denial for limited reasons risks failing the “least restrictive means” prong of the RFRA.

Additionally, deciding officials should be careful not to overreach on some of the military’s less tangible concerns. Military needs such as mission accomplishment, readiness, and health and safety should be easily understood and explainable to the public and the courts. Less understood are concerns over “unit cohesion,” “good order,” and “discipline,”<sup>288</sup> at least to the extent that the general public may not accept that a simple accommodation such as a yarmulke would impact those things. Courts have struggled with these issues as well, such as in relatively recent cases where the military has sought to defend homosexual discharges pursuant to now-defunct “Don’t Ask, Don’t Tell.” The government has defended those actions, citing to congressional findings related to homosexuality’s impact on “unit cohesion,” but the courts expressed skepticism that private relationships had an impact on military units.<sup>289</sup> Worse, the courts have found that such discharges had the opposite effect on cohesion and morale, causing the elimination of otherwise competent and well-trained members.<sup>290</sup>

Similar questions should persist in the realm of religious accommodation. Although unit cohesion doubtlessly remains an essential military goal, the question that deciding officials need to ask themselves is how a particular grant of accommodation would impact cohesion. The “Don’t Ask, Don’t Tell” cases suggest that the military’s reasoning needs to go beyond the hypothetical—exactly why would allowing a particular concession be harmful to the unit’s ability to work together, particularly if similar accommodations have been granted in the past? This is not to say that a religious accommodation could never impact cohesion, but rather that the deciding official needs to positively identify a real rather than hypothetical threat to that need. Indeed, the *Singh* court expressed skepticism over the Army’s claims that Sikh grooming standards meaningfully impacted a member’s cohesion with his peers.<sup>291</sup>

The same idea goes for good order and discipline—the deciding official should point to something concrete before determining that a particular religious practice would violate these principles. The terms “good order” and “discipline” are frequently used in military practice, most famously in Article 134 of the Uniform

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<sup>288</sup> DoDI 1300.17, *supra* note 6, at ¶ 4.c, e.

<sup>289</sup> Witt v. Dep’t of the Air Force, 527 F.3d 806, 821 (9th Cir. 2008).

<sup>290</sup> Log Cabin Republicans v. U.S., 716 F.Supp. 2d 884, 919-923 (C.D. Cal. 2010).

<sup>291</sup> *Singh v. McHugh*, No. 14-cv-1906, 2015 U.S. Dist. LEXIS 76526, 61-62 (D.D.C. June 12, 2015) (“Defendants have not claimed or shown that any of the soldiers and officers who have served with beards have been less disciplined, less credible, less socially integrated, or less well-trained than their clean-shaven colleagues. In addition, to the extent that the Army has also asserted an interest in diversity, that interest would plainly be furthered by permitting plaintiff’s enrollment in ROTC.”).

Code of Military Justice,<sup>292</sup> yet at times they seem to evade definition. DoDI 1300.17 unfortunately does not define the terms, so presumably it either relies on a colloquial understanding or else leaves itself open to interpretation as the understanding of the term evolves. The Supreme Court acknowledged that “good order and discipline” were broad terms when it analyzed a constitutional attack on Article 134 in the case of *Parker v. Levy*.<sup>293</sup> Yet the Court upheld the statute, believing that even though the literal language of the statute was broad, it had been sufficiently narrowed and clarified by the military courts of appeal.<sup>294</sup>

Once again, deciding officials should be ready to articulate why a particular grant of religious accommodation would impact good order and discipline. To do so, they might look to examples from Article 134. The Manual for Courts-Martial states that such acts are really only those which are “directly” prejudicial to good order and discipline “and not to acts which are prejudicial only in a remote or indirect sense.”<sup>295</sup> It then outlines a nonexhaustive list of sub-offenses which have fallen under Article 134 (provided that the terminal elements of prejudice or service-discrediting) are met, such as adultery,<sup>296</sup> prostitution,<sup>297</sup> and other acts not otherwise covered in the Code’s other punitive articles.

In deciphering whether a particular grant of religious accommodation would be prejudicial to good order and discipline, the deciding official might do well to analyze whether granting the request would somehow violate notions of good order and discipline as understood by Article 134. That is, would the service member’s action or inaction somehow constitute an offense under the Code? Perhaps, for example, if an officer requested permission to proselytize to subordinates, the commander could conclude that those actions risk becoming fraternization.<sup>298</sup>

Because the DoDI leaves “good order” and “discipline” undefined, it could be interpreted much more broadly as a generalized respect for command authority—that short of an illegal action, a subordinate should always follow a superior for the sake of instilling respect for command and the organization. It goes to the old maxim that those who can be trusted in small things can be trusted in large ones.<sup>299</sup> One could argue that because discipline should be enforced for its own sake—because military members are entrusted with carrying out high-risk activities with their own lives at risk—they should be prepared to subordinate all interests to the military mission.

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<sup>292</sup> 10 U.S.C. § 934 (2015).

<sup>293</sup> *Parker v. Levy*, 417 U.S. 733 (1974).

<sup>294</sup> *Id.* at 752-59.

<sup>295</sup> MANUAL FOR COURTS-MARTIAL (2012 ed.), United States, Part IV, Punitive Articles ¶ 60.c.(a).

<sup>296</sup> *Id.* at ¶ 62.

<sup>297</sup> *Id.* at ¶ 97.

<sup>298</sup> Fraternization falls under Article 134, Uniform Code of Military Justice. *Id.* at ¶ 83.

<sup>299</sup> Cf. *Luke* 16:10 (New American Bible Revised Edition).

Such thinking is understandable, but potentially dangerous. From a “slippery slope” standpoint, we might wonder whether there is any limit to what the military could or should deny for the sake of discipline. For example, it could be argued that leave requests should be routinely denied even in non-mission essential periods, because members should be expected to continue to report to duty for the sake of discipline. Or, it could be argued that subordinates should never be given permission to leave work to attend to routine family matters such as picking up children from school or running an errand, because again, discipline is paramount.

These scenarios are absurd, and the military generally understands that requests related to family and personal matters should routinely be granted to preserve morale. Members who have personal issues weighing on their minds will probably be a less effective part of the fighting force; they will become distracted, stressed, or disheartened. In these situations, while commanders have the authority to deny these requests, as a routine matter, they do not do so when the impact on mission accomplishment and routine duties is low and the benefit to morale would be high.

A similar approach could be taken when evaluating religious accommodation requests against mission needs, to include the elusive “good order and discipline.” Deciding officials probably can deny accommodation for the sake of instilling obedience, but should they? They should consider whether a denial that does not directly relate to health, safety, or mission accomplishment would have an adverse impact on the member’s own morale and sense of good order and discipline. If the matter related to the request is a deeply-held religious belief that would impose on the member’s conscience and cause an irreconcilable conflict between their duty to the military and to their god, the result of which would impact the service member’s military effectiveness and performance, then the deciding official might consider granting the request if no other impact to the mission would result.

#### E. Are the Least Restrictive Means Being Used?

As a final concern, deciding officials should remember that even if the military has a compelling interest which overcomes the religious needs of the service member, RFRA and the DoDI require consideration of whether less restrictive means of accomplishing the military’s goals are available.<sup>300</sup> In many cases, there will simply be no less restrictive means: the military’s need will override the service member’s desire and no compromise will be available. For example, if a Muslim member wants to hold his noon prayer and his unit’s convoy is departing at the same time due to a strict schedule, it would be absurd to delay mission requirements to accommodate one person.<sup>301</sup> In many cases, time will be of the essence, and there

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<sup>300</sup> 42 U.S.C. § 2000bb-1(b)(2); DoDI 1300.17, *supra* note 6, at ¶ 4.e.(1)(b).

<sup>301</sup> U.S. v. Webster, 65 M.J. 936, 947-48 (A. Ct. Crim. App. 2008), illustrates that a court will look more favorably at the “least restrictive means” element where the military has made efforts at

may be no luxury to deliberate over an alternative. In other cases, the lack of an alternative will be readily apparent. In the case of dress and uniform requirements, the military's interest is in having its members look as identical as possible in order to foster unity and subordinate the individual to the organization. A deviation for religious apparel or wear is incompatible with that idea; either service members dress and look identical to their peers, or they do not.

Nonetheless, deciding officials must consider this element of the analysis. RFRA and the DoDI do not stop the analysis with a determination that the government has a compelling interest; the deciding official is required to determine if alternate means of accommodation are available. If there is some other way of furthering the military's needs, then the request apparently needs to be granted.

In many cases, the military will determine that no less-restrictive means are available. Because the military is a specialized society and because military-specific decisions are often considered nonjusticiable by the courts,<sup>302</sup> there may be a limited risk that a court would second-guess a military determination that no less-restrictive means are available, particularly when the issue relates to combat, readiness, or health and safety. Regardless of whether nonjusticiability will protect against challenges to denials of religious accommodation, RFRA and the DoDI compel an analysis of the issue even if a court will defer to the military's judgment.

However, commanders and lawyers should carefully consider whether a court, if it does reach the issue, could find a less-restrictive means. The *Singh* court determined that a temporary accommodation of the plaintiff's grooming standards were appropriate in lieu of a permanent one.<sup>303</sup> The deciding official should again

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accommodating. In that case, the Army gave Webster the opportunity to apply for conscientious objector status or other religious accommodation, to include non-combatant duties while deployed, but he declined to do so and avoided deployment instead.

<sup>302</sup> See *Orloff v. Willoughby*, 345 U.S. 83, 91 (1953), and its famous comment that

[J]udges are not given the task of running the Army. The responsibility for setting up channels through which grievances can be considered and fairly settled rests upon the Congress and upon the President of the United States and his subordinates. The military constitutes a specialized community governed by a separate discipline from that of the civilian. Orderly government requires that the judiciary be as scrupulous not to interfere with legitimate Army matters as the Army must be scrupulous not to intervene in judicial matters.

*Id.* at 93-94. Courts have remained wary of interfering in traditionally or exclusively military functions, such as command, control, and personnel matters. See, e.g., *Rostker v. Goldberg*, 452 U.S. 57, 65 (1981), quoting *Gilligan v. Morgan*, 413 U.S. 1, 10 (1973) ("composition, training, equipping and control" are nonjusticiable); *Department of Navy v. Egan*, 484 U.S. 518 (1988) (security clearance determinations are nonjusticiable); *Knutson v. Wisconsin Air Nat'l Guard*, 995 F.2d 765, 771 (7th Cir.1993) (duty orders, promotions, demotions, and retentions are nonjusticiable).

<sup>303</sup> *Singh v. McHugh*, No. 14-cv-1906, 2015 U.S. Dist. LEXIS 76526, 77-78 (D.D.C. June 12, 2015).

consider a litigation risk analysis to determine if a repeat of the *Singh* case is possible. At the very least, the DoDI's requirements that an accommodation is conditioned on the member's current circumstances, and that the member must seek renewal of the accommodation after a significant change such as a new assignment, may still grant the military a degree of "reserved" control over the member.

Finally, even if denial is properly justified as a matter of proper military image, one last question remains.

#### F. If Accommodation is Not Required, Should it Be Granted Anyway?

The above discussion concerns whether a military member's *must* be granted—that is, whether the member's legal interest in a practice is so strong that it overcomes any compelling interest of the military. However, it should not be overlooked that the DoDI is written permissively. It states that accommodation "will be approved" when an issue overcomes the RFRA standard (which is difficult), but there is nothing within that says it may not be approved when the request reaches the appropriate approval level. Denial appears to be a permissive function; the Instruction says that requests "may be denied" when the service member's religious need will not overcome the RFRA standard.<sup>304</sup>

There is, unfortunately, neither a "correct" answer, nor a "one size fits all" answer to this issue. The DoDI is rather non-specific on the permissive aspect of religious accommodations, other than providing a few factors to consider in relation to dress and appearance issues.<sup>305</sup> It should be emphasized that whatever decision is made will be entirely discretionary, and if an accommodation is granted, that discretionary power should be made known so as not to create the impression that a substantive right has been created when none exists.

The deciding official may simply need to review the process that led to denial and ask whether accommodation "could" be granted under the circumstances that otherwise prohibited it. The largest consideration would again be the question of mission accomplishment, particularly with regard to issues related to health, safety, and accomplishment of primary duties. If an accommodation would endanger lives or prevent immediate duties (such as a tactical duty or something related specifically to the service member's job function), then the deciding official has a great incentive to deny the request. For example, if a service member working with dangerous mechanical equipment wanted to grow a lengthy beard for religious reasons, not only would the commander have the right to say no, but also the duty to do so since the health and safety concern cannot be eliminated.

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<sup>304</sup> DoDI 1300.17, *supra* note 6, at ¶4.e.(1), (2).

<sup>305</sup> *Id.* at Enclosure ¶ 5-7.

However, where the sole concern relates to the less-tangible military concerns of cohesion, good order and discipline, or military image, the deciding official should give a serious look at whether a permissive grant of accommodation is workable. Would the grant of accommodation truly affect those factors, or is there simply a hypothetical concern that the accommodation might affect those things? Can the accommodation be granted conditionally, and later retracted if it proves to have a negative impact on those matters over time? If similar accommodations have been granted elsewhere—for example, if the service member is requesting religious headgear, and the service is already granting headgear waivers to Jews, Sikhs, and Muslims—is there serious reason that a similar, conservative exemption should not be given?

The deciding official should also again consider the level of seriousness the member has expressed in the request. Is this a deep, personal issue that would substantially impact the member's morale if the request is fully denied? If the member does not demonstrate that the specific accommodation is required as part of his or her religious identity, then there is less incentive to grant the accommodation. However, if the issue is one of fundamental importance to the member—if noncompliance would result in the member committing a “mortal sin” or some other violation of their religious identity—then the deciding official might evaluate if service member is being put in the impossible position of having to choose between their country and their God.

Admittedly, having the command and the judge advocate analyze the religious importance of a requested accommodation risks being subjective. It may nonetheless be necessary. Part of the RFRA and the DoDI's analysis is to determine whether a member is “substantially burdened,” again referring to whether there is a significant impact to the member's exercise of religion. The advantage to commanders analyzing these requests is that it creates an opportunity to parse out requests which do not meaningfully impact the member's religion. For example, if the command has a policy limiting use of electronic mail to official purposes and a member requests to advertise a Bible study, the deciding official could easily deny it. While a member might claim that he has a religious obligation to “spread the Gospel,” for example, the burden would be on him to show that his religion or personal views actually require using a government e-mail account to do so. In other words, the member can proselytize on his own time and with his own account.

However, the e-mail example is one that easily favors a denial. Trickier are issues where the member does demonstrate a substantial burden. The military's need for a hierarchical chain of command requires that a superior not be “held hostage” by a service member whose needs should be subordinate to the group. Nonetheless, the deciding official should give serious consideration to whether a denial of accommodation will create more trouble than it is worth. Because religious persons may have immutable obligations with respect to their faith, an otherwise lawful military requirement which breaks that obligation may come off as a form of

persecution. The member may feel obligated to disobey their military obligation and accept whatever punishment to which the military subjects him. In these instances, disciplining the member may be ineffective because the member may actively welcome the discipline rather than risk displeasing their God. There is a certain absurdity in attempting to enforce standards against someone who refuses to be enforced. Deciding officials should therefore carefully consider whether they want to put religious service members in a position that could inspire avoidable dissent.

Additionally, the deciding official should consider whether there will be a larger consequence to public perception of whether the military is or is not an inclusive environment that allows its members to exercise its constitutional rights. Granted, military members have diminished constitutional rights thanks to the specialized society in which they operate. Nonetheless, a perception that the military oppresses religious rights—particularly when placed against a less tangible military need such as “unit cohesion”—may impact the willingness of religious persons to join or remain in the military.

## V. HYPOTHETICAL SCENARIO

Let us now apply the discussion of religious accommodation to some possible situations. Imagine that a new female recruit to the Air Force is a Hindu and wishes to wear a bindi, the traditional red dot makeup worn on the lower forehead by members of that culture. She wishes to wear it on a regular basis, both at her home station as well as the deployed environment. Her stated purpose is that it is a traditional Hindu symbol of her marriage, and also because she believes it has spiritual benefits consistent with those in Hindu tradition. However, a review of the Air Force’s dress and appearance regulation reveals that the bindi is apparently not authorized under service standards.<sup>306</sup> Consistent with the DoD Instruction and the Air Force’s own standards for requesting an exception to dress and appearance policy,<sup>307</sup> she asks her chain of command for permission to wear it. Should it be granted, and how should the deciding officials interpret it?

### A. What is the Military Need From Which the Service Member Wants Accommodation?

First, we should analyze exactly what the military policy is and why it enforcement is important as a general rule. In this particular instance, the member

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<sup>306</sup> This interpretation is arguable. U.S. DEP’T OF AIR FORCE, INSTR. 36-2903, DRESS AND APPEARANCE OF AIR FORCE PERSONNEL, ¶ 3.3 (Jul. 18, 2011), states: “Female Airmen may wear cosmetics; however, if worn, they will be conservative (moderate, being within reasonable limits; not excessive or extreme) and in good taste....Cosmetics will not be worn during field conditions.” The instruction does not explicitly prohibit the bindi, but one could reasonably interpret “conservative” as opposing untraditional, non-Western makeup, particularly since ¶ 3.4.3 also prohibits cosmetic tattooing which does not have a “natural appearance.”

<sup>307</sup> *Id.* at ¶ 9.12.

wishes to be excused from a specific portion of the Air Force’s dress and appearance policy. The Air Force allows cosmetics on women, but “if worn, they will be conservative (moderate, being within reasonable limits; not excessive or extreme) and in good taste.” Because the bindi is non-traditional in western, American culture, there would likely be a strong presumption against wearing one since it would appear out-of-place within the larger demographics of the force.

Deciding officials should review not just the specific policy (conservative makeup only), but also the larger basis for the policy. Here, the Air Force has formally stated the philosophy behind its dress and appearance standards:

Pride in one’s personal appearance and wearing the uniform, greatly enhances the esprit de corps essential to an effective military force. Therefore, it is most important for all Airmen to maintain a high standard of dress and personal appearance. The five elements of this standard are neatness, cleanliness, safety, uniformity, and military image. The first four are absolute, objective criteria needed for the efficiency and well-being of the Air Force. The fifth, military image is subjective, but necessary. Appearance in uniform is an important part of military image. Judgment on what is the proper image differs in and out of the military. The American public and its elected representatives draw certain conclusions on military effectiveness based on the image Airmen present. The image must instill public confidence and leave no doubt that Airmen live by a common standard and respond to military order and discipline. The image of a disciplined and committed Airman is incompatible with the extreme, the unusual, and the fad. Every Airman has a responsibility to maintain an “acceptable military image,” as well as the right, within limits, to express individuality through his or her appearance.<sup>308</sup>

In addition, the Instruction provides additional guidance and considerations to be considered in evaluating requests for religious accommodation while in uniform.

9.12.2.1. Uniforms indicate combatant status under the international laws of armed conflict by distinguishing military members of the armed forces from civilians and other noncombatants.

9.12.2.2. In the military culture, uniforms and dress and appearance standards foster a strong sense of unit cohesion with consequent positive impact on morale, good order, and discipline.

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<sup>308</sup> *Id.* at ¶ 1.1.2.

9.12.2.3. Uniforms and dress and appearance standards, which are traditionally neat and conservative, symbolize subordination of self and personal interests to military service and national defense interests and to command and ultimately civilian authority.

9.12.2.4. Uniforms and dress and appearance standards are a powerful symbol to the public, whose confidence in the military services in general and in military members in particular, is a function of all of the foregoing.

9.12.2.5. Deviation from standards can be perceived by military members and civilians alike as challenge to authority and/or as evidence of disrespect or malcontent. It is immaterial whether that conclusion is perceived or real when public confidence in the military or service member confidence in the authority or command and/or threat to unit cohesion appears to have been undermined. Deviations from standards are inherently conspicuous and “send a signal” of individuality whether intentional or not.

9.12.2.6. In joint and multi-service environments, a permissive approach to adherence to uniforms and dress and appearance standards by one service, whether real or perceived, can negatively impact services which adhere to more restrictive standards.

9.12.2.7. Safety; interference of religious item with wear of protective gear; danger to equipment posed by religious gear (e.g., loose fitting items are not permitted around aircraft).

9.12.2.8. Performance of military duties can be hindered by ad hoc additions to the uniform or modifications of dress and appearance.<sup>309</sup>

It is clear that from an Air Force perspective, members are expected to be neat, clean, safe, uniform, and present a proper image. The disadvantage of the Instruction’s broad wording is that it leaves open exactly what an “acceptable military image” is, and the regulation even admits that this standard is subjective. However, it does present a strongly-worded concern that a variance in dress and appearance standards will create a real or perceived threat of contempt towards authority. The regulation does not specifically address the bindi nor any other specific religious apparel or makeup, so deciding officials will have to use their judgment in determining whether the bindi can fall within military standards.

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<sup>309</sup> *Id.*

## B. What is the Nature of the Request Being Made by the Service Member?

The airman in this scenario is requesting to wear a bindi, a relatively uncommon adornment in most parts of the United States and even rarer still in a military environment. In order to properly address it, the deciding official should be familiar with what it is so as not to make a rushed decision in approving or denying it.

Research uncovers that the bindi is a dot, typically red, worn on the forehead by Hindu women.<sup>310</sup> It tends to be a simple adornment of makeup made from herbal paste or other natural materials.<sup>311</sup> A search for images reveals that the bindi can vary in size, with some being about as small as a pencil eraser while others dominate the entire forehead. (For the sake of this scenario, assume that the airman will keep it smaller.) The bindi is a subset of a larger Hindu tradition of wearing a “tilak,” which can be any larger mark used to represent one’s sectarian affiliation.<sup>312</sup>

Hindus vary in their reasons for wearing the bindi. Some wear it for purely cosmetic reasons or beautification. However, others have a variety of spiritual and medicinal reasons for wearing it. Varying colored bindis are worn by single and married Hindu women alike, signifying both Hindu culture and their marital status.<sup>313</sup> It can also be used to focus attention during meditation,<sup>314</sup> or as a means of continuing prayer and reflecting on a Hindu’s purpose throughout the day.<sup>315</sup> It may be helpful for the deciding official to consult a chaplain (particularly a Hindu one) or other spiritual or cultural expert to determine the full scope and significance of the bindi.

## C. What is the Effect of Denial on the Service Member’s Exercise of Religion?

Since Hinduism is so variable, determining the impact of denial on the member’s exercise of religion may be difficult. With regards to the bindi, the deciding official should appreciate that some Hindus ignore the bindi or only wear it for fashionable purposes, while others legitimately do so for spiritual reasons. Care should be taken to remember that the issue needs to be examined with respect to the individual member and not larger social trends. In our scenario, the service member has identified that she has a combination of cultural and spiritual reasons for desiring to wear the bindi—she views it as a symbol of her marriage, but she also believes that there is some spiritual benefit to wearing it. She continues to wear it

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<sup>310</sup> *Bindi—Meaning and Significance of the “Dot” on Forehead*, SANSKRITIMAGAZINE.COM (November 25, 2013) <http://www.sanskritimagazine.com/culture/bindi-meaning-and-significance-of-the-dot-on-forehead/>.

<sup>311</sup> *Id.*

<sup>312</sup> *Tilak*, BRITANNICA.COM, <http://www.britannica.com/EBchecked/topic/595727/tilak> (last visited Nov. 5, 2015).

<sup>313</sup> *Bindi*, *supra* note 310.

<sup>314</sup> *Id.*

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

when she is out of uniform and not in a duty status, but during duty hours she will be unable to exercise this part of her faith. Assume, therefore, that her exercise would be substantially burdened if she were denied an accommodation to wear it.

The deciding official or a chaplain might interview the member to determine why the bindi is so significant to this particular airman. She might believe that there is legitimate spiritual protection in the bindi which defends her from evil spirits or other outside forces. (A non-Hindu might inwardly scoff at such a belief, but should remember that while religious matters are relative to the believer, they can nonetheless be very real and powerful to their adherents.) She might also consider it a strong part of her religious and cultural identity, in the same way that Jews view the yarmulke or Sikhs and Muslims view their beards, in which case not wearing it would be considered an extreme violation of her faith. Alternatively, an interview might determine that while she has a strong cultural preference towards wearing it, she would reluctantly but understandably comply with military directives to not wear it.

Doing some research, it does not appear to the deciding official that wear of the bindi holds extreme religious significance. Although it holds considerable cultural significance to Hindus, there is no indication that there is any doctrinal requirement that a Hindu wear it. The failure to wear it does not appear to be a “mortal sin” as Christians would see it, or an absolute cultural identifier as Jews, Muslims, or Sikhs require. A cultural survey suggests that some Hindus wear it, some do not, and it is apparently up to the believer on whether he or she wants to maintain it.

However, the deciding official should still consider what personal impact this would have on the airman. There may be some impact to her morale, since in her culture and faith, the bindi is a symbol of marriage. The military allows conservative jewelry, so her peers are allowed to wear the traditional western wedding ring while in uniform, but she is not allowed her culture’s equivalent. (She would, of course, be allowed to wear her own wedding ring, but she may not perceive that as a fair equivalent.)

#### D. What is the Effect of Approval or Denial on Mission Accomplishment?

At this point, the deciding official will have to give serious consideration to what “the mission” is in this case and how it will be impacted by granting or denying the accommodation. Because the bindi is a minimal application of makeup, it is difficult to fathom any direct impact to a tangible mission requirement. If the airman were a mechanic, it would not prevent her from turning wrenches. If she were a pilot, it would not prevent her from flying an aircraft. There is no immediately visible to health, safety, welfare, or job performance in this adornment. The deciding official’s opinion might change if the airman were in a location where wear of the bindi or other cultural markers might make her a target because anti-

Hindu hostility. However, such threats are considerably less likely in a peacetime, stateside environment.

This leaves the deciding official to consider the less tangible elements of mission accomplishment: unit cohesion, good order, and discipline, including “uniform grooming and appearance standards.” Turning back to the Air Force’s dress and grooming regulation, we are reminded that the service’s philosophy is in preserving “neatness, cleanliness, safety, uniformity, and military image.” It has already been determined that safety is not an issue here, and presumably, the Hindu airman will keep her bindi neat and clean. We are therefore left with the question of “uniformity and military image”—will it look acceptable for an individual airman to have a small, conservative dot on her forehead?

This question is not easily answered, subjective, and will probably be open to criticism no matter how it is answered. In the military’s favor is its interest in subordination of the individual to the higher needs of the group, symbolized in uniform dress and appearance standards. Practices which draw attention to the individual at the expense of the unit are frowned upon. It can be argued that because the bindi is a relatively unorthodox practice in American culture, it would be too obtrusive and draw too much attention away from the group and towards the individual. Perhaps if the bindi were a more common practice in American culture, it would not appear out of place in uniform. As it stands now, however, it would too readily appear out of place in a military environment.<sup>316</sup>

The other side would ask why a small, unobtrusive dot would significantly detract from uniform appearance when the airman is otherwise properly groomed and wearing her uniform correctly. It could be argued that uniformity is not what it used to be. In a large military formation, we might find more variety than suggested by “uniformity.” Male and female service members will be wearing similar but not identical uniforms. Some might be wearing glasses; others, moustaches. Females might be wearing conservative makeup or jewelry, and will likely have longer hair than their male counterparts. Under an exception to regulations, some of the males might have beards due to medical conditions. With recent trends, some might even have beards under a religious waiver, as well as religiously-driven headgear. There should be a generalized uniformity in what the formation is wearing, but absolute identicalness will be impossible. However, requiring each member to be neat and conservative relative to their sex, medical conditions, grooming preferences, and cultural practices is possible.

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<sup>316</sup> However, a deciding official might consider the bindi comparable to the Catholic custom of wearing ashes on the forehead on Ash Wednesday, albeit the Hindu member’s use would be done regularly and not limited to one day. There is no service-wide prohibition on wear of Ash Wednesday ashes, and there is anecdotal evidence that Catholic members have worn them without restriction. *Ash Wednesday in Iraq and D.C.*, CHRISTIANFIGHTERPILOT.COM (Mar. 4, 2010) <http://christianfighterpilot.com/2010/03/04/ash-wednesday-in-iraq-and-dc/>.

In other words, there is no “correct” answer to this particular question. Ultimately, the deciding official needs to determine exactly what “uniformity” and a “military image” are and whether a bindi can be incorporated into that.

#### E. Are Less Restrictive Means Available?

In this case, it appears that there are no less restrictive means available if the goal is uniformity and the deciding official rejects *Singh*'s holding that there is no compelling interest present. The military interest is in having a consistently-dressed force with minimal body decorations. Either the member is allowed to wear a bindi in uniform or she is not. The deciding official should be cautious of *Singh*'s ruling that a “less restrictive” means could exist in the form of a temporary accommodation where the bindi is allowed unless a true operational need should require limiting it.

#### F. Conclusion

DoDI 1300.17 requires that an accommodation be granted if it does not adversely affect a military need, to include unit cohesion.<sup>317</sup> A subset of those needs are “uniformity and adhering to standards, [and] putting unit before self.”<sup>318</sup> Given that the bindi is, for better or worse, a significant deviation from American cultural norms, the military deciding official has a colorable argument to justify denying a request for accommodation. It is likely that since, in the scenario, the Hindu airman has identified a religious practice that has been “substantially burdened” here given that she wears the bindi regularly, the RFRA analysis is triggered. However, the military maintains that it has a compelling interest in maintaining uniformity in military appearance to the extent practicable, and there is no less restrictive means available since the military and the airman’s goals are diametrically opposed. Given *Goldman*-deference it is possible that a court would even question a military deciding official’s decision to deny the accommodation.

However, the deciding officials should consider the impact of *Singh*, which presented a similar set of facts in terms of a cosmetic deviation that appears to have no operational impact on performing duty. The final approval authority for the accommodation needs to consider the likelihood of whether a *Singh*-type ruling would result if the case is challenged in court. *Singh* is still a unique case that has not been affirmed at an appellate level. Still, a risk assessment should be considered, since the facts of this hypothetical are arguably comparable to *Singh*.

The remaining question is whether the accommodation *should* be granted. Again, DoDI 1300.17’s language is presumptive towards granting accommodations, and permissive in denying them. It states that a request for accommodation “may” be denied when the government has the stronger interest. The strength of the particular

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<sup>317</sup> DoDI 1300.17, *supra* note 6, at ¶ 4.e.(1).

<sup>318</sup> *Id.* at ¶ 4.(h).

facts in this case might prompt the deciding official to allow the accommodation: it is relatively small, unobtrusive, and apparently would not interfere with safety or job performance.

Note that the DoDI seems to heavily favor the wear of religious apparel in uniform when neat, conservative, and not otherwise a risk.<sup>319</sup> Note that under the Instruction, “grooming and appearance practices” are not considered “religious apparel”<sup>320</sup> so a bindi would likely be considered “body art” instead. On the one hand, the bindi has no apparent impact on carrying out military duties: it would not impair safety, health, or interfere with special equipment.<sup>321</sup> On the other, being an unorthodox form of makeup by Western standards, even a conservative bindi might be considered too obtrusive and distracting. Still, this last point is left to the discretion of the deciding official. Given the minimal intrusion of the bindi, the fact that it has high importance to the airman, and the fact that the military does grant other dress and appearance accommodations, there is perhaps a good incentive to grant this request.

Still, the deciding official should tailor the accommodation request as specifically as possible to ensure that proper military decorum and command authority are maintained. The waiver authority might specify that the bindi may only be worn in a certain manner (conservatively colored makeup only, not jewelry), of a specific size (for example, limited to a quarter inch in circumference), not in certain conditions (official photos, formations, or in field conditions), and only in certain locations (the home duty station).

## VI. CONCLUSION

Religious accommodation issues will not go away any time soon. In many ways, the military is representative of the changing face of America. As the United States increases in its population of minority religions such as Islam, Sikh, and Hindu, so will the population of those believers increase in the military. However, religious identity is not easily separated from the adherent, even when the military demands that individuality be subordinated to the greater whole of the organization. These religiously-minded individuals want to faithfully serve their country, but they are equally or even more compelled to serve whatever higher power or belief system they hold. Strange as they may seem to Westerners, these compulsions include customs related to dress, appearance, diet, rituals, and other external trappings. To most members of American culture, these may seem unfamiliar and even unnecessary, but as was stated, they will not be easily separated from believers.

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<sup>319</sup> *Id.* at enc. ¶ 5.

<sup>320</sup> *Id.* at ¶ 4.f.(1)(b).

<sup>321</sup> *Id.* at enc. ¶ 10.a-c.

Remember that not all accommodation issues concern appearance and diet. There are also moral issues, in which an orthodox believer will feel compelled to refrain from taking a particular action because it conflicts with the moral parameters of their religion. These obligations can be grounded in the Ten Commandments, natural law, or whatever other moral code to which the believer subscribes. Although not every member of an organized religion takes the tenets of their faith to heart, many others do, and to them, certain behavior is not optional even in the face of military orders.

The above analysis illustrates that the law is clearly on the military's side. Despite the First Amendment, RFRA, and even the Department of Defense's own internal rules, it will be extremely rare that the military will be legally obligated to grant an accommodation. Acknowledging that, the military needs to strongly consider whether denials for their own sake will have a negative impact on morale, recruiting, and retention.

Fortunately, the DoDI is written broadly enough that in many situations, commanders and other deciding officials have wide discretion in determining whether an accommodation can be granted. Certainly, in cases where direct mission accomplishment or health, safety, and welfare would be directly impacted, accommodation is non-negotiable. However, in cases where military needs are less tangible—abstracts such as “unit cohesion” or “good order and discipline”—the military might consider granting the accommodation where the request is small, unobtrusive, and the concerns are more abstract than real. Furthermore, the military is already in the habit of granting some of these waivers—some Jews wear yarmulkes and Sikhs wear turbans with no apparent impact to the greater good. If these small deviations from policy can be granted, the question is: why not others?

DoDI 1300.17 does not provide a one-size-fits-all answer to these issues. Some accommodation requests—such as wearing a full religious garb over an entire uniform—would go too far. Others, like a simple dot on the forehead, would have no impact on the mission. Where the accommodation would cause no real harm to the mission, and where it would otherwise help adherents understand that they too have a place in the military, deciding officials should use the DoDI to their advantage and allow for accommodation where possible.

PRESERVING THE ALLIANCE: THE NEED FOR A NEW  
COMMITMENT TO COMMON FUNDING IN NATO FINANCING

MAJOR ISRAEL D. KING\*

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\* Judge Advocate, United States Air Force. Presently assigned as Instructor, Operations and International Law, The Judge Advocate General’s School, U.S. Air Force, Maxwell Air Force Base, Alabama; J.D., 2006, Wake Forest University; B.A., 2002, University of Richmond; A.A./A.S., 2000, Belleville Area College. Previous assignments include Area Defense Counsel, Whiteman Air Force Base, Missouri, 2011-2013; Rule of Law Field Support Officer, Camp Nathan Smith, Afghanistan, 2010-2011; Assistant Staff Judge Advocate, Kadena Air Base, Japan, 2007-2010. Member of the bar of North Carolina.

*It is clear that the North Atlantic Pact is not an improvisation. It is the statement of the facts and lessons of history. We have learned our history lesson from two world wars in less than half a century. That experience has taught us that the control of Europe by a single aggressive, unfriendly power would constitute an intolerable threat to the national security of the United States.... We have also learned that if the free nations do not stand together, they will fall one by one. The stratagem of the aggressor is to keep his intended victims divided, or better still, set them to quarreling among themselves. Then they can be picked off one by one without arousing unified resistance. We and the free nations of Europe are determined that history shall not repeat itself in that melancholy particular.<sup>1</sup>*

## I. INTRODUCTION.

On March 18, 1949, U.S. Secretary of State Dean Acheson spoke the above words as he took to the radio to sell to the American public the idea of a peacetime political and military alliance with Europe.<sup>2</sup> Less than a month later, Secretary Acheson affixed his signature to the North Atlantic Treaty alongside those of representatives from eleven other North American and European nations.<sup>3</sup> With this act, the U.S. chose to break with its most famous founder, George Washington, who in 1796 admonished the American people to have “as little political connection as possible” with the nations of Europe.<sup>4</sup> Thus, with the stroke of a pen, more than 150 years of isolationism in U.S. foreign policy came to an end.<sup>5</sup>

Over the next several years, the United States and its allies in the North Atlantic Treaty Organization (NATO) strove to deepen their level of political and military integration. The increased focus on integration included an effort to develop a system of “common funding” whereby the NATO allies could pool their funds to pay the operations and infrastructure costs of NATO’s civilian and military institutions. Unfortunately, the unwillingness of the NATO allies to part with their funds raised doubt as to whether these efforts would succeed. Ultimately, it was little more than the allies’ fear of the Soviet Union that led them to compromise and make common funding an institution in the alliance.<sup>6</sup>

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<sup>1</sup> Dean Acheson, Sec’y of State, U.S. Dep’t of State, Speech on the Proposed North Atlantic Treaty 8 (Mar. 18, 1949), *available at* <http://www.trumanlibrary.org/nato/doc5g.htm>.

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

<sup>3</sup> See North Atlantic Treaty, Apr. 4, 1949, 63 Stat. 2241, 34 U.N.T.S. 243, *available at* [http://www.archives.gov/exhibits/featured\\_documents/north\\_atlantic\\_treaty](http://www.archives.gov/exhibits/featured_documents/north_atlantic_treaty).

<sup>4</sup> RICHARD B. MORRIS & JEFFREY B. MORRIS, GREAT PRESIDENTIAL DECISIONS: STATE PAPERS THAT CHANGED THE COURSE OF HISTORY FROM WASHINGTON TO REAGAN 44 (1988).

<sup>5</sup> LAWRENCE S. KAPLAN, NATO BEFORE THE KOREAN WAR: APRIL 1949–JUNE 1950, at 1 (2013).

<sup>6</sup> See *infra* Part II.

Over the years, common funding has provided the NATO allies with a number of benefits. The status of common funding as a vehicle by which the NATO allies can organically pool their efforts has also made it a symbol of transatlantic solidarity. However, the NATO allies have proven unwilling to commit through common funding the amount of resources necessary to supply NATO with the supplies and services it needs, choosing instead to provide capabilities individually through national defense spending. Unfortunately, this approach has proven flawed. Most NATO allies, in particular those that hail from Europe, have been unwilling to allocate an adequate amount of their national treasure towards their own national defense budgets for their own defense and the defense of their NATO allies. This has seriously damaged the alliance's effectiveness as well as the solidarity of its members.<sup>7</sup>

Given the increased threat posed by renewed Russian antagonism and the increased involvement of NATO in "out-of-area" operations (those conducted outside of the territory of NATO member nations) in places like Afghanistan and the Horn of Africa, NATO must adopt an expanded role for common funding if it is to continue as a credible instrument for the maintenance of international peace and security. This is the best way for the NATO allies to start rebuilding their solidarity and restoring key capabilities that will maintain NATO's status as a force to be reckoned with on both sides of the Atlantic.<sup>8</sup>

The purpose of this article is to highlight the strengths and weaknesses of NATO's current common funding scheme and provide recommendations for improvement through an enhanced role for common funding. Part II traces the origins of common funding in NATO, highlighting the reluctance with which the NATO allies put forth their commitments to share in the costs of NATO through common funding. Part III transitions to the present day, outlining how the NATO allies continue to refrain from utilizing common funding to its full potential, and the problems this has caused for the alliance. Finally, Part IV outlines how NATO can integrate increased common funding into its operations, thus improving its effectiveness. Part IV also explains specifically why the United States, as NATO's largest contributor, stands to benefit from the expanded use of common funding.

## II. THE ORIGINS OF NATO COMMON FUNDING

The institution of NATO common funding is nearly as old as NATO itself. Beginning in early 1951, the NATO allies moved toward common funding as the means by which they could pool their funds to pay for the operations, maintenance, and infrastructure needs of NATO's civilian and military institutions.<sup>9</sup> Unfortunately, as they worked to institutionalize common funding, they learned that as much as

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<sup>7</sup> See *infra* Part III.

<sup>8</sup> See *infra* Part IV.

<sup>9</sup> See *infra* Part II.A.

they wanted the benefits of common funding, they had little enthusiasm for bearing its cost.<sup>10</sup>

### A. The Need for Common Funding

Common funding in NATO began with a resolution the NATO allies approved on 12 February 1951, directing a working group to recommend an international budget for the organization.<sup>11</sup> By that time, the NATO allies had created integrated military and civilian institutions to execute NATO's mission, and thus had need of a mechanism by which to fund their operations and the construction of facilities to support them.<sup>12</sup> Further, at that time there were many in government who saw in NATO the means toward realization of closer ties and deeper integration among the NATO allies that over time would facilitate both "defense [and] development" in Europe and North America.<sup>13</sup>

Thus, it was a confluence of views that propelled the NATO allies toward common funding. Basically, those who supported common funding as merely an efficient way to pay for NATO joined with those who saw it as "an end in itself, desirable not only because it would provide cheaper and more standard equipment and facilities, but also because it would represent a natural step and a helpful precedent in the evolution toward a highly interwoven alliance."<sup>14</sup>

### B. Institutionalizing Common Funding

Although the NATO allies appeared united in their pursuit of common funding, their unity quickly disappeared when they moved to put common funding into practice. Although they all recognized the alliance's need for common funding, they also sought ways that would allow them to individually pay as little as possible.<sup>15</sup>

The issue of what methodology to use in apportioning costs provided the NATO allies with the perfect opportunity to argue for smaller shares of NATO's common-funded budgets. For example, when debating what cost-sharing methodology to apply to the operating budget of NATO's International Staff, nearly all member

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<sup>10</sup> See *infra* Part II.B.

<sup>11</sup> North Atlantic Treaty Organization [NATO], *Summary Record of a Meeting of the Council Deputies Held in the Council Chamber, 13, Belgrave Square, London, S.W.1. on Monday, 12th February, 1951, at 3 p.m.*, at 6–9, NATO Doc. D-R(51)9 (Feb. 14, 1951), available at [http://archives.nato.int/uploads/t/null/3/2/32564/D-R\\_51\\_9\\_ENG.pdf](http://archives.nato.int/uploads/t/null/3/2/32564/D-R_51_9_ENG.pdf).

<sup>12</sup> ROBERT S. JORDAN, *THE NATO INTERNATIONAL STAFF/SECRETARIAT: 1952–1957*, at 115, 268 (1967). See also DON COOK, *FORGING THE ALLIANCE: NATO 1945–1950*, at 250 (discussing the creation of the Supreme Headquarters Allied Powers Europe (SHAPE)).

<sup>13</sup> Ellen Hallams, *NATO at 60: Going Global?*, 64 INT'L J. 423, 433–34 (2009).

<sup>14</sup> E. VANDEVANTER, JR., RAND CORPORATION, *COMMON FUNDING IN NATO 14* (1967), available at [https://www.rand.org/content/dam/rand/pubs/research\\_memoranda/2009/RM5282.pdf](https://www.rand.org/content/dam/rand/pubs/research_memoranda/2009/RM5282.pdf).

<sup>15</sup> WALLACE J. THIES, *FRIENDLY RIVALS: BARGAINING AND BURDEN-SHIFTING IN NATO 277* (2003).

nations aside from the United States argued for using a cost-sharing methodology based on “capacity to pay.”<sup>16</sup> Although they argued that such a methodology was the only truly fair way to apportion costs, it also happened to make their prospective cost-shares very low vis-à-vis the United States, by far NATO’s wealthiest member.<sup>17</sup> As expected, the United States supported using a cost-sharing methodology based on factors other than capacity to pay,<sup>18</sup> arguing that this approach was the fairest way of apportioning costs, not least because it would “emphasize the strong cooperative nature of the organization, in which each member has an equal voice.”<sup>19</sup> Incidentally, this approach was also structured to keep the United States cost-share to a fraction of what it would have been under a capacity to pay approach.<sup>20</sup>

For months the NATO allies debated these and other arguments, casting doubt on whether they would ever be able to reach agreement.<sup>21</sup> What ultimately brought them together was not altruism, but fear.<sup>22</sup> The start of the Korean War caused a panic that similar Soviet-sponsored conflicts might emerge on European fronts.<sup>23</sup> As a result, the NATO allies attached a new sense of urgency to funding NATO’s institutions that led many of them to agree to a greater cost-share of common-funded expenditures than they had previously been willing to accept.<sup>24</sup>

Ultimately the NATO allies succeeded in instituting common funding as a fixture in NATO.<sup>25</sup> Unfortunately, the fact that they had agreed to share in the costs

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<sup>16</sup> NATO, *Summary Record of a Meeting of the Council Deputies Held at 13, Belgrave Square, London, S.W.1. on Monday 2nd April, 1951 at 3.0. p.m.*, at 1–3, NATO Doc. D-R(51)24 (Apr. 5, 1951) [hereinafter NATO, Doc. D-R(51)24], available at [http://archives.nato.int/uploads/r/null/3/2/32670/D-R\\_51\\_24\\_ENG.pdf](http://archives.nato.int/uploads/r/null/3/2/32670/D-R_51_24_ENG.pdf).

<sup>17</sup> NATO, *The Establishment of an International Budget for NATO: First Interim Report of the Working Group*, at 4–8, NATO Doc. D-D(51)59 (Mar. 2, 1951) [hereinafter NATO, Doc. D-D(51)59], available at [http://archives.nato.int/uploads/r/null/3/1/31088/D-D\\_51\\_59\\_ENG.pdf](http://archives.nato.int/uploads/r/null/3/1/31088/D-D_51_59_ENG.pdf).

<sup>18</sup> NATO, Doc. D-R(51)24, *supra* note 16, at 1–3.

<sup>19</sup> NATO, Doc. D-D(51)59, *supra* note 17, at 4–8.

<sup>20</sup> NATO, Doc. D-D(51)59, *supra* note 17, at 4–8.

<sup>21</sup> See NATO, *Summary Record of a Meeting of the Council Deputies Held at 13, Belgrave Square, London, S.W.1. on Monday, 28th May, 1951 at 3.0 p.m.*, at 5, NATO Doc. D-R(51)42 (May 29, 1951), available at [http://archives.nato.int/uploads/r/null/3/2/32846/D-R\\_51\\_42-FINAL\\_ENG.pdf](http://archives.nato.int/uploads/r/null/3/2/32846/D-R_51_42-FINAL_ENG.pdf).

<sup>22</sup> Malcolm W. Hoag, *On NATO Pooling*, 10 WORLD POL. 475, 475 (1958).

<sup>23</sup> FRANCIS A. BEER, INTEGRATION AND DISINTEGRATION IN NATO 246 (1969).

<sup>24</sup> See NATO, *Resolution on the Method of Sharing SHAPE Costs*, NATO Doc. D-D(51)181 (Aug. 29, 1951) (containing the compromise agreement reached on cost sharing formulas for SHAPE), available at [http://archives.nato.int/uploads/r/null/3/1/31730/D-D\\_51\\_181-FINAL\\_ENG.pdf](http://archives.nato.int/uploads/r/null/3/1/31730/D-D_51_181-FINAL_ENG.pdf); NATO, *Infrastructure: Note by the Secretary General and Vice-Chairman of the Council*, at 2-4, NATO Doc. C-M(53)46, (Apr. 18, 1953), available at [http://archives.nato.int/uploads/r/null/2/1/21717/C-M\\_53\\_46\\_ENG.pdf](http://archives.nato.int/uploads/r/null/2/1/21717/C-M_53_46_ENG.pdf) (containing the compromise agreement reached on a cost-sharing formula for NATO’s infrastructure program).

<sup>25</sup> See NATO, *Summary Record of a Meeting of the Council Deputies Held at 13, Belgrave Square, London, S.W.1. on Wednesday, 22nd August, 1951 at 3 p.m.*, at 3, NATO Doc. D-R(51)63 (Sept. 3, 1951), available at [http://archives.nato.int/uploads/r/null/3/2/32944/D-R\\_51\\_63-FINAL\\_ENG.pdf](http://archives.nato.int/uploads/r/null/3/2/32944/D-R_51_63-FINAL_ENG.pdf)

of NATO only in the face of clear threats to their national security foreshadowed a continuing unwillingness to dedicate scarce national resources to their common defense.<sup>26</sup> As discussed later, the NATO allies have in fact continued to exhibit unwillingness to sharing in the costs of the alliance, not just in the realm of common funding, but in the overall dimension of NATO financing.<sup>27</sup> Thus, the NATO allies have propagated a resource crisis in NATO that threatens the future of the entire alliance.<sup>28</sup>

### III. THE CURRENT APPROACH TO COMMON FUNDING

Over the years, common funding has provided the NATO allies with a number of benefits.<sup>29</sup> Despite these benefits, the NATO allies have chosen to rely on national defense spending to provide the overwhelming majority of the resources NATO needs to accomplish its mission. In doing so, they have relegated common funding to a small, supporting role, limiting its reach in several ways in order to make more funds available for their individual defense needs. Unfortunately, the NATO allies have also become progressively less willing and able to provide for NATO through national defense spending. The result has been a resource crisis within NATO that has cast the future of the entire alliance into doubt.<sup>30</sup>

#### A. The Benefits of Common Funding

Without exception, the NATO allies have “integrated their efforts more productively in common funding than in any other area of endeavor.”<sup>31</sup> In paying for the operations and maintenance of NATO’s civilian headquarters and military entities, common funding has strengthened the alliance’s military might and diplomatic reach.<sup>32</sup> Further, in paying for NATO’s infrastructure costs, common funding has provided the alliance with a diverse array of military facilities that have been essential in enabling NATO to execute its mission of collective defense.<sup>33</sup>

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(announcing the approval of common funding for SHAPE); NATO, *Summary Record of a Meeting of the Council with the Military Committee Held at the Palais de Chaillot, Paris, on 20th April, 1953, at 3.15 p.m.*, at 4–5, NATO Doc. C-R(53)19 (Apr. 21, 1953), available at [http://archives.nato.int/uploads/r/null/2/22676/C-R\\_53\\_19\\_ENG.pdf](http://archives.nato.int/uploads/r/null/2/22676/C-R_53_19_ENG.pdf) (announcing the approval of common funding for NATO’s infrastructure program).

<sup>26</sup> RONALD S. RITCHIE, *NATO: THE ECONOMICS OF AN ALLIANCE* 2 (1956).

<sup>27</sup> See *infra* Part III.

<sup>28</sup> See *infra* Part III.

<sup>29</sup> See *infra* Part III.A.

<sup>30</sup> See *infra* Part III.B.

<sup>31</sup> VANDEVANTER, JR., *supra* note 14, at 6.

<sup>32</sup> NATO, *Funding NATO*, [http://www.nato.int/cps/en/natohq/topics\\_67655.htm?selectedLocale=en](http://www.nato.int/cps/en/natohq/topics_67655.htm?selectedLocale=en) (last visited Nov. 12, 2015).

<sup>33</sup> NATO INFRASTRUCTURE COMM., *50 YEARS OF INFRASTRUCTURE: NATO SECURITY INVESTMENT PROGRAM IS THE SHARING OF ROLES, RISKS, RESPONSIBILITIES, COSTS, AND BENEFITS* 19 (2001), available at [available at http://www.nato.int/structur/intrastruc/50-years.pdf](http://www.nato.int/structur/intrastruc/50-years.pdf).

NATO common funding has thus “provided many needed items that would otherwise not have become available,” such as NATO-wide air-defense facilities, command and control systems, and communication equipment.<sup>34</sup> But common funding buys more than just goods and services. By giving the NATO allies the opportunity to share the “roles, risks, responsibilities, costs and benefits” of enhancing their collective peace, security, and stability,<sup>35</sup> it also enhances their solidarity.<sup>36</sup> It is for that reason that commentators have referred to common funding as “the central glue that binds 28 separate nations into a common military fighting machine.”<sup>37</sup>

## B. Limitations Placed Upon Common Funding

Given the benefits common funding provides, one might think that the NATO allies would be eager to extend its reach as far as it can go. However, this is not the case. The NATO allies have generally disfavored the use of common funding to provide NATO with what it needs, principally because every dollar the NATO allies agree to contribute to NATO through the common funding process is one dollar that is no longer subject to their sovereign use or control.<sup>38</sup> They may neither re-allocate that dollar to some other purpose in their national budgets, nor may they control how NATO uses that dollar without the agreement of the other NATO allies.<sup>39</sup>

Thus, for the sake of retaining greater control over their national resources, the NATO allies have chosen to limit the role of common funding in favor of using national defense spending as the primary means of providing resources to NATO.<sup>40</sup> The disparity between national defense spending and the value of NATO’s common-funded budgets is striking. Presently, the value of all NATO’s common-funded budgets combined totals less than one half of one percent of the NATO allies’ combined annual defense budgets.<sup>41</sup> The NATO allies have been able to keep NATO operating with this low-level of common funding primarily by limiting the scope of NATO’s common-funded budgets and limiting the individual cost-shares of those budgets.<sup>42</sup>

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<sup>34</sup> VANDEVANTER, JR., *supra* note 14, at 6; NATO, *Funding NATO*, *supra* note 32.

<sup>35</sup> NATO INFRASTRUCTURE COMMITTEE, *supra* note 33, at 5.

<sup>36</sup> NATO INFRASTRUCTURE COMMITTEE, *supra* note 33, at 5.

<sup>37</sup> Ivo H. Daalder, Op-Ed., *NATO’s Economy of Scale*, N.Y. TIMES, July 22, 2010, [http://www.nytimes.com/2010/07/23/opinion/23iht-eddaalder.html?\\_r=0](http://www.nytimes.com/2010/07/23/opinion/23iht-eddaalder.html?_r=0).

<sup>38</sup> See PATRICK WOUTERS, EGDMONT ROYAL INST. FOR INT’L RELATIONS, *BALANCING DEFENCE AND SECURITY EFFORTS WITH A PERMANENTLY STRUCTURED SCORECARD* 17–18 (2008).

<sup>39</sup> NATO, NATO HANDBOOK 58 (2006) (hereinafter NATO HANDBOOK), available at <http://www.nato.int/docu/handbook/2006/hb-en-2006.html>.

<sup>40</sup> *Id.* at 57.

<sup>41</sup> CARL EK, CONG. RESEARCH SERV., RL30150, NATO COMMON FUNDS BURDENSARING: BACKGROUND AND CURRENT ISSUES 1 n.2 (2012).

<sup>42</sup> *Id.*

## 1. Limitations on the Scope of Common Funding

The principal mechanism by which the NATO allies have limited common funding is by promulgating regulations that have shrunk the types of resources *eligible* for common funding, thus restricting the overall size of NATO's common funded budgets.<sup>43</sup>

### (a) *The “Over and Above” Principle*

One such regulatory limitation is the so-called “over and above” principle. The “over and above” principle was promulgated in 1993 specifically to shrink NATO's “footprint” in the optimism-filled days following the fall of the Soviet Union.<sup>44</sup> This principle mandates that NATO may not use common funds to acquire resources unless those resources are “over the existing available assets and also above reasonable expectations of provision from nations' resources.”<sup>45</sup> NATO has interpreted this principle as making ineligible for common funding anything that the NATO allies consider to be a “national responsibility,”<sup>46</sup> like “physical military assets such as ships, submarines, aircraft, tanks, artillery or weapon systems.”<sup>47</sup>

While the “over and above” principle in isolation would not have posed a real threat to NATO, the NATO allies also took the opportunity presented by the fall of the Soviet Union to significantly cut their defense budgets.<sup>48</sup> Subsequently, as these defense spending cuts reduced the quantum of resources the NATO allies made available to NATO from their individual national resources, the “over and above” principle precluded NATO from acquiring those resources through common funding. The operation of these two forces created deficiencies in defense resourcing within NATO that only grew with time as the NATO allies continued to cut their defense budgets into the twenty-first century.<sup>49</sup> Now, as fiscal austerity measures brought on by the 2008 global financial crisis have led the European NATO allies to make even deeper cuts to their defense spending, the level of resources that they individually

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<sup>43</sup> See generally NATO HANDBOOK, *supra* note 39, at 58–64 (describing the process of common funding in NATO).

<sup>44</sup> See NATO, *Renewal of the Infrastructure Programme, Note by the Secretary General*, at 6, NATO Doc. C-M(93)38 (May 6, 1993) (stating that the “over and above” principle was designed to facilitate a “more selective approach” to NATO common funding).

<sup>45</sup> NATO, *Bi-SC Capability Package Directive 85-1*, at 9, NATO Doc. Bi-SC 85-1 (Jan. 2013).

<sup>46</sup> U.S. GEN. ACCOUNTING OFFICE, GAO/NSIAD-98-113, NATO ENLARGEMENT: REQUIREMENTS AND COSTS FOR COMMONLY FUNDED PROJECTS 4 n.9 (1998).

<sup>47</sup> NATO HANDBOOK, *supra* note 38, at 57.

<sup>48</sup> Charles Berry & Hans Binnendijk, *Widening Gaps in U.S. and European Defense Capabilities and Cooperation*, TRANSATLANTIC CURRENT, July 2012, at 3, available at <http://www.isn.ethz.ch/Digital-Library/Publications/Detail/?lang=en&id=151677>.

<sup>49</sup> Quint Hoekstra, *Implications of Broken Promises on NATO's 2% Rule*, ATLANTIC VOICES, Feb. 2013, at 2-3.

provide to their common defense sits at an all-time low.<sup>50</sup> Strikingly, aside from the United States, only two of the twenty-eight NATO allies have levels of defense spending at or above two percent of Gross Domestic Product, a benchmark set by the NATO allies decades ago to indicate an adequate level of defense spending.<sup>51</sup> This is despite the ongoing crisis in Ukraine and recent promises by NATO members to raise their spending levels, and is in stark contrast to Russia's defense spending, which sits at 4.2% of its GDP.<sup>52</sup>

The resource deficiencies brought on by low levels of European defense spending has had a clearly detrimental effect on NATO's ability to execute operations abroad.<sup>53</sup> For example, during NATO's 2011 intervention in Libya,<sup>54</sup> the European NATO allies quickly found themselves insufficient to the task, particularly in the areas of "precision-guided munitions, aerial refueling capacity, and intelligence, surveillance, and reconnaissance assets."<sup>55</sup> This invariably led them to ask for assistance from the United States, despite the fact that the United States had signaled a desire to play merely a supporting role in the operation.<sup>56</sup> By the end of the conflict, the United States was providing the majority of air-to-air refueling assets, over half of the electronic warfare airframes, and "100 percent of operational level combat-ISR UAVs."<sup>57</sup> The United States even had to utilize its own stockpiles of precision-guided munitions when European stockpiles ran dangerously low.<sup>58</sup>

Should current trends continue, resource shortfalls from the European NATO allies will certainly widen, making it even more difficult for NATO to project a credible deterrent to nascent threats like recent Russian aggressiveness, or to participate in operations overseas.<sup>59</sup> What is more, they risk losing entirely "key

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

<sup>51</sup> ANDERS F. RASMUSSEN, THE SECRETARY GENERAL'S ANNUAL REPORT 2013, at 20 (2014), available at [http://www.nato.int/cps/en/natolive/opinions\\_106247.htm](http://www.nato.int/cps/en/natolive/opinions_106247.htm); see Sam Jones, *NATO Spending Promises Largely Ignored*, FT.COM, Feb. 26, 2015.

<sup>52</sup> Jonathan Beale, *NATO Defence Spending Falls Despite Promises to Reverse Cuts*, BBC NEWS, Feb. 26, 2015, <http://www.bbc.com/news/world-31619553>.

<sup>53</sup> Berry & Binnendijk, *supra* note 48, at 3.

<sup>54</sup> Pierre A. Leroux, *Improving NATO's Capabilities: A Roadmap to 2020*, at 31 (Feb 2012) (unpublished M.M.A.S. thesis, U.S. Army Command and General Staff College), available at <http://cgsc.contentdm.oclc.org/cdm/ref/collection/p4013coll2/id/2948>.

<sup>55</sup> LAWRENCE KORB & MAX HOFFMAN, WHAT'S NEXT FOR NATO? DEFINING A NEW ROLE FOR THE ALLIANCE IN A POST-COLD WAR WORLD 4 (2012).

<sup>56</sup> Leroux, *supra* note 54, at 75–76.

<sup>57</sup> Leroux, *supra* note 54, at 75–76.

<sup>58</sup> John A. Tirpak, *Lessons from Libya*, AIR FORCE MAG. (Dec. 2011), <http://www.airforcemag.com/MagazineArchive/Pages/2011/December%202011/1211libya.aspx>.

<sup>59</sup> See ANDREW DORMAN ET AL., THE IMPLICATIONS OF MILITARY SPENDING CUTS FOR NATO'S LARGEST MEMBERS 3 (Clara Marina O'Donnell ed., 2012), available at <http://www.brookings.edu/~media/research/files/papers/2012/7/military%20spending%20nato%20odonnell/military%20spending%20nato%20odonnell%20pdf>.

capabilities, skills, and expertise, which could then take many years and enormous financial investments to regenerate.”<sup>60</sup>

(b) *The “Costs Lie Where They Fall” Principle*

The other major constraint that the NATO allies have used to limit the resources eligible for common funding is the so-called “costs lie where they fall” principle, which requires the NATO allies to “absorb any and all costs associated with their participation in [NATO-led] operations.”<sup>61</sup> Only “those costs not attributable to a specific nation” may be eligible for common funding, and only once the member nations have agreed to the eligibility.<sup>62</sup>

Although the “costs lie where they fall” principle theoretically allows the NATO allies to contribute funds to a military campaign directly, rather than to a central middleman that reimburses the NATO allies for their participation,<sup>63</sup> it has in reality had the unintended consequence of actually discouraging the NATO allies from participating in NATO operations.<sup>64</sup> This is because the principle creates a classic “free-rider” problem, effectively rewarding those who do not participate by allowing them to share in an operation’s benefits while excusing them from having to pay its costs, either to support their own deployment or the deployment of their fellows.<sup>65</sup> At the same time, the principle punishes those who do wish to participate by making them bear the entire cost of their deployment in terms of casualties and money, an arrangement that has made even large, wealthy countries hesitant about dedicating their forces.<sup>66</sup>

Because of these perverse incentives, the “costs lie where they fall” principle has compromised NATO’s ability to execute and sustain its operations.<sup>67</sup> For example, much of NATO’s difficulty in securing the desired number of forces for ISAF in Afghanistan can be traced back to the “costs lie where they fall” principle and its tendency to discourage participation by countries willing to contribute forces because of the cost of deploying and sustaining those forces in theater. For example,

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<sup>60</sup> JAMIE SHEA, KEEPING NATO RELEVANT 8 (2012).

<sup>61</sup> NATO, *Revised Funding Policy for Non-Article 5 NATO-Led Operations*, at 1-2, NATO Doc. PO(2005)0098 (Oct. 18, 2005).

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

<sup>63</sup> See WOUTERS, *supra* note 38, at 17–18.

<sup>64</sup> KEES HOMAN, *NATO, Common Funding and Peace Support Operations: A Comparative Perspective*, FIRST ANNUAL BALTIC CONFERENCE ON DEFENCE (ABC/D): ROAD TO TRANSFORMATION SUMMIT, at 20, 30, available at [http://www.clingendael.nl/sites/default/files/20061000\\_cscsp\\_art\\_homan.pdf](http://www.clingendael.nl/sites/default/files/20061000_cscsp_art_homan.pdf).

<sup>65</sup> KLAUS NAUMANN ET AL., TOWARDS A GRAND STRATEGY FOR AN UNCERTAIN WORLD: RENEWING TRANSATLANTIC PARTNERSHIP 128 (2007).

<sup>66</sup> HOMAN, *supra* note 64, at 30.

<sup>67</sup> NAUMANN ET AL., *supra* note 65, at 128.

in 2006, Poland “put conditions on the deployment of its forces not because of a lack of political will, but because of concerns about infrastructure, military capability and, above all, finance.”<sup>68</sup> Further, there is reasonable suspicion that the actions of other countries in providing only token forces to that effort (despite possessing large military forces at home or in other European countries) is at least in part due to NATO’s restrictive fiscal rules.<sup>69</sup>

Should the “costs lie where they fall” principle remain in effect, NATO risks further disruption to its ability to conduct operations in the future.<sup>70</sup> At best, countries will continue to limit their contributions, further raising tensions between those who see themselves as security “producers” and those whom they see as security “consumers” in NATO.<sup>71</sup> At worst, more and more of the NATO allies will choose the “zero participation” option,<sup>72</sup> which would mean nothing less than the end of NATO as an alliance of like-minded states unified in common cause.

## 2. Limitations on Common Funding Cost-Shares

In addition to imposing regulatory limitations upon common-funded expenditures, the NATO allies have also limited common funding in NATO by seeking to place limits on their own contributions to NATO’s common-funded budgets.<sup>73</sup>

History shows that attempts by the NATO allies to renegotiate their respective cost-shares began in 1952, less than a year after they had reached agreement on NATO’s first cost-sharing arrangement.<sup>74</sup> Since then, efforts by the NATO allies to renegotiate their cost-shares have proceeded almost continuously.<sup>75</sup> For example, France demanded a renegotiation of its cost-share in 1966, and Canada demanded a renegotiation of its cost-share in 1994.<sup>76</sup> The United States has also sought to reduce its own cost-share on multiple occasions.<sup>77</sup> In 2005, the United States secured a permanent cap on its cost-share for all of NATO’s common-funded budgets.<sup>78</sup>

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<sup>68</sup> JENNIFER MEDCALF, *GOING GLOBAL OR GOING NOWHERE? NATO’S ROLE IN CONTEMPORARY INTERNATIONAL SECURITY* 199 (2008).

<sup>69</sup> VINCENT MORELLI & PAUL BELKIN, *CONG. RESEARCH SERV.*, RL33627, *NATO IN AFGHANISTAN: A TEST OF THE TRANSATLANTIC ALLIANCE* 20 (2009), available at <https://www.fas.org/sgp/crs/row/RL33627.pdf>.

<sup>70</sup> HOMAN, *supra* note 64, at 30.

<sup>71</sup> See JOEL R. HILLISON, *NEW NATO MEMBERS: SECURITY CONSUMERS OR PRODUCERS?* 26–28 (2009).

<sup>72</sup> See SHEA, note 61, at 4.

<sup>73</sup> See GEN. ACCOUNTING OFFICE., *GAO/NSIAD-98-172, NATO: HISTORY OF COMMON BUDGET COST SHARES* 4 (1998), available at <http://gao.gov/assets/230/225915.pdf>.

<sup>74</sup> *Id.* at 2.

<sup>75</sup> *Id.* at 1–4.

<sup>76</sup> *Id.* at 4.

<sup>77</sup> THIES, *supra* note 15, at 184–88.

<sup>78</sup> EK, *supra* note 41, at 7.

While these activities may have put some money back into the pockets of individual NATO allies, they have proven detrimental to the alliance as a whole. Any reduction in one ally's cost-share has to be borne by one or more of the others. Thus, efforts by some NATO allies to reduce their cost-shares have often resulted in stiff opposition from the rest.<sup>79</sup> Negotiations over cost-shares have turned acrimonious and have even led some nations to partially withdraw from the common-funding system in protest.<sup>80</sup> While the NATO allies have never left any portion of their approved common-funded budgets unfunded, the damage to alliance solidarity caused by these efforts has been grave.<sup>81</sup>

Ultimately, as can be seen through NATO's experiences operating in Afghanistan and in Libya, the NATO allies have done much harm to the alliance by compromising common funding for the sake of retaining national control over more of their scarce resources. It is clear that the NATO allies can no longer rely on themselves to independently "fund" NATO, because they will always be faced with tough choices in the allocation of their scarce national resources, and there will always be the desire to free-ride in order to spend money on priorities other than defense.<sup>82</sup> Thus, if NATO is to survive as a viable military alliance on both sides of the Atlantic, its members must adopt a new approach to providing NATO with the resources it needs to accomplish its mission.

#### IV. A NEW ROLE FOR COMMON FUNDING

In order for any new approach to NATO financing to work, it must include a greater role for common funding.<sup>83</sup> This is the best way for the NATO allies to start the process of restoring their solidarity and resolving issues of inequitable burden-sharing among them.<sup>84</sup> While this will require all the NATO allies to make additional financial commitments to NATO's common-funded budgets, ultimately this is in their best interests, as well as in the best interests of the alliance as a whole.<sup>85</sup>

##### A. Avenues for Improvement

In working to undo the damage that their current approach to NATO financing has wrought, the NATO allies should start by abandoning the "over and above"

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<sup>79</sup> THIES, *supra* note 15, at 184–88.

<sup>80</sup> THIES, *supra* note 15, at 184–88.

<sup>81</sup> STANLEY R. SLOAN, *PERMANENT ALLIANCE? NATO AND THE TRANSATLANTIC BARGAIN FROM TRUMAN TO OBAMA* 84-85 (2010).

<sup>82</sup> THIES, *supra* note 15, at 5–8.

<sup>83</sup> NATO, *NATO 2020: ASSURED SECURITY; DYNAMIC ENGAGEMENT* 41 (2010), available at [http://www.nato.int/cps/en/natohq/topics\\_85961.htm](http://www.nato.int/cps/en/natohq/topics_85961.htm) (last updated June 27, 2012).

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

<sup>85</sup> *See infra* Part IV.A.–B.

and “costs lie where they fall” principles, simultaneously committing themselves politically to the expanded use of common funding within the alliance.<sup>86</sup>

### 1. Abandon the “Over and Above” Principle

As stated previously, the “over and above” principle, when combined with declining national defense spending, has resulted in clear capability gaps within the alliance. Given that most of the allies have chosen not to increase their national defense spending, even in the face of new threats to European peace and security,<sup>87</sup> the best way forward is to abandon the “over and above” principle. This will make it easier for the NATO allies to use common funding to provide the alliance with the resources it needs. Such additional funding could be put to use right away in remedying recognized deficiencies in European defense capabilities,<sup>88</sup> such as in smart munitions, air-to-air refueling, and surveillance, intelligence, and reconnaissance aircraft.<sup>89</sup> The implementation of this expanded use of common funding could and should be managed by extending the application of existing policies and procedures for the acquisition of common-funded items set forth in the NATO Support and Procurement Agency’s Procurement Regulations.<sup>90</sup>

The benefits of expanding the range of goods and services procurable with common funds are readily apparent. Like individuals who pool their money to purchase a car, NATO allies that pool their money to purchase planes, missiles, and other equipment are able to take advantage of productivity gains through these assets that they would not otherwise have had.<sup>91</sup> While they will be required to essentially “share” ownership of that equipment, this can actually encourage further integration and interdependency among them in matters of research, development, production, and maintenance standards—goals that the alliance has long publicly supported.<sup>92</sup> Furthermore, as such “collective purchasing” would require far less individual expenditure than would otherwise be required, it allows NATO allied governments a more politically palatable alternative to the substantial increases in national defense spending necessary to reach NATO’s two percent of GDP target.<sup>93</sup> Common acquisition of common assets has the potential to actually reduce costs

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<sup>86</sup> See *infra* Part IV.A.1–3.

<sup>87</sup> SLOAN, *supra* note 81, at 84–85.

<sup>88</sup> SHEA, *supra* note 60, at 8; DORMAN ET AL., *supra* note 59, at 9.

<sup>89</sup> NATO, *NATO-EU: Working to Fill Gaps in Defence Capabilities* (Aug. 13, 2012), [http://www.nato.int/cps/en/natolive/news\\_89487.htm](http://www.nato.int/cps/en/natolive/news_89487.htm).

<sup>90</sup> See NATO Support and Procurement Agency [NSPA], *Procurement* <http://www.nspa.nato.int/en/organization/procurement/procurement.htm> (last visited Nov. 13, 2015).

<sup>91</sup> Lucie Stephens, *Buying Things Together Works Better*, THE BROKER (June 26, 2013), <http://www.thebrokeronline.eu/Blogs/Spurring-economic-transition/Buying-things-together-works-better>.

<sup>92</sup> NATO, *Summit Declaration on Defence Capabilities: Toward NATO Forces 2020* (May 20, 2012), [http://www.nato.int/cps/en/natohq/official\\_texts\\_87594.htm](http://www.nato.int/cps/en/natohq/official_texts_87594.htm).

<sup>93</sup> Leroux, *supra* note 54, at 84.

vis-à-vis national procurement when expenditures are concentrated on a single source of supply, as economies of scale will naturally bring down the price of the item acquired as the allies purchase more of that item.<sup>94</sup>

While there are those who are skeptical that the NATO allies are capable of coming together to make such acquisitions happen, the NATO Airborne Warning and Control System (AWACS) program provides clear evidence that they can.<sup>95</sup> In 1978, before the “over and above” principle came into being, twelve of NATO’s member nations agreed to pool their resources to acquire 18 E-3A aircraft.<sup>96</sup> These aircraft have been in constant operation ever since, sustained by common funds and operated by a staff of civilian and military personnel from seventeen of the NATO allies.<sup>97</sup> Cited variously as “perhaps NATO’s best-integrated international unit”<sup>98</sup> and “one of the most successful collaborative ventures ever undertaken by the Alliance,”<sup>99</sup> the AWACS program is “a tangible example of what NATO nations can achieve by pooling resources and working together in a truly multi-national environment to provide the Alliance with a readily available capability.”<sup>100</sup> Once the “over and above” principle is abandoned, the NATO allies could readily adopt the NATO AWACS model of operations to other areas where capability gaps could be efficiently filled with common assets.

## 2. Abandon the “Costs Lie Where They Fall” Principle

Just as abandoning the regulatory “over and above” principle will provide the NATO allies with more avenues for acquiring critical military equipment and related capabilities, so will abandoning the policy containing the “costs lie where they fall” principle enhance NATO’s effectiveness in conducting “out-of-area” military operations. In this way, NATO will no longer effectively penalize those who contribute the most to a military deployment while rewarding those who

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<sup>94</sup> HUGH BAYLEY, TRENDS IN DEFENSE RESOURCE MANAGEMENT IN EUROPE AND NORTH AMERICA AND THE NEW BURDENSARING DEBATE: A SURVEY 6 (2007), available at <http://www.nato-pa.int/default.asp?SHORTCUT=1169>; Hoag, *supra* note 22, at 477.

<sup>95</sup> F. STEPHEN LARRABEE ET AL., RAND CORPORATION, NATO AND THE CHALLENGES OF AUSTERITY 94 (2012), available at [http://www.rand.org/content/dam/rand/pubs/monographs/2012/RAND\\_MG1196.pdf](http://www.rand.org/content/dam/rand/pubs/monographs/2012/RAND_MG1196.pdf).

<sup>96</sup> ALEXANDER H. CORNELL, INTERNATIONAL COLLABORATION IN WEAPONS AND EQUIPMENT DEVELOPMENT AND PRODUCTION BY THE NATO ALLIES: TEN YEARS LATER—AND BEYOND 17–18 (1981). *See also* ARNOLD L. TESSMER, POLITICS OF COMPROMISE: NATO AND AWACS (1988) (providing a detailed look at the NATO AWACS acquisition process).

<sup>97</sup> *The Mission and Crew*, NATO AIRBORNE EARLY WARNING & CONTROL FORCE E-3A COMPONENT, <http://www.e3a.nato.int/eng/html/organizations/mission.htm> (last visited Nov. 13, 2015).

<sup>98</sup> CONG. BUDGET OFFICE, NATO BURDENSARING AFTER ENLARGEMENT 27 (2001), available at <http://www.dtic.mil/dtic/tr/fulltext/u2/a452609.pdf>.

<sup>99</sup> NATO AEW&C PROGRAMME MANAGEMENT AGENCY, NATO’S EYE IN THE SKY, <http://www.napma.nato.int/awacs/0.html> (last visited Nov. 13, 2015).

<sup>100</sup> *Id.*

contribute the least. While it may be difficult for many of the NATO allies to accept the possibility of sharing the deployment costs of all NATO allies participating in NATO-led operations, the example of the United Nations (UN) peacekeeping fund can serve as a model for how the common funding of “out-of-area” NATO operations can work.<sup>101</sup>

The UN has used a separate fund for peacekeeping operations since 1963.<sup>102</sup> Since then, the UN has used this fund to pay for over sixty different peacekeeping missions all around the globe.<sup>103</sup> The UN General Assembly is responsible for generating revenue for this fund, and does so by assessing contributions against its members based upon the size of a member’s per capita gross national income as compared with the average per capita gross national income of all member nations. There are only three variances from this general approach. First, the permanent members of the UN Security Council pay a premium consistent with their special responsibilities in maintaining international peace and security. Second, the least developed members of the UN receive an extra discount due to their place at the bottom of the economic ladder. Third, extra discounts are provided on a case-by-case basis to those nations that are “victims of, and those that are otherwise involved in, the events or actions leading to a peacekeeping operation.”<sup>104</sup>

Funds are disbursed according to the terms of a contract between the UN and each member contributing to a peacekeeping operation that specifies the personnel and/or material to be provided by the member as well as the rates at which the UN will reimburse the member for its contribution. The UN starts the reimbursement process once a member has deployed its contingent and UN staff has verified that the member is in compliance with the contract. From that point, the UN reimburses the member incrementally until it redeploys its contingent.<sup>105</sup>

What truly makes the UN peacekeeping fund a model to be emulated is its success in encouraging UN member participation in peacekeeping operations. In February of 2014 alone, 122 countries were actively participating in UN peacekeeping operations.<sup>106</sup> Even more interesting is the fact that the top ten contributors in terms of personnel that month were developing countries.<sup>107</sup> This is representative

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<sup>101</sup> HOMAN, *supra* note 64, at 30–31.

<sup>102</sup> JEFFREY LAURENTI, FINANCING THE UNITED NATIONS 31 (2001).

<sup>103</sup> United Nations, List of Peacekeeping Operations 1948–2013, *available at* <http://www.un.org/en/peacekeeping/documents/operationslist.pdf> (last visited Nov. 13, 2015).

<sup>104</sup> G.A. Res. 67/239, U.N. Doc. A/RES/67/239 (Feb. 11, 2013).

<sup>105</sup> United Nations, Contingent Owned Equipment, <http://www.un.org/en/peacekeeping/sites/coe/about.shtml> (last visited Nov. 13, 2015).

<sup>106</sup> United Nations, Contributors to United Nations Peacekeeping Operations, [http://www.un.org/en/peacekeeping/contributors/2014/feb14\\_1.pdf](http://www.un.org/en/peacekeeping/contributors/2014/feb14_1.pdf) (last visited Nov. 13, 2015).

<sup>107</sup> United Nations, Ranking of Military and Police Contributions to UN Operations, [http://www.un.org/en/peacekeeping/contributors/2014/feb14\\_2.pdf](http://www.un.org/en/peacekeeping/contributors/2014/feb14_2.pdf) (last visited Nov. 13, 2015).

of the general trend and shows that common funding has been especially good at encouraging smaller, less wealthy nations to participate in peacekeeping operations, not least because for many of these countries, reimbursement rates tend to provide “a very high income...in relation to their standard of living.”<sup>108</sup>

Given that it is typically the smaller members of NATO that have had trouble contributing to NATO operations, either out of incapacity or a desire to “free-ride,”<sup>109</sup> the experience of the UN provides hope that a similar mechanism in NATO will provide the impetus for wider sharing of operational roles, risks, and responsibilities among the NATO allies. At least with the abandonment of the “costs lie where they fall” principle, those nations who want to contribute to a NATO operation but lack the funds to get their forces or equipment in theater could use common funds to get them there.<sup>110</sup> Even those who do not want to contribute forces but want to exhibit solidarity with their fellows could use common funding to contribute financially.<sup>111</sup> While ultimately it will require the exercise of much political will on the part of all NATO allies to bring about the level of participation in NATO operations that is needed, “common funding and collective solutions is the way forward if [NATO wants] to get the right capabilities, to conduct military operations in a cost effective manner, and to strengthen [its] cohesion and solidarity as Allies.”<sup>112</sup>

### 3. Stop Efforts to Minimize Common Funding Cost-Shares

There should be no mistake that the expansion of NATO’s common-funded budgets will inevitably require each NATO ally to pay more than it does now to cover additional common-funded expenditures. Even though this increased amount would still be far less than each nation would have to pay if it were to shoulder the entire burden alone, and even though the benefits of common funding are clear, the NATO allies will likely be tempted to avoid shouldering any additional burden by negotiating smaller cost-shares of those budgets for themselves.<sup>113</sup> In a way, this behavior is understandable. The “tragedy of the commons” would hold that as independent, rational actors, nations are inclined to act in furtherance of their own self-interest, even when doing so is contrary to the interests of the larger international community.<sup>114</sup> However, it would behoove the NATO allies to resist this temptation.

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<sup>108</sup> Homan, *supra* note 64, at 23.

<sup>109</sup> See Bayley, *supra* note 94, at 2–3.

<sup>110</sup> Anders F. Rasmussen, Sec’y-Gen., NATO, Speech at Tallinn, Estonia: On Alliance Solidarity in the 21st Century (Apr. 22, 2010), available at [http://www.nato.int/cps/en/natohq/opinions\\_62699.htm](http://www.nato.int/cps/en/natohq/opinions_62699.htm) (last updated Sep. 13, 2010).

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

<sup>112</sup> *Id.*

<sup>113</sup> See Thies, *supra* note 15, at 277.

<sup>114</sup> Garrett Hardin, *Tragedy of the Commons*, in *Concise Encyclopedia of Economics*, available at <http://www.econlib.org/library/Enc/TragedyoftheCommons.html> (last visited Nov. 13, 2015).

The primary reason for this is because willingly participating in NATO's common-funded budgets is in fact in their individual best interests. First, participation will allow the NATO allies to expand the favorable terms under which they are currently able to access NATO common funds. Under currently applicable cost-shares, most European NATO allies are able to purchase a dollar's worth of defense for less than ten cents.<sup>115</sup> Even the United States, NATO's largest contributor, pays only around twenty-two cents for every dollar spent.<sup>116</sup> Second, participation will enhance NATO's intrinsic military capabilities, making it a more credible deterrent against aggressive tendencies such as those recently exhibited by Russia in places like Georgia and Ukraine.<sup>117</sup> Third, it will improve NATO's ability to deploy forces to areas outside of Europe, making it a more effective instrument for the maintenance of international peace and security. Fourth, it will help reverse the harm to alliance solidarity that previous rounds of bickering have caused. Further attempts by NATO allies to reduce their cost-shares will only result in more tedious negotiations with the potential to further raise tensions among the allies.<sup>118</sup> And while a NATO ally may reap some financial savings by successfully lowering its cost-share, those cost-savings are not worth the loss of solidarity that would result.

It is truly in the best interests of all NATO allies for them to eliminate burden-shifting gamesmanship in setting their common funding cost-shares, just as it is in their best interests to remove the various limitations that they have placed on common funding over the years. In doing so, the NATO allies will go a long way toward dissolving the tensions that have accumulated over the past sixty years, while simultaneously reaping substantial cost-savings in providing for their common defense.<sup>119</sup> In this way, common funding will once again be able to fulfill its purpose as the "glue" that keeps the alliance together.

## B. Why the United States Should Support More Common Funding

The United States in particular should push for a larger role for common funding in NATO. As NATO's largest contributor, the United States has long felt it bears a disproportionate share of the costs for defending the North Atlantic area.<sup>120</sup> For years, the United States has tried to convince its European allies to take on greater responsibility for their own defense.<sup>121</sup> In 2011, as the European NATO allies

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<sup>115</sup> Daalder, *supra* note 37.

<sup>116</sup> See NATO, *Funding NATO*, *supra* note 32 (specifying the cost-sharing formulas applicable starting January 1, 2016).

<sup>117</sup> Bernd Riegert, *Opinion: NATO Needs to Rethink its Strategy*, DW (June 5, 2014), <http://www.dw.de/opinion-nato-needs-to-rethink-its-strategy/a-17614273>.

<sup>118</sup> See THIES, *supra* note 15, at 277.

<sup>119</sup> See Jaap de Hoop Scheffer, *The Truth About NATO Burden-Sharing*, PROJECT SYNDICATE, June 18, 2008, <http://www.project-syndicate.org/commentary/the-truth-about-nato-burden-sharing>.

<sup>120</sup> SLOAN, *supra* note 81, at 84–88.

<sup>121</sup> Hoekstra, *supra* note 49, at 5.

continued their trend of cutting their defense budgets, former Secretary of Defense Robert Gates told fellow NATO defense ministers that

there will be dwindling appetite and patience in the U.S. Congress—and in the American body politic [at] large—to expend increasingly precious funds on behalf of nations that are apparently unwilling to devote the necessary resources or make the necessary changes to be serious and capable partners in their own defense.... Indeed, if current trends in the decline of European defense capabilities are not halted and reversed, future U.S. political leaders—those for whom the Cold War was *not* the formative experience that it was for me—may not consider the return on America’s investment in NATO worth the cost.<sup>122</sup>

Despite these words, the nations of Europe have continued to cut their defense spending.<sup>123</sup> This is indicative that the European NATO allies are not swayed by the arguments the United States has already put forward.<sup>124</sup> Thus, if the United States wishes to change the behavior of its European NATO allies, it must change its approach to the problem.<sup>125</sup>

One possibility would be to reduce U.S. funding for NATO as warned by former Secretary Gates in his speech, the theory being that the loss of the U.S. security blanket will jolt the Europeans into action to reinforce their own defense.<sup>126</sup> However, this approach is risky at best. There is no guarantee that this approach will spur the kind of change among the European allies that the United States is looking for. Europe may simply continue to let its defense budgets slide, relying as they do now in their belief that the United States will come to its aid if necessary.<sup>127</sup>

Even if Europe does respond by boosting its defense capabilities, it would still be anathema to our own national security interests to withdraw from NATO.<sup>128</sup> Participating in NATO affords the United States “a continuing front-line role in

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<sup>122</sup> Robert Gates, Sec’y of Def., U.S. Dep’t of Def., Remarks at the Security and Defense Agenda (June 10, 2011), *available at* <http://archive.defense.gov/Transcripts/Transcript.aspx?TranscriptID=4839>.

<sup>123</sup> Ted C. Fishman, *Why the U.S. Is Stuck With NATO’s Bill*, USA TODAY, June 22, 2011, [http://www.usatoday30.usatoday.com/news/opinion/forum/2011-06-21-US-stuck-with-NATO-bill\\_n.htm](http://www.usatoday30.usatoday.com/news/opinion/forum/2011-06-21-US-stuck-with-NATO-bill_n.htm).

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

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

<sup>126</sup> See Andrew J. Bacevich, *Let Europe be Europe: Why the United States Must Withdraw from NATO*, FOREIGN POL’Y, May/Apr 2010, at 1, *available at* <http://foreignpolicy.com/2010/02/11/let-europe-be-europe/>.

<sup>127</sup> Ted Galen Carpenter & Marian L. Tupy, *U.S. Defense Spending Subsidizes European Free-Riding Welfare States*, CATO INST., July 12, 2010, <http://www.cato.org/publications/commentary/us-defense-spending-subsidizes-european-freeriding-welfare-states>.

<sup>128</sup> See KORB & HOFFMAN, *supra* note 55, at 5–7.

shaping and influencing the collective defense posture of the alliance.”<sup>129</sup> Given the threats to United States national security that remain present in the Middle East, Africa, and Asia, it is important for the United States to have a seat at the table in Europe in order to ensure that we are able to leverage regional resources to help us protect our interests.<sup>130</sup> As NATO is “the only forum enabling the U.S. and its European Allies to consult and develop common views and solutions” to security threats in the Old World, the truth is that the United States needs NATO, perhaps just as much as NATO needs the United States.<sup>131</sup>

Increased common funding, on the other hand, would provide the United States with the opportunity to realize great gain without the corresponding costs that withdrawing from NATO would incur. The benefits to the United States from increased common funding would include less reliance by Europe on the United States as assets purchased through common funds are used to strengthen European defense capabilities, giving the United States room to scale back its resources in the region as those of Europe itself increase.<sup>132</sup> The same would apply to NATO-led operations, as more common funding leads to greater participation in those operations by other NATO allies.<sup>133</sup> And of course the United States could itself take advantage of expanded common funding to defray even more of the costs associated with its own activities in Europe and in support of NATO-led operations than it already does.<sup>134</sup>

## V. CONCLUSION

While an increased role for common funding in NATO is necessary, making it work will not be without its challenges. Some might be opposed on the basis that common funding infringes on every nation’s sovereign right to independently control its own defense resources.<sup>135</sup> Others might feel that common funding will compromise the health of their indigenous defense industries.<sup>136</sup> Yet others may feel

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<sup>129</sup> U.S. DEP’T OF DEF., MILITARY CONSTRUCTION PROGRAM FY 2014 BUDGET: NORTH ATLANTIC TREATY ORGANIZATION SECURITY INVESTMENT PROGRAM 4 (2013) [hereinafter MILITARY CONSTRUCTION PROGRAM].

<sup>130</sup> KORB & HOFFMAN, *supra* note 55, at 5–8.

<sup>131</sup> MILITARY CONSTRUCTION PROGRAM, *supra* note 129, at 3.

<sup>132</sup> MARKO SAVKOVIC, IS A MORE ASSERTIVE EUROPE POSSIBLE THROUGH POOLING AND SHARING INITIATIVES? 4 (2013).

<sup>133</sup> John Craddock, Supreme Allied Commander Eur., NATO, Remarks at the Reserve Officers Association in Washington, DC: NATO and Afghanistan: Equitable Burden Sharing (July 10, 2009).

<sup>134</sup> See MILITARY CONSTRUCTION PROGRAM, *supra* note 129, at 6.

<sup>135</sup> LARRABEE ET AL., *supra* note 95, at 94.

<sup>136</sup> KORB & HOFFMAN, *supra* note 55, at 5.

that the NATO decision-making process will prevent the common-funding process from being productive.<sup>137</sup>

While these are all valid concerns, at bottom they are driven more by politics than by financial or military concerns. Needless to say, the state of the world today makes it imperative that the NATO allies not fail in bringing to pass greater cooperation among them. With security threats growing in the Near East while fiscal constraints deepen, the NATO allies truly have no choice but to turn to “pooling scarcer resources at the alliance level and cooperating to realize common defense and security objectives”<sup>138</sup> if they want to preserve the military vitality of the alliance. And, while it cannot solve all of NATO’s problems, greater common funding provides the NATO allies with the best avenue to make those changes that will not only save NATO from irrelevancy, but also enhance NATO’s strength and viability in the years to come.

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<sup>137</sup> See Brian Collins, *Operation Enduring Freedom and the Future of NATO*, 3 GEO. J. INT’L AFF. 51, 53 (2002).

<sup>138</sup> PAUL BELKIN, CONG. RESEARCH SERV., RL42529, NATO’S CHICAGO SUMMIT 2 (2012).

HUNTING DOWN TERRORISTS “WHEREVER THEY EXIST”:  
ISIL IN SYRIA AND THE LEGAL ARGUMENT FOR  
UNITED STATES MILITARY OPERATIONS WITHIN THE  
TERRITORY OF A NON-CONSENTING NATION-STATE

MAJOR AARON L. JACKSON\*

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\* Maj Aaron L. Jackson, Judge Advocate, United States Air Force (LL.M. The George Washington University (2015); J.D., University of Oklahoma (2009); B.S. U.S. Air Force Academy (2003)) serves as an Assistant Professor of Law, United States Air Force Academy, Colorado Springs, Colorado.

## I. INTRODUCTION

The sky was blue and the air was still. James Foley's knees pressed into the hot Syrian sand, his arms bound behind him as he looked into the camera and read his final words.<sup>1</sup> Next to him stood a hooded man dressed in black, his hand tightly grasping the orange jumpsuit of the kneeling journalist. "You are no longer fighting an Islamic insurgency," declared the man in black, pointing a tactical knife toward the camera, "We are an Islamic Army."<sup>2</sup> Moments later, the man in black stepped behind the stone-faced American, wrapped his arm around the kneeling man's forehead, and commenced the beheading. Meet the new face of terror: the Islamic State in Iraq and the Levant (ISIL).<sup>3</sup>

Less than one month after the brutal execution of James Foley, President Obama stood before television cameras and delivered a prime time address to the nation that articulated the United States' plan to "degrade and ultimately destroy ISIL through a comprehensive and sustained counterterrorism strategy."<sup>4</sup> In addition to general statements of condemnation and retribution against the terrorist organization, President Obama made one thing particularly clear: "[W]e will hunt down terrorists who threaten our country, wherever they are."<sup>5</sup> United States engagement of ISIL in Syria continues to provide a large topic of debate, as does President Obama's declaration. Can the United States engage in unilateral operations against ISIL *wherever they exist*? More specifically, as applied to ISIL in Syria, does international law allow the United States to conduct military operations against a non-State actor within the territory of a non-consenting nation-State? Answering this difficult question requires an in-depth analysis of international law and *jus ad bellum* principles in the War on Terror, thus providing the centerpiece of this Article.

In February 2015, Joshua L. Dorosin, Assistant Legal Advisor in the State Department's Office of Political-Military Affairs, articulated the United States' legal position regarding current military operations against ISIL. First, Iraq's consent provides the requisite legal authority for United States operations conducted against ISIL in Iraq.<sup>6</sup> Second, Article 51 of the United Nations Charter authorizes military

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<sup>1</sup> The Islamic State, *Islamic State Says Beheads U.S. Journalist, Holds Another*, REUTERS.COM, <http://www.reuters.com/video/2014/08/20/islamic-state-says-beheads-us-journalist?videoId=340547198>.

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

<sup>3</sup> The terrorist organization referred to herein as "ISIL" has many names. Though the Islamic State in Syria is typically referred to as "ISIS," the author elected the broader title of "ISIL," as it reflects the larger scope of the terrorist organization. This becomes important as the article discusses the overall breadth of ISIL and the threat posed to the United States.

<sup>4</sup> *Transcript of Obama's Remarks on the Fight Against ISIS*, N.Y. TIMES, Sept. 10, 2014, <http://www.nytimes.com/2014/09/11/world/middleeast/obamas-remarks-on-the-fight-against-isis.html>.

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

<sup>6</sup> *U.S. State Department Briefing, 5th Annual "Live from L" on ISIL and the Use of Force*, Feb. 12, 2015 (downloaded with permission from the American Bar Association).

operations against ISIL in self-defense of the United States and Iraq.<sup>7</sup> Third, because Syria lacks the willingness or ability to deter the ISIL threat within its sovereign territory, unilateral operations within its borders become necessary for the defense of both nations, regardless of Syria's consent.<sup>8</sup>

The United States position, however, faces a significant amount of opposition. Some opponents to U.S. military operations in Syria focus on Syria's lack of consent to external breaches of their sovereign territory.<sup>9</sup> Others note an absence of any specific UN Security Council resolution.<sup>10</sup> Still others argue that ISIL does not present the level of threat necessary to justify extraterritorial engagement.<sup>11</sup> In light of the opposition, was President Obama correct? When it comes to ISIL in Syria, the answer is yes.

United States military operations conducted in Syria to deter and defeat ISIL are firmly rooted in international law, regardless of consent by the Assad regime. At the outset, it is important to emphasize that this position does not seek to provide the United States with a blank check to conduct unilateral military operations against any form of aggressive non-State actor, "wherever they exist." However, ISIL is not the typical non-State aggressor, and conditions on the ground in Syria are far from stable. The unique circumstances presented by ISIL in Syria provide the necessary conditions for extraterritorial engagement of a non-State actor regardless of the host-nation's consent. Moreover, it offers a template for assessing the legality of future military operations waged against this significant, and expanding, terrorist organization.

The first section of this Article provides a foundational understanding of the unique threat posed by ISIL. The second section discusses U.S. operations against ISIL in Iraq and Syria. The third section begins with a brief history of extraterritorial military operations waged against non-State actors then provides a legal argument in favor of current U.S. operations in Syria. The final section looks beyond Syria, providing several guideposts for waging military campaigns against ISIL in the future and discusses the need for enhanced international effort in two key areas.

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

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

<sup>9</sup> See John Bellinger, *The Administration Should Explain Its International Legal Basis to Attack ISIL in Syria*, LAWFARE (Sept. 13, 2014, 4:25 PM), <http://www.lawfareblog.com/2014/09/the-administration-should-explain-its-international-legal-basis-to-attack-isil-in-syria/>.

<sup>10</sup> See Ashley Deeks, *U.S. Airstrikes Against ISIS in Syria? Possible International Legal Theories*, LAWFARE (Aug. 23, 2014, 3:04 PM), <http://www.lawfareblog.com/2014/08/u-s-airstrikes-against-isis-in-syria-possible-international-legal-theories/>.

<sup>11</sup> See Doug Bandow, *Fighting ISIL is Not America's War: Other Countries Should Lead Coalition Against Islamic State*, FORBES.COM (Sept. 13, 2014), <http://www.forbes.com/sites/dougbandow/2014/09/13/fighting-isil-is-not-americas-war-other-countries-should-lead-coalition-against-islamic-state/> (Bandow suggests "the beheadings were the equivalent of waving a red cape at the American bull.").

This position is not taken lightly. Long-term implications may certainly arise from conducting military operations in the territory of a non-consenting nation-State. While international law supports President Obama's declaration as applied to ISIL in Syria, other scenarios may not necessitate or support such extraterritorial operations. Therefore, future application of this principle also requires a firm understanding of its limitations.

## II. UNDERSTANDING THE ISLAMIC STATE

Over 2,500 years ago, famous military strategist Sun Tzu stated that success on the battlefield demands one first understand the enemy.<sup>12</sup> This principle of war maintains equal importance when addressing the legal argument at hand. In this case, understanding the true nature of the threat posed by ISIL requires discussion of the past, present, and potential future of this unique terrorist organization.

### A. The Past: Abu Musab Al-Zarqawi and the Dream of an Islamic State

Although ISIL appeared to quickly emerge in the summer of 2014, the organization's origins actually date to the end of the last century with the rise of a man who would later become infamous during the War in Iraq: Abu Musab al-Zarqawi. The first step toward establishing an "Islamic State" took place in August of 1999 when Zarqawi departed from his homeland in Jordan to join the Al Qaeda jihadi<sup>13</sup> movement in Afghanistan.<sup>14</sup> Zarqawi did not enter Afghanistan an inexperienced soldier. His devotion to waging jihad began in 1988 when he first traveled to Afghanistan to battle Soviet forces in the Soviet-Afghan War.<sup>15</sup> After returning to Jordan, Zarqawi's militant activities increased, resulting in his arrest and imprisonment in 1994 for plotting a terrorist attack at home.<sup>16</sup> Though sentenced to 15 years imprisonment, Zarqawi was pardoned in May 1999 by King Abdullah.<sup>17</sup> After his release, Zarqawi again traveled to Afghanistan and joined Al Qaeda's terrorist training camp at Herat.<sup>18</sup> While in Herat, Zarqawi was ultimately

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<sup>12</sup> See Sun Tzu, *The Art of War* (Oxford University Press, 1963), available at <http://classics.mit.edu/Tzu/artwar.html>. Sun Tzu aptly stated, "If you know the enemy and know yourself, you need not fear the result of a hundred battles. If you know yourself but not the enemy, for every victory gained you will also suffer a defeat. If you know neither the enemy nor yourself, you will succumb in every battle." *Id.*

<sup>13</sup> "Jihad" is defined as "a holy war waged on behalf of Islam as a religious duty." MERRIAM-WEBSTER ONLINE, <http://www.merriam-webster.com/dictionary/jihad>.

<sup>14</sup> See CHARLES RIVER EDITORS, *THE ISLAMIC STATE OF IRAQ AND SYRIA: THE HISTORY OF ISIS/ISIL 10* (2014).

<sup>15</sup> See *id.*

<sup>16</sup> See *id.*

<sup>17</sup> See *id.*

<sup>18</sup> See *id.*

given responsibility for managing the training camp. His enthusiastic zeal and strong leadership skills soon gained the attention of Al Qaeda leader, Osama bin Laden.<sup>19</sup>

At some point in 2000, the intelligence community believes Zarqawi formed “Jam’at al Jihad” (JTJ), a “networking” operation within the Herat training camp “made up of local Islamist sympathizers and militants along with some foreign fighters.”<sup>20</sup> Success of the JTJ network resulted in increased followership and devotion to its leader. By 2001, Zarqawi emerged as a “full-fledged terrorist commander” of a training camp supporting 2,000 to 3,000 jihadists.<sup>21</sup>

As a result of rumors that the United States would soon extend its military efforts to Iraq, Zarqawi left the Herat training camp in 2003 to re-establish his JTJ network within the Kurdistan region of Iraq.<sup>22</sup> Throughout 2003 and 2004, Zarqawi devoted himself to expanding and consolidating the already-strong network while keeping close ties with bin Laden in Afghanistan. An untold number of Iraqis joined the cause, many of whom were former soldiers and leaders in Saddam Hussein’s disbanded Army.<sup>23</sup> Additionally, Zarqawi’s force increased in size by funneling hundreds of foreign fighters into Iraq through the porous Syrian border.<sup>24</sup>

Beginning in 2004, the JTJ network initiated its terror campaign in Iraq. Video of the beheading of American Nicholas Berg on May 7, 2004 received instant international attention.<sup>25</sup> Follow-on beheadings of Jack Armstrong and Jack Henley, both U.S. citizens, placed further emphasis on this new breed of terrorist.<sup>26</sup> Zarqawi’s attacks within the highly secured “Green Zone” in Baghdad resulted in additional “bolstering [of JTJ’s] reputation as a vicious and highly effective group.”<sup>27</sup> Through such atrocious actions, Zarqawi established himself and the JTJ as a preminent terror organization. On December 27, 2004, the JTJ organization publically declared its

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<sup>19</sup> See THE ISLAMIC STATE OF IRAQ AND SYRIA: THE HISTORY OF ISIS/ISIL, *supra* note 14, at 10.

<sup>20</sup> *Id.* at 14.

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

<sup>22</sup> *Id.* at 15.

<sup>23</sup> See generally Gregor Aisch, Joe Burgess, C.J. Chivers, Alicia Parlapiano, Sergio Pecanha, Archie Tse, Derek Watkins, & Karen Yourish, *How ISIS Works*, N.Y.TIMES.COM (Sept. 16, 2014), <http://www.nytimes.com/interactive/2014/09/16/world/middleeast/how-isis-works.html>.

<sup>24</sup> THE ISLAMIC STATE OF IRAQ AND SYRIA: THE HISTORY OF ISIS/ISIL, *supra* note 14, at 16.

<sup>25</sup> ‘Zarqawi’ Beheaded U.S. Man in Iraq, BBC NEWS, May 13, 2004, [http://news.bbc.co.uk/2/hi/middle\\_east/3712421.stm](http://news.bbc.co.uk/2/hi/middle_east/3712421.stm).

<sup>26</sup> See Caroline Faraj, Thaira al-Hilli, Bassem Muhy, Faris Qasira, & Mohammed Tawfeeq, *Body of Slain American Hostage Found*, CNN.COM (Sept. 22, 2004, 6:38 PM), <http://www.cnn.com/2004/WORLD/meast/09/22/iraq.beheading/>.

<sup>27</sup> THE ISLAMIC STATE OF IRAQ AND SYRIA: THE HISTORY OF ISIS/ISIL, *supra* note 14, at 17.

allegiance to Osama bin Laden and changed its name to Al Qaeda in Iraq (AQI).<sup>28</sup> Zarqawi was named head of this newly formed Al Qaeda faction.<sup>29</sup>

In addition to attacks against U.S. forces, Zarqawi focused significant effort toward destabilizing the region by engaging the Iraqi Shiite population with a combination of largely publicized assassinations, bombings, kidnappings, and suicide attacks.<sup>30</sup> Zarqawi's strategy was simple. In a letter written to bin Laden, he explained:

Targeting and striking their [the Shiite population's] religious, political, and military symbols will make them show their rage against the Sunnis and bear their inner vengeance. If we succeed in dragging them into a sectarian war, this will awaken the sleepy Sunnis who are fearful of destruction and death.<sup>31</sup>

Zarqawi conducted a string of mass bombings between March and August of 2004, resulting in the deaths of nearly 400 Shiite civilians.<sup>32</sup> With the dawn of a new year came a rise in high-profile attacks by AQI, and Iraqi civilians, government officials, and security forces served as the primary targets. Coordinated attacks at polling sites during the January 2005 election killed dozens.<sup>33</sup> AQI assassinations of Shia leaders and members of various Shia militia groups significantly added to the death toll.<sup>34</sup> By mid-2005, Zarqawi "had unleashed a new level of terror that was ferociously brutal, even by al-Qaeda's standards."<sup>35</sup>

The increasing brutality and manner of attack caused the Al Qaeda core to question AQI's leadership. "At issue was Zarqawi's penchant for bloody spectacle—and, as a matter of doctrine, his hatred of other Muslims, to the point of excommunicating and killing them."<sup>36</sup> While such brutal methods attracted fringe members of society, Zarqawi's strategy of targeting the innocent Shiite Muslims within Iraq proved unsuccessful. Rather than inciting division within the two religious sects, AQI's targeted efforts generated public outrage from both communities.<sup>37</sup> In May

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<sup>28</sup> *Id.* at 18.

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

<sup>30</sup> *Id.* at 19.

<sup>31</sup> *Id.* at 17.

<sup>32</sup> See THE ISLAMIC STATE OF IRAQ AND SYRIA: THE HISTORY OF ISIS/ISIL, *supra* note 14, at 17.

<sup>33</sup> U.S. STATE DEPARTMENT, OFFICE OF THE COORDINATOR FOR COUNTERTERRORISM, COUNTRY REPORTS ON TERRORISM (2008), available at <http://www.state.gov/j/ct/rls/crt/2007/103714.htm> [hereinafter COUNTRY REPORTS ON TERRORISM].

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

<sup>35</sup> THE ISLAMIC STATE OF IRAQ AND SYRIA: THE HISTORY OF ISIS/ISIL, *supra* note 14, at 19.

<sup>36</sup> Graeme Wood, *What ISIS Really Wants*, THE ATLANTIC (Mar. 2015), <http://www.theatlantic.com/magazine/archive/2015/03/what-isis-really-wants/384980/>.

<sup>37</sup> See THE ISLAMIC STATE OF IRAQ AND SYRIA: THE HISTORY OF ISIS/ISIL, *supra* note 14, at 19.

2005, Zarqawi released a statement justifying the “collateral killing” of Muslim civilians, adding to existing public outrage and further straining relations with Al Qaeda.<sup>38</sup> Al Qaeda implored Zarqawi to alter his strategy by seeking amends with other militant groups and emphasized the importance of “maintaining popular support.”<sup>39</sup> Such requests, however, fell on deaf ears. On October 24th, AQI conducted coordinated attacks on two hotels in Baghdad, killing dozens.<sup>40</sup> AQI also expanded its terror reach beyond the borders of Iraq. In August, AQI attempted a rocket attack on a U.S. Navy ship in the port of Acqaba, Jordan.<sup>41</sup> Finally, on November 9, 2005, AQI struck three hotels in Amman, Jordan.<sup>42</sup> The simultaneous attacks killed 67 civilians and injured more than 150.<sup>43</sup> In the wake of the bombing, “thousands of Jordanians took to the streets shouting for the downfall of al-Zarqawi.”<sup>44</sup>

This final attack marked the end of Al Qaeda’s support of Abu Musab al-Zarqawi. In January 2006, Al Qaeda stripped all authority from its rogue leader. Five months later, intelligence reports confirmed Zarqawi’s death by U.S. airstrike.<sup>45</sup> In the end, Zarqawi “proved so reckless, brutal, uncompromising, and ignorant of the importance of local support that plenty of al-Qaeda leaders were no doubt somewhat relieved that al-Zarqawi was killed.”<sup>46</sup>

Abu Musab al-Zarqawi’s death, however, did not mark the end but the beginning. Shortly thereafter, senior Al Qaeda leaders named Abu Ayyub al-Masri as AQI’s new leader.<sup>47</sup> Al-Masri presented the antithesis to Zarqawi’s relationship with the greater Al Qaeda network. Rather than a rogue militant on the fringes of the larger organization, al-Masri maintained close ties to Al Qaeda leadership as a “former top confidante” of Ayman al-Zawahiri.<sup>48</sup>

One popular criticism of AQI under the leadership of Zarqawi was its heavy recruitment and population of foreign fighters.<sup>49</sup> Many Iraqis saw AQI as outsiders attempting to destabilize the country they loved.<sup>50</sup> Therefore, on October 15, 2006, in an attempt to re-brand the organization as an Iraqi force, al-Masri announced the

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

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

<sup>40</sup> See COUNTRY REPORTS ON TERRORISM, *supra* note 33.

<sup>41</sup> NATIONAL COUNTERTERRORISM CENTER, AL-QAIDA IN IRAQ (AQI), available at <http://www.nctc.gov/site/groups/aqi.html>.

<sup>42</sup> THE ISLAMIC STATE OF IRAQ AND SYRIA: THE HISTORY OF ISIS/ISIL, *supra* note 14, at 19.

<sup>43</sup> AL-QAIDA IN IRAQ (AQI), *supra* note 41.

<sup>44</sup> THE ISLAMIC STATE OF IRAQ AND SYRIA: THE HISTORY OF ISIS/ISIL, *supra* note 14, at 19.

<sup>45</sup> AL-QAIDA IN IRAQ (AQI), *supra* note 41.

<sup>46</sup> THE ISLAMIC STATE OF IRAQ AND SYRIA: THE HISTORY OF ISIS/ISIL, *supra* note 14, at 20.

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

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

<sup>49</sup> See AL-QAIDA IN IRAQ (AQI), *supra* note 41.

<sup>50</sup> See COUNTRY REPORTS ON TERRORISM, *supra* note 33.

creation of the Islamic State of Iraq (ISI),<sup>51</sup> to be led by Iraqi national Abu Umar al-Baghdadi.<sup>52</sup> “AQI members marched through cities they considered to be a part of their new state as a show of force.”<sup>53</sup> The ultimate goal of ISI was clear: “[O]ust foreign influence from Iraqi territory, topple the current government, and establish in its stead a pure Islamic state.”<sup>54</sup> This desired end state exemplifies Zarqawi’s continued influence on the organization and distinguishes ISI from its Al Qaeda core.

While operating in tandem, ISI and AQI continued their brutal methods of terror. Al-Masri “issued a statement pledging to continue what Zarqawi began, and AQI...continued its strategy of targeting Coalition Forces, Iraqi government groups, and Shia civilians to provoke sectarian violence and undermine perceptions that the Iraqi government can defend them.”<sup>55</sup> The number of attacks in Iraq reached its peak between 2006 and 2007.<sup>56</sup> However, such continuous attacks against innocent Iraqis took its toll on the local populace. Growing hatred of AQI/ISI resulted in the formation of the “Awakening Movement,” a large “coalition of prominent Iraqi tribes” determined to see the defeat of terror in Iraq.<sup>57</sup>

At the same time as the formation of the “Awakening Movement,” U.S. forces initiated its “troop surge” strategy in Iraq, which introduced an additional 20,000 troops into the combat zone by June 2007.<sup>58</sup> The effect of both efforts working in tandem was immediate. Terror incidents dramatically declined as a result of successful operations involving the United States and coalition troops, Iraqi forces, and members of the Awakening Movement.<sup>59</sup> Joint efforts continued for two years, with consistent reduction in terror attack. By “early 2009, over 100,000 Sunni tribesman had joined the [Awakening] forces...”<sup>60</sup> Within that same timeframe, civilian deaths declined from nearly 3,500 deaths per month to less than 500.<sup>61</sup>

AQI/ISI experienced a similarly staggering reduction in numbers. “AQI had garnered hundreds of foreign fighters per month at one point, but by 2009, only five or six entered Iraq each month.”<sup>62</sup> Additionally, a joint United States-Iraqi raid on a home near Tikrit on April 28, 2010 resulted in the deaths of AQI’s and ISI’s top

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<sup>51</sup> THE ISLAMIC STATE OF IRAQ AND SYRIA: THE HISTORY OF ISIS/ISIL, *supra* note 14, at 22.

<sup>52</sup> AL-QAIDA IN IRAQ (AQI), *supra* note 41.

<sup>53</sup> See COUNTRY REPORTS ON TERRORISM, *supra* note 33.

<sup>54</sup> THE ISLAMIC STATE OF IRAQ AND SYRIA: THE HISTORY OF ISIS/ISIL, *supra* note 14, at 24.

<sup>55</sup> See COUNTRY REPORTS ON TERRORISM, *supra* note 33.

<sup>56</sup> THE ISLAMIC STATE OF IRAQ AND SYRIA: THE HISTORY OF ISIS/ISIL, *supra* note 14, at 21.

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

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

<sup>59</sup> See *Timeline: The Iraq Surge, Before and After*, WASHINGTONPOST.COM, <http://www.washingtonpost.com/wp-srv/nation/thegamble/timeline/>.

<sup>60</sup> THE ISLAMIC STATE OF IRAQ AND SYRIA: THE HISTORY OF ISIS/ISIL, *supra* note 14, at 21.

<sup>61</sup> See *Timeline: The Iraq Surge*, *supra* note 59.

<sup>62</sup> THE ISLAMIC STATE OF IRAQ AND SYRIA: THE HISTORY OF ISIS/ISIL, *supra* note 14, at 21.

leaders, Abu Ayyub al-Masri and Abu Umar al-Baghdadi.<sup>63</sup> By 2010, approximately “80% of ISI’s leaders had been killed or captured” by coalition forces.<sup>64</sup>

Despite the monumental efforts of joint forces, ultimate success in Iraq would not come. Though AQI and ISI appeared to lie in ashes in 2010, the organization would ignite once more under the direction of its current leader: Abu Bakr al-Baghdadi.<sup>65</sup> Hardened by five years spent in detention at Camp Bucca, al-Baghdadi emerged by presidential pardon to a country reeling from years of war and political strife.<sup>66</sup> Regarded as “savvy” and “opportunistic,” al-Baghdadi saw the withdrawal of U.S. troops and disbanding of the Awakening Movement in 2011 as the perfect opportunity for ISI to once again build its strength within the region.<sup>67</sup> Within one month of the United States withdrawal from Iraq, terror attacks drastically intensified, and the number of fatalities increased by 500.<sup>68</sup> “In July 2012, Abu Bakr al-Baghdadi announced the start of what he called the ‘Breaking the Walls’ campaign, which triggered a massive launch of suicide attacks, simultaneous bombings, jail breaks, and assassination attempts.”<sup>69</sup> Many who formerly took up arms in support of the Awakening Movement found themselves disillusioned by a defective Iraqi government and joined ISI.<sup>70</sup> Under the leadership of al-Baghdadi, the nearly defeated organization once again emerged, stronger than ever.

The Syrian revolution taking place just west of Iraq presented further opportunity to expand and amass power within the highly destabilized region. Baghdadi seized the moment. As a result of efforts to extend the organization’s reach into Syria, in April 2013, Baghdadi declared “the birth of the Islamic State in Iraq and the Levant (ISIL).”<sup>71</sup>

## B. The Present: Abu Bakr Al-Baghdadi and the Birth of the Islamic State

Over two years have passed since Abu Bakr al-Baghdadi declared the birth of ISIL. Today the organization remains in a category all its own. Several factors significantly distinguish ISIL from other terrorist groups. The first factor is its capture of geographic regions. Spanning across the northern portions of Syria and Iraq, from north of Aleppo to Mosul, and extending as far south as Fallujah,<sup>72</sup>

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<sup>63</sup> *Id.* at 25.

<sup>64</sup> *Id.* at 26.

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

<sup>66</sup> *Id.* at 27.

<sup>67</sup> THE ISLAMIC STATE OF IRAQ AND SYRIA: THE HISTORY OF ISIS/ISIL, *supra* note 14, at 27.

<sup>68</sup> *Id.* at 29.

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

<sup>70</sup> *Id.* at 28.

<sup>71</sup> *Id.* at 30.

<sup>72</sup> See Elias Groll, *The Beginning of a Caliphate: The Spread of ISIS, in Five Maps*, FOREIGN POLICY (June 11, 2014, 7:24 PM), <http://foreignpolicy.com/2014/06/11/the-beginning-of-a-caliphate-the->

ISIL now operates strongholds or outright control of more “[t]erritory than [a]ny [e]xtremist [o]rganization in [h]istory.”<sup>73</sup> In January 2014, ISIL claimed full control of Fallujah,<sup>74</sup> a key strategic position located approximately forty miles from Iraq’s capital. In June 2014, ISIL captured Mosul, Iraq’s second largest city,<sup>75</sup> defeating an Iraqi force of nearly 30,000 with less than 1,000 highly motivated militants.<sup>76</sup> Additional Iraqi cities also fell into ISIL hands during a stream of attacks, including portions of Samara and Tikrit.<sup>77</sup> In May 2015, ISIL forces captured Ramadi, the capital of Iraq’s largest province.<sup>78</sup> As a result of ISIL’s capture of the Syrian city of Palmyra, ISIL now “controls more than half” of Syria.<sup>79</sup> Today, ISIL rules a swath of territory “larger than the United Kingdom.”<sup>80</sup>

A second factor is its governmental structure. Once ISIL captures territory, it establishes a governmental system operating under strict Sharia<sup>81, 82</sup> “Religious police make sure that shops close during Muslim prayers and that women cover their hair and faces in public. Public spaces are walled off with heavy metal fences topped with the black flags of [ISIL]. People accused of disobeying the law are punished by public executions or amputations.”<sup>83</sup> Organizationally, ISIL functions similar to a standard governmental system. As head caliph, Abu Bakr al-Baghdadi maintains two deputies responsible for Iraq and Syria respectively.<sup>84</sup> Cabinet members oversee ISIL’s primary organizational departments, such as “finance, security,

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spread-of-isis-in-five-maps/.

<sup>73</sup> *ISIL Controls More Resources, Territory than Any Extremist Organization in History*, WASHINGTON FREE BEACON (Aug. 4, 2014, 11:54 AM), <http://freebeacon.com/national-security/isil-controls-more-resources-territory-than-any-extremist-organization-in-history/>.

<sup>74</sup> THE ISLAMIC STATE OF IRAQ AND SYRIA: THE HISTORY OF ISIS/ISIL, *supra* note 14, at 30.

<sup>75</sup> See Mehmet Hecan, *ISIL Takes Over Mosul*, TURKISH WEEKLY (June 11, 2014), available at <http://www.turkishweekly.net/2014/06/11/news/isil-takes-over-mosul/>.

<sup>76</sup> THE ISLAMIC STATE OF IRAQ AND SYRIA: THE HISTORY OF ISIS/ISIL, *supra* note 14, at 30.

<sup>77</sup> *Id.*

<sup>78</sup> Yaroslav Trofimov, *After Ramadi, U.S. and Allies Face Dilemma in Fight Against Islamic State*, WSJ.COM (May 20, 2015, 5:53 PM), <http://www.wsj.com/articles/after-ramadi-u-s-and-allies-face-dilemma-on-how-to-proceed-1432147743>.

<sup>79</sup> *ISIL Fighters Capture Syrian City of Palmyra, Site of Famed Ruins*, ALJAZEERA AMERICA AMERICA (May 21, 2015, 6:36 AM), <http://america.aljazeera.com/articles/2015/5/21/isil-fighters-captures-syrian-city-of-palmyra-site-of-famed-ruins2.html>.

<sup>80</sup> See Wood, *supra* note 36.

<sup>81</sup> *Sharia* law is an Islamic legal system focused on achieving “[t]otal and unqualified submission to the will of Allah.” Emerging in 8th century C.E., *Sharia* “constitutes a divinely ordained path of conduct that guides Muslims toward a practical expression of religious conviction in this world and the goal of divine favour in the world to come.” BRITANNICA.COM, available at <http://www.britannica.com/EBchecked/topic/538793/Shariah>.

<sup>82</sup> Gregor Aisch, Joe Burgess, C.J. Chivers, Alicia Parlapiano, Sergio Pecanha, Archie Tse, Derek Watkins, & Karen Yourish, *How ISIS Works*, N.Y.TIMES.COM (Sept. 16, 2014), <http://www.nytimes.com/interactive/2014/09/16/world/middleeast/how-isis-works.html>.

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

<sup>84</sup> See *id.*

media, prisoners and recruitment.”<sup>85</sup> Lower deputies stretch across Syria and Iraq, managing the local governments.<sup>86</sup>

A third factor is its financial resources. ISIL exists as one of the most prosperous terror groups in history. Much of this is based on its control of dozens of oil fields and refineries stretching across Syria and Iraq.<sup>87</sup> Capturing these revenue-producing sites became a large priority for the organization during the summer of 2014.<sup>88</sup> In July 2014, ISIL took control of Syria’s largest oil field, a site that produced approximately 30,000 barrels a day.<sup>89</sup> Iraqi oil fields in the hands of ISIL are believed to produce “25,000 to 40,000 barrels” daily.<sup>90</sup> Experts estimate that, as of 2014, total revenue of oil sold on the black market each day amounted to roughly \$2 million.<sup>91</sup>

ISIL further increases its finances by pillaging the territories over which it gains control. After capturing Mosul, terrorists looted approximately \$429 million from its central bank.<sup>92</sup> This raid, alone, made ISIL the “richest terror faction in the world.”<sup>93</sup> In addition to money, ISIL has looted a countless number of priceless antiquities, sales of which are believed to generate a large, though unspecified, sum.<sup>94</sup> Further revenue is amassed through an extensive tax system established within ISIL’s controlling regions. “Want to do business in ISI[L]-controlled territory? You pay a tax. Want to move a truck down an ISI[L]-controlled highway? You pay a toll. Villagers in ISI[L] territory reportedly are charged and pay for just about everything.”<sup>95</sup> Finally, ISIL receives significant funds by conducting countless “kidnapping for ransom” operations. Total revenue from kidnappings in one year was estimated between \$35 and \$45 million.<sup>96</sup> The UN reports ISIL generates

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

<sup>86</sup> *See id.*

<sup>87</sup> *See id.*

<sup>88</sup> *See id.*

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> *See* Fareed Rahman, *ISIL Raises Over \$2M per Day By Selling Oil*, GULF NEWS (Aug. 13, 2014, 7:13 PM), <http://gulfnews.com/business/oil-gas/isil-raises-over-2m-per-day-by-selling-oil-1.1375681>.

<sup>92</sup> *See* Jack Moore, *Mosul Seized: Jihadis Loot \$429M From City’s Central Bank to Make ISIS World’s Richest Terror Force*, INTERNATIONAL BUSINESS TIMES (June 11, 2014, 11:12 PM), <http://www.ibtimes.co.uk/mosul-seized-jihadis-loot-429m-citys-central-bank-make-isis-worlds-richest-terror-force-1452190>.

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

<sup>94</sup> *See* UN Chokes Off ISIL Financing from Oil, Antiquities, and Ransoms, THE NATIONAL (Feb. 13, 2015, 12:06 AM), <http://www.thenational.ae/world/middle-east/un-chokes-off-isil-financing-from-oil-antiquities-and-ransoms>.

<sup>95</sup> Scott Bronstein & Drew Griffin, *Self-Funded and Deep-Rooted: How ISIS Makes Its Millions*, CNN.COM (Oct. 7, 2014, 9:54 AM), <http://www.cnn.com/2014/10/06/world/meast/isis-funding/>.

<sup>96</sup> Taimur Khan, *ISIL Takes Up To \$45M in Ransoms*, THE NATIONAL (Nov. 25, 2014, 10:03 PM), <http://www.thenational.ae/world/middle-east/isil-takes-up-to-45m-in-ransoms>.

between \$96,000 and \$123,000 in ransom payments each day.<sup>97</sup> For these reasons, ISIL is regarded as “the best-financed group . . . ever seen.”<sup>98</sup>

A fourth factor is ISIL’s staggering weapons cache. “[ISIL] has stolen hundreds of millions of dollars’ worth of weapons and equipment from Iraqi and Syrian military installations.”<sup>99</sup> As of July 2014, weapons included approximately 30 T-55 tanks, 10 T-72 tanks, Humvees, AK-47s, M79 Osa Rocket Launchers, RBG-6 grenade launchers, RPG-7 grenade launchers, M198 Howitzers, Type 59-1 field guns, ZU-23-2 anti-aircraft guns, FIM-92 Stinger surface-to-air missiles, HJ-8 anti-tank missiles, and DShK 1938 machine guns.<sup>100</sup> Much of this arsenal was likely amassed “from fleeing Iraqi soldiers when the group seized swaths of Iraq in June [2014].”<sup>101</sup> In addition, ISIL fighters may have inadvertently received weapons supplied by the United States in a missed airdrop to Kurdish fighters in November 2014 that included “hand grenades, ammunition, and rocket-propelled grenade launchers.”<sup>102</sup> ISIL commonly parades its formidable arsenal throughout captured villages as a show of force to the local community.<sup>103</sup> Moreover, the organization commonly displays its vast stockpile of munitions on social media sites, which serves as an additional recruitment tool.<sup>104</sup>

A fifth factor is its number of devoted jihadists. According to unclassified Central Intelligence Agency estimates, ISIL maintains “between 20,000 and 31,500 fighters in Iraq and Syria.”<sup>105</sup> As of February 2015, “[a]t least 20,000 [foreign] fighters have traveled to Syria and Iraq over the course of the recent conflicts in the two countries.”<sup>106</sup> A large number of foreigners flocking to ISIL come from North

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<sup>97</sup> See *UN Chokes Off ISIL Financing from Oil, Antiquities, and Ransoms*, *supra* note 94.

<sup>98</sup> Bronstein & Griffin, *supra* note 95.

<sup>99</sup> Aisch, Burgess et al., *supra* note 23.

<sup>100</sup> See Jeremy Bender, *As ISIS Routs The Iraqi Army, Here’s A Look At What The Jihadists Have In Their Arsenal*, BUSINESS INSIDER (July 8, 2014, 10:13 AM), <http://www.businessinsider.com/isis-military-equipment-breakdown-2014-7?op=1#t-55-tanks-1>.

<sup>101</sup> *ISIL Fighters Show Off Weapons Likely Seized from U.S. Airdrop*, AL JAZEERA AMERICA (Oct. 22, 2014, 12:46 PM), <http://america.aljazeera.com/articles/2014/10/22/us-weapons-isis.html>.

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

<sup>103</sup> See generally Jeremy Binnie London, *ISIL Displays Captured Weapons*, IHS JANE’S 360 (July 2, 2014), <http://www.janes.com/article/40256/isis-displays-captured-weapons>; see also *ISIL Fighters Show Off Weapons Likely Seized from U.S. Airdrop*, AL JAZEERA AMERICA (Oct. 22, 2014, 12:46 PM), <http://america.aljazeera.com/articles/2014/10/22/us-weapons-isis.html>.

<sup>104</sup> See generally Bender, *supra* note 100.

<sup>105</sup> Aisch, Burgess et al., *supra* note 23.

<sup>106</sup> Sarah Almkhtar, Jeremy Ashkenas, Jennifer Daniel, Matthew Ericson, Ford Fessenden, K.K. Rebecca Lai, Bill Marsh, Haeyoun Park, Nilkanth Patel, Archie Tse, Time Wallace, Derek Watkins, Jeremy White, & Karen Yourish, *Where the Foreign Fighters in Iraq and Syria are Coming From*, N.Y. TIMES (Feb. 2, 2015), <http://www.nytimes.com/interactive/2014/06/12/world/middleeast/the-iraq-isis-conflict-in-maps-photos-and-video.html>.

Africa and the Middle East.<sup>107</sup> However, the locations of inbound jihadists span the globe. From former Soviet states to Western Europe, from Pakistan to Australia and Japan, thousands have joined the ranks of ISIL.<sup>108</sup> At least 100 United States citizens have left the homeland to join the militant movement.<sup>109</sup>

ISIL's "ability to lure thousands of Westerners is unprecedented in modern history, and may be its scariest success."<sup>110</sup> Recruitment efforts have attracted children as young as fifteen.<sup>111</sup> In November 2014, three Denver-based teenagers were detained in Frankfurt, Germany on their way to join ISIL in Syria.<sup>112</sup> In February 2015, three "straight-A" students, fifteen and sixteen year old girls, left their home in the United Kingdom to join ISIL after being actively recruited by the organization.<sup>113</sup>

The organization's appeal continues to baffle many. Experts offer some guidance on why the world's youth appear to be attracted to such a way of life. "Either outright converts from Christianity or people raised in nonobservant or atheist households, they are often rebels in search of a flag of convenience."<sup>114</sup> Terrorism expert Mathieu Guidere estimates that more than half of those who flock to ISIL are simply "disillusioned idealists and revolutionaries."<sup>115</sup> Noted by Daniel Byman, a scholar at the Brookings Institution, "To them, a lot of Islamic State's appeal is that it is badass, and not that it has a particularly sophisticated theology."<sup>116</sup>

Reports now show that ISIL actively recruits children as well, training them in camps and referring to them as "Cubs of the Islamic State."<sup>117</sup> Boys as young as six years old are taught how to "clean, disassemble, and shoot machine guns."<sup>118</sup> During the November 2014 fighting in the Syrian town of Kobani, locals

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

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

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

<sup>110</sup> Yaroslav Trofimov, *Islamic State's Scariest Success: Attracting Western Newcomers*, WSJ.COM (Feb. 26, 2015, 8:46 AM), <http://www.wsj.com/articles/islamic-states-scariest-success-attracting-western-newcomers-1424932279>.

<sup>111</sup> See Nick Allen, *Three Teenage Colorado Girls Try to Join ISIL*, THE TELEGRAPH (Oct. 22, 2014, 7:18 AM), <http://www.telegraph.co.uk/news/worldnews/northamerica/usa/11178899/Three-teenage-Colorado-girls-try-to-join-Isil.html>.

<sup>112</sup> *Id.*

<sup>113</sup> Nicholas McCallum, *Known ISIL Recruiter Contacted British School Girls Before They Fled*, 9NEWS.COM (Feb. 23, 2015, 8:13 AM), <http://www.9news.com.au/national/2015/02/23/08/13/known-isil-recruiter-contacted-british-school-girls-before-they-fled>.

<sup>114</sup> Trofimov, *supra* note 110.

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

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

<sup>117</sup> Cassandra Vinograd, Ghazi Balkiz, & Ammar Cheikh Omar, *ISIS Trains Child Soldiers at Camps for 'Cubs of the Islamic State'*, NBC NEWS (Nov. 7, 2014, 4:47 AM), <http://www.nbcnews.com/storyline/isis-terror/isis-trains-child-soldiers-camps-cubs-islamic-state-n241821>.

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

saw children “fighting alongside the militants.”<sup>119</sup> As described by one Iraqi official, “They [ISIL] use dolls to teach them how to behead people, then they make them watch a beheading, and sometimes they force them to carry the heads in order to chase the fear away from their hearts.”<sup>120</sup> Experts note that such activities “ensure [ISIL’s] longevity by providing a ready-and-willing next generation of jihadis.”<sup>121</sup>

A sixth factor of central importance is its extremist ideology, which significantly exceeds other Islamic terror organizations. “ISIL’s ideology has been labeled as ‘extreme,’ even in comparison to hardliners like al-Qaeda....”<sup>122</sup> Rather than merely waging jihad in the name of Islam, ISIL’s primary goal may be found in its name: the Islamic State. “It must be noted that groups like ISIL are not nationalist groups operating under the cloak of religion but are jihadist groups committed to the liberation of Muslims across the world. Its aim is not forming a Salafist or Sunni state system in Iraq but an Islamic Caliphate encompassing the entire region of the Levant, from Iraq and across Syria to Lebanon and beyond.”<sup>123</sup> And it does not end with the Middle East. Once ISIL establishes a Caliphate within these geographic regions, “a global Caliphate is [then] pursued.”<sup>124</sup>

Understanding the term “caliphate” is vital to grasping ISIL’s ideology. A “caliphate” is defined as “a political-religious state comprising the Muslim community and the lands and peoples under its dominion in the centuries following the death of the Prophet Muhammad.”<sup>125</sup> To establish a caliphate, the caliph (leader of the caliphate) must meet three criteria under Sunni law: (1) being an adult Muslim male of Quraysh descent; (2) “exhibiting moral probity and physical and mental integrity;” and (3) having authority through possession of territory sufficient to enforce Islamic law.<sup>126</sup> Adherents to this particular sect of Islam “regard[] the caliphate as the only righteous government on Earth.”<sup>127</sup>

Establishment of a caliphate goes beyond the creation of a political-religious state; it is also a “vehicle for [Islamic] salvation.”<sup>128</sup> Under this faction of Islamic faith, Muslims that die without “pledging [oneself] to a valid caliph and incurring the obligations of that oath, [have] failed to live a fully Islamic life.... [And thus] died a

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<sup>119</sup> Zeina Karam & Vivian Salama, *ISIS Is Recruiting and Exploiting Children*, THE WORLD POST (Nov. 23, 2014, 8:59 AM), [http://www.huffingtonpost.com/2014/11/23/isis-child-soldiers\\_n\\_6207064.html](http://www.huffingtonpost.com/2014/11/23/isis-child-soldiers_n_6207064.html).

<sup>120</sup> Vinograd, Balkiz, & Omar, *supra* note 117.

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

<sup>122</sup> THE ISLAMIC STATE OF IRAQ AND SYRIA: THE HISTORY OF ISIS/ISIL, *supra* note 14, at 35.

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

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

<sup>125</sup> BRITANNICA.COM, available at <http://www.britannica.com/EBchecked/topic/89739/Caliphate>.

<sup>126</sup> Wood, *supra* note 36.

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

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

death of disbelief.”<sup>129</sup> In this sense, Abu Bakr al-Baghdadi, as proclaimed caliph of the Islamic State, does not simply represent the leader of a terrorist organization. He is the proposed source of Islamic salvation. Failure to declare an oath of allegiance would result in loss of eternal favor with Allah.

Under this form of political-religious government, the caliph must ensure strict adherence to Sharia law.<sup>130</sup> As noted by Bernard Haykel, professor of theology at Princeton University, regarding Sharia, ““Slavery, crucifixion, and beheadings are not something that freakish [jihadists] are cherry-picking from the medieval tradition... Islamic State fighters are ‘smack in the middle of the medieval tradition and are bringing it wholesale into the present day.””<sup>131</sup> “In theory, all Muslims are obliged to immigrate to the territory where the caliph is applying these laws.”<sup>132</sup> As professed by Abu Mohammed al-Adnani, spokesperson for ISIL, “The proclamation of the caliphate means that every Muslim has the duty to pledge allegiance to the new caliph of Muslims or otherwise dies the death of the time of Jahiliyaa.”<sup>133</sup>

Receiving its origins from Abu Musab al-Zarqawi, establishment of the caliphate further distinguishes ISIL from its Al Qaeda core. Al Qaeda does not seek to establish a caliphate, as it does not possess physical territory in which to implement Sharia law. Rather, unlike Zarqawi, “[b]in Laden viewed his terrorism as a prologue to a caliphate he did not expect to see in his lifetime.”<sup>134</sup>

In addition to the establishment of the caliphate, ISIL further differs from Al Qaeda in its treatment of other sects of Islam. Although Osama bin Laden “followed the strict Salafi code of Islam that deems Shiites to be apostates,” as does ISIL today, “bin Laden decided to take the middle ground and called for unity between Shiites and Sunnis.”<sup>135</sup> ISIL, on the other hand, continues Zarqawi’s original vision of “openly and aggressively attack[ing] Shiite targets, not just mosques and shrines but civilians as well.”<sup>136</sup> ISIL’s progressive steps toward achieving the caliphate further legitimizes the organization in the minds of some, leaving many jihadists to view Al Qaeda as insufficient to waging jihad.<sup>137</sup> Moreover, Al Qaeda’s refusal to acknowledge the caliphate casts further divide between the two organizations.<sup>138</sup>

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

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

<sup>131</sup> Wood, *supra* note 36.

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

<sup>133</sup> THE ISLAMIC STATE OF IRAQ AND SYRIA: THE HISTORY OF ISIS/ISIL, *supra* note 14, at 43.

<sup>134</sup> Wood, *supra* note 36.

<sup>135</sup> THE ISLAMIC STATE OF IRAQ AND SYRIA: THE HISTORY OF ISIS/ISIL, *supra* note 14, at 36.

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

<sup>137</sup> Wood, *supra* note 36.

<sup>138</sup> *See id.*

A seventh factor is ISIL's brutality. Despite their differences, ISIL—in all its forms—remained under the larger banner of Al Qaeda for approximately ten years until Al Qaeda finally released a statement on February 2, 2014 disavowing the organization. ISIL simply “was becoming too extremist in its ideology and especially in its tactics, even for al-Qaeda’s standards.”<sup>139</sup> Their brutal methods of death and destruction have raised the terror bar to an unprecedented level. “I have run out of words to depict the gravity of the crimes committed inside Syria,” stated Paulo Sergio Pinheiro, chairman of a UN panel, regarding the organization’s methods of control.<sup>140</sup> “Children are encouraged to attend executions”... “[l]ater they wander past corpses displayed on crucifixes in public squares.”<sup>141</sup> “ISIL massacred, looted, tortured, and killed civilians and soldiers alike, conducted mock trials and brutal executions, and published grisly videos and photographs online of beheaded bodies, crucifixions of alleged thieves, dead children, and mass graves of executed Syrian soldiers.”<sup>142</sup> As a result of ISIL’s ruthless control of the region, “[m]ore than three million refugees have fled Syria since 2012.”<sup>143</sup>

The United Nations has repeatedly condemned the actions of ISIL and continues to report its atrocities. According to UN reports, “At least 11,602 civilians have been killed and 21,766 wounded from beginning of January [2014] until December 10, 2014. Between June 1, 2014 and December 10, 2014, when the conflict spread from Anbar to other areas of Iraq, at least 7,801 civilians were killed and 12,451 wounded.”<sup>144</sup> Further atrocities reported within a three-month period at the end of 2014 included “killing of civilians, abductions, rapes, slavery and trafficking of women and children, forced recruitment of children, destruction of places of religious significance, looting and the denial of fundamental freedoms.”<sup>145</sup> “ISIL extremists have reportedly engaged in so-called ‘cultural cleansing’ across Iraq and other territories occupied by the group.”<sup>146</sup>

ISIL’s brutality continues. On February 3, 2015, ISIL released video of the horrific death of Lt. Muath al-Kaseasbeh, a Jordanian pilot burned alive by ISIL

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<sup>139</sup> THE ISLAMIC STATE OF IRAQ AND SYRIA: THE HISTORY OF ISIS/ISIL, *supra* note 14, at 42.

<sup>140</sup> Nick Cumming-Bruce, *U.N. Investigators Cite Atrocities in Syria*, N.Y. TIMES (Sept. 16, 2014), <http://www.nytimes.com/2014/09/17/world/middleeast/un-investigators-cite-atrocities-in-syria.html>.

<sup>141</sup> *Id.*

<sup>142</sup> THE ISLAMIC STATE OF IRAQ AND SYRIA: THE HISTORY OF ISIS/ISIL, *supra* note 14, at 42.

<sup>143</sup> Almkhtar et al., *supra* note 106.

<sup>144</sup> *Iraq: UN Documents Rights Violations of Increasingly Sectarian Nature*, UN NEWS CENTRE, Feb. 23, 2015, <http://www.un.org/apps/news/story.asp?NewsID=50149#.VPeEtI05BwU>.

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

<sup>146</sup> *Security Council Strongly Deplores ISIL's 'Barbarism,' Says Resolve Stiffened to Defeat Group*, UN NEWS CENTRE, Feb. 28, 2015, <http://www.un.org/apps/news/story.asp?NewsID=50209#.VPeFS405BwV>.

after being captured by the organization in 2014.<sup>147</sup> Less than two weeks later, ISIL released another video showing the beheading of 21 Egyptian Coptic Christians in Libya in a manner similar to the September 2014 deaths of Americans James Foley<sup>148</sup> and Steven Sotloff.<sup>149</sup> This heinous event prompted the mass migration of nearly 15,000 Egyptians back to their homeland.<sup>150</sup> Assyrian Christians in Syria may face a similar fate, as reports indicate up to 150 were abducted by ISIL by the end of February, 2015.<sup>151</sup> As described by State Department officials, ““ISIL’s latest targeting of a religious minority is only further testament to its brutal and inhumane treatment of all those who disagree with its divisive goals and toxic beliefs.””<sup>152</sup> These instances of cruelty provide only a snapshot of myriad atrocities committed by ISIL. As noted by Nickolay Mladenov, Special Representative of the UN Secretary-General for Iraq, ““We have done a number of these reports [regarding ISIL actions] and we continue in them to register day after day horrible, horrible atrocities.””<sup>153</sup> In light of the escalating nature of ISIL’s actions, only time will tell where, and how, its fighters will strike next.

### C. The Potential Future: The Geographic Rings of the Global Strategy

Though ISIL’s short-term appears to remain focused on securing the Levant region, it maintains a long-term, global ambition.<sup>154</sup> Recent intelligence described ISIL’s strategy for world-wide expansion as a phased approach involving “three geographic rings.”<sup>155</sup> The primary focus at this point rests in the “Interior Ring,” the

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<sup>147</sup> Sophia Jones, *Thousands of Jordanians Gather in Amman to Denounce Islamic State for Brutal Killing of Pilot*, THE WORLD POST (Feb. 6, 2015, 12:15 PM), [http://www.huffingtonpost.com/2015/02/06/jordanians-protest-islami\\_n\\_6629344.html](http://www.huffingtonpost.com/2015/02/06/jordanians-protest-islami_n_6629344.html).

<sup>148</sup> Sophia Jones, *ISIS Boasted of These Christians’ Deaths. Here are the Lives They Lived.*, THE WORLD POST (Feb. 18, 2015, 4:56 PM), [http://www.huffingtonpost.com/2015/02/18/isis-christians-killed-\\_n\\_6703278.html](http://www.huffingtonpost.com/2015/02/18/isis-christians-killed-_n_6703278.html); see also Lee Ferran & Rym Momtaz, *Video Appears to Show Beheading of Journalist James Foley, Who Went Missing in Syria*, ABC NEWS (Aug. 19, 2014, 5:55 PM), <http://abcnews.go.com/Blotter/james-foley-video-appears-show-beheading-journalist-missing/story?id=25043593>.

<sup>149</sup> See Mark Lander & Eric Schmitt, *ISIS Says It Killed Steven Sotloff After U.S. Strikes in Northern Iraq*, N.Y. TIMES, Sept. 2, 2014, at A1, <http://www.nytimes.com/2014/09/03/world/middleeast/steven-sotloff-isis-execution.html>.

<sup>150</sup> *15,000 Egyptians Flee Libya After ISIL Execution of Christians*, THE NATIONAL (Feb. 23, 2015, 10:11 PM), <http://www.thenational.ae/world/middle-east/15000-egyptians-flee-libya-after-isis-execution-of-christians>.

<sup>151</sup> Michael Pizzi, *ISIL Kidnapping Underlines ‘Grave Peril’ of Assyrian Christians*, AL JAZEERA AMERICA (Feb. 25, 2015, 5:00 AM), <http://america.aljazeera.com/articles/2015/2/25/isis-kidnapping-underlines-grave-peril-of-assyrian-christians.html>.

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

<sup>153</sup> *Iraq: UN Documents Rights Violations of Increasingly Sectarian Nature*, *supra* note 144.

<sup>154</sup> Jessica Lewis McFate & Harleen Gambhir, *Islamic State’s Global Ambitions*, WALL STREET JOURNAL (Feb. 22, 2015, 11:03 PM), <http://www.wsj.com/articles/islamic-states-global-ambitions-1424646205>.

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

geographic area including “Iraq and . . . the Levantine states of Syria, Jordan, Lebanon, and Israel-Palestine.”<sup>156</sup> The second phase involves the “Near Abroad Ring,” which “includes the rest of the Middle East and North Africa, extending east to Afghanistan and Pakistan.”<sup>157</sup> Finally, the “Far Abroad Ring” focuses on the remaining portions of the world, “specifically Europe, the United States, and Asia.”<sup>158</sup>

Actions by ISIL suggest that it is already expanding beyond the “Interior Ring.” When Baghdadi formally declared the establishment of the caliphate at the start of Ramadan<sup>159</sup> in June 2014, he also changed the organization’s name from ISIL to the Islamic State.<sup>160</sup> Though most in the United States and United Nations continue to refer to the organization as ISIS or ISIL, Baghdadi’s declaration articulated the formation of an Islamic government intended to extend beyond the Levant region of the Middle East, applicable to Muslims worldwide.<sup>161</sup>

Intelligence reports suggest that ISIL’s grasp currently extends into the “Near Abroad Ring.” Boko Haram recently pledged its loyalty to the brutal terror organization, thus extending ISIL’s reach into western Africa.<sup>162</sup> ISIL also actively recruits within Afghanistan and Pakistan.<sup>163</sup> Moreover, intelligence suggests government officials and private citizens within Qatar have taken steps to support militant groups including Al Qaeda and ISIL, thereby destabilizing relations between the United States and its ally.<sup>164</sup> “In September, the U.S. Treasury Department said publicly that an Islamic State commander had received \$2 million in cash from an unnamed Qatari businessman.”<sup>165</sup> Other less obvious supporting efforts have also been noted

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

<sup>157</sup> *Id.*

<sup>158</sup> *Id.*

<sup>159</sup> Ramadan is an important religious holiday for followers of Islam. In 2014, Ramadan began on Sunday, June 29th. Baghdadi was believed to declare the establishment of the Caliphate and the Islamic State on that day.

<sup>160</sup> Fred Kaplan, *ISIS’ Leader Just Declared Himself Caliph*, SLATE (July 1, 2014, 8:48 AM), [http://www.slate.com/articles/news\\_and\\_politics/war\\_stories/2014/07/iraq\\_isis\\_leader\\_abu\\_bakr\\_al\\_baghdadi\\_names\\_himself\\_caliph.html](http://www.slate.com/articles/news_and_politics/war_stories/2014/07/iraq_isis_leader_abu_bakr_al_baghdadi_names_himself_caliph.html).

<sup>161</sup> Taylor Wofford, *ISIL, ISIS, or IS? The Etymology of the Islamic State*, NEWSWEEK (Sept. 16, 2014, 10:01 AM), <http://www.newsweek.com/etymology-islamic-state-270752>.

<sup>162</sup> *ISIL ‘Accepts Boko Haram’s Pledge of Allegiance’*, AL JAZEERA (Mar. 12, 2015, 10:03 PM), <http://www.aljazeera.com/news/2015/03/isis-accepts-boko-haram-pledge-allegiance-150312201038730.html>.

<sup>163</sup> David Sterman & Jameel Khan, *General Confirms ISIS Recruiting in Af-Pak; Pakistani Police Clash with Anti-Charlie Hebdo Protest; ISIS Threat at Mumbai Airport*, FOREIGN POLICY (Jan. 16, 2015), <http://foreignpolicy.com/2015/01/16/general-confirms-isis-recruiting-in-af-pak-pakistani-police-clash-with-anti-charlie-hebdo-protest-isis-threat-at-mumbai-airport/>.

<sup>164</sup> Jay Solomon & Nour Malas, *Qatar’s Ties to Militants Strain Alliance*, WALL STREET JOURNAL (Feb. 23, 2015, 10:30 PM), <http://www.wsj.com/articles/qatars-ties-to-militants-strain-alliance-1424748601>.

<sup>165</sup> *Id.*

within the country.<sup>166</sup> ISIL is currently spreading its reach to other countries in South Asia as well. Organization recruiters have been arrested in various cities within India and Pakistan.<sup>167</sup> Moreover, the organization has “formally integrated renegade South Asian militant leaders into its ranks.”<sup>168</sup> Though Al Qaeda continues to dominate this region, ISIL’s close ties with prominent individuals within the area make further expansion likely.<sup>169</sup>

As of February 2015, intelligence reports confirm ISIL’s movement into the “Far Abroad Ring” as well, primarily in Southeast Asia.<sup>170</sup> As this region of the globe maintains approximately “15% of the worlds [*sic*] 1.6 billion Muslims,” establishment of a declared caliphate therein raises significant concern.<sup>171</sup> Movement in the third geographic ring is not limited to eastern movement. ISIL actively recruits throughout the west, to include Canada and the United States.<sup>172</sup>

Individuals returning to their homeland from ISIL-dominated regions present a significant threat. “Several attacks in Europe over the last year have shown the willingness of former ISIL fighters to conduct attacks once they return to their home countries.”<sup>173</sup> In May, 2014, a French citizen believed to have fought with ISIL in Syria murdered four people in Brussels, Belgium.<sup>174</sup> Four months later, “Australian authorities arrested fifteen individuals suspected of planning to kidnap and behead members of the public on behalf of ISIL.”<sup>175</sup> ISIL’s movement toward the Mediterranean Sea in places such as Libya further threatens the global economy by potentially destabilizing one of the world’s most important “maritime trade routes.”<sup>176</sup>

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<sup>166</sup> *See id.*

<sup>167</sup> Michael Kugelman, *How ISIS Could Become a Potent Force in South Asia*, FOREIGN POLICY (Feb. 20, 2015), <http://foreignpolicy.com/2015/02/20/how-isis-could-become-a-potent-force-in-south-asia/>.

<sup>168</sup> *Id.*

<sup>169</sup> *See id.*

<sup>170</sup> Joel Vargas, *The Islamic State Terrorist Franchise Becomes Official in Southeast Asia*, EXAMINER.COM (Feb. 23, 2015, 6:16 AM), <http://www.examiner.com/article/the-islamic-state-terrorist-franchise-becomes-official-southeast-asia>.

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

<sup>172</sup> Alessandra Masi, *ISIS Recruiting Westerners: How the ‘Islamic State’ Goes After Non-Muslims and Recent Converts in the West*, INTERNATIONAL BUSINESS TIMES (Sept. 8, 2014, 11:24 AM), <http://www.ibtimes.com/isis-recruiting-westerners-how-islamic-state-goes-after-non-muslims-recent-converts-west-1680076>.

<sup>173</sup> *DHS Analysis Finds ISIL Most Likely to Conduct IED, Small Arms Attacks in Western Countries*, PUBLIC INTELLIGENCE (Dec. 5, 2014), <http://publicintelligence.net/dhs-analysis-isis-attack-tactics/>.

<sup>174</sup> *Id.*

<sup>175</sup> *Id.*

<sup>176</sup> Seth Cropsey, *When Islamic State Starts Hitting Ships*, WALL STREET JOURNAL (Feb. 23, 2015, 6:21 PM), <http://www.wsj.com/articles/seth-cropsey-when-islamic-state-starts-hitting-ships-1424733682>.

Threats to the west include attacks against the United States. Noted by President Obama in a recent letter to lawmakers:

The so-called Islamic State of Iraq and the Levant (ISIL) poses a threat to the people and stability of Iraq, Syria, and the broader Middle East, and to U.S. national security. It threatens American personnel and facilities located in the region and is responsible for the deaths of U.S. citizens James Foley, Steven Sotloff, Abdul-Rahman Peter Kassig, and Kayla Mueller. If left unchecked, ISIL will pose a threat beyond the Middle East, including to the United States homeland.<sup>177</sup>

In July 2014, former Secretary of Defense Chuck Hagel stated that ISIL presented “an imminent threat” against the homeland.<sup>178</sup> Fears of ISIL attacks within the United States were recently confirmed, as ISIL took credit for the May 2015 shooting in Garland, Texas, by two of its “soldiers.”<sup>179</sup>

ISIL rhetoric is rife with threats to the homeland. In an August 2014 video sent to the United States, ISIL warned of their intent to “drown all...[Americans] in blood.”<sup>180</sup> In September 2014, ISIL spokesperson Abu Muhammad al-Adnani “called, for the first time, for lone offender attacks against the United States and coalition partners in retaliation for military operations in Iraq and Syria.”<sup>181</sup> Several months later, the Department of Homeland Security released an intelligence assessment identifying “potential tactics and targets in ISIL-linked western attacks” that included possible use of “edged weapons, small arms, or improvised explosive devices (IEDs),” similar to methods identified in other western countries.<sup>182</sup> Though large-scale attacks are yet to occur within the United States, the October 2014 attack in Canada by an “ISIL-inspired terrorist” that resulted in the death of one Canadian soldier<sup>183</sup> demonstrates that ISIL-based terror lies at the U.S. doorstep, if not within.

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<sup>177</sup> *Text of Obama's Letter to Lawmakers Accompanying War Request*, STRIPES (Feb. 11, 2015), <http://www.stripes.com/news/us/text-of-obama-s-letter-to-lawmakers-accompanying-war-request-1.329012>.

<sup>178</sup> Brett LoGiurato, *Defense Secretary: ISIS Is an 'Imminent Threat to Every Interest We Have,'* BUSINESS INSIDER (Aug. 21, 2014, 4:34 PM), <http://www.businessinsider.com/hagel-isis-threat-terrorism-us-airstrikes-2014-8>.

<sup>179</sup> Karen Leigh & Devlin Barrett, *Muhammad Cartoon Contest Gunman Wasn't Seen as Pressing Threat*, WALL STREET JOURNAL (May 5, 2015, 7:44 PM), <http://www.wsj.com/articles/federal-officials-worried-muhammad-cartoon-contest-could-lead-to-violence-1430838084>.

<sup>180</sup> *Islamic State Message: "We Will Drown All of You in Blood,"* USA TODAY, available at <http://www.usatoday.com/videos/news/world/2014/08/18/14263293/>.

<sup>181</sup> DEPARTMENT OF HOMELAND SECURITY, INTELLIGENCE ASSESSMENT: POTENTIAL TACTICS AND TARGETS IN ISIL-LINKED WESTERN ATTACKS (Oct. 17, 2014).

<sup>182</sup> *Id.*

<sup>183</sup> *Canada Says Attacks Won't Dent Its Support for Anti-ISIL Strikes*, AL JAZEERA AMERICA (Oct. 23, 2014, 7:17 AM), <http://america.aljazeera.com/articles/2014/10/23/canada-parliamentshooting.html>.

At least 40 radicalized U.S. citizens have already returned to the homeland from fighting alongside ISIL.<sup>184</sup> According to one member of ISIL, attacks in New York are coming “soon.”<sup>185</sup> “A lot of [ISIL] brothers are mobilizing. They are mobilizing for a brilliant attack.”<sup>186</sup>

Over the past year, ISIL has expanded at remarkable speed. Once believed a regional concern, the impact of ISIL now spans the globe. Their intent is clear: establishment of a global caliphate. Their drive, unwavering, motivated at its core by deep religious conviction. As stated by ISIL spokesperson Abu Muhammad al-Adnani, “‘We will conquer your Rome, break your crosses, and enslave your women’ . . . [i]f we do not reach that time, then our children and grandchildren will reach it, and they will see your sons as slaves at the slave market.”<sup>187</sup> The world is now listening. Simply stated by the UN Security Council, ISIL “must be defeated.”<sup>188</sup>

### III. THE PRESENT CAMPAIGN AGAINST ISIL

#### A. The United States in Iraq

Just months after U.S. troops officially withdrew from Iraq, Abu Bakr Al-Baghdadi’s terrorist organization began amassing power in Iraq once more. By the summer of 2014, ISIL controlled strongholds in Iraq from Fallujah to Mosul.<sup>189</sup> In response, America returned to the war-torn region at the request, and in defense, of the Iraqi government. By September 2014, “[t]hirty countries pledged to help Iraq in the fight [against] ISIL ‘by any means necessary.’”<sup>190</sup> As of President Obama’s first

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<sup>184</sup> Adam Kredon, *Dem Rep: 40 American ISIL Fighters Have Already Returned to the United States*, THE WASHINGTON FREE BEACON (Sept. 19, 2014, 9:35 AM), <http://freebeacon.com/national-security/dem-rep-40-american-isil-fighters-have-already-returned-to-the-united-states/>.

<sup>185</sup> Stephen Gutowski, *Canadian ISIL Member Says Attacks Coming to New York Soon*, THE WASHINGTON FREE BEACON (Sept. 25, 2014, 3:22 PM), <http://freebeacon.com/national-security/canadian-isil-member-says-attacks-coming-to-new-york-soon/>.

<sup>186</sup> *Id.*

<sup>187</sup> Wood, *supra* note 36.

<sup>188</sup> *Security Council Strongly Deplores ISIL’s “Barbarism,” Says Resolve Stiffened to Defeat Group*, *supra* note 146. The bulk of this Article was written in the spring of 2015. Since that time, circumstances involving ISIL in Syria—and beyond—continue to change on a daily basis. Recent events include, among others, Russian military engagement in Syria, additional land capture by ISIL, and, most recently, the tragic attacks in Paris. Adjusting this article to reflect the most current situation would require near-continuous modification. As a result, the author elected to avoid large-scale adjustments. This decision was made primarily due to the fact that, despite additional events, the foundational aspects of the article remain relatively unchanged as related to the *jus ad bellum* principles discussed herein. If anything, such additional events only enhance the author’s position that ISIL poses a real and direct threat to the United States.

<sup>189</sup> THE ISLAMIC STATE OF IRAQ AND SYRIA: THE HISTORY OF ISIS/ISIL, *supra* note 14, at 30.

<sup>190</sup> *World Leaders Pledge to Help Iraq Fight ISIL*, AL JAZEERA (Sept. 15, 2014, 11:17 PM), <http://www.aljazeera.com/news/middleeast/2014/09/france-urges-global-fight-against-201491584827778481.html>.

address to the nation regarding ISIL on September 10, 2014, the United States had already “conducted more than 150 successful airstrikes in Iraq.”<sup>191</sup> Early airstrikes against ISIL militants were crucial in securing several key Iraqi victories, such as retaking the Mosul dam<sup>192</sup> and protecting Kurdish refugees trapped on Mount Sinjar.<sup>193</sup> As President Obama noted, “These strikes have protected American personnel and facilities, killed ISIL fighters, destroyed weapons and given space for Iraqi and Kurdish forces to reclaim key territory. These strikes have also helped save the lives of thousands of innocent men, women, and children.”<sup>194</sup>

Since deploying forces to Iraq during the summer of 2014, United States commitment has expanded beyond airstrikes. Intelligence-gathering and special operations play an important role as well.<sup>195</sup> As of January 2015, approximately 2,150 troops deployed to various regions within Iraq.<sup>196</sup> The number of U.S. troops could eventually reach 3,100.<sup>197</sup> However, introduction of such American personnel does not equate to a ground campaign. Rather, troops located within Iraq and surrounding Middle East countries exist only to train and equip.<sup>198</sup>

Despite suggestions of some of the United States’ top military leaders, to include then-Chairman of the Joint Chiefs of Staff General Martin Dempsey,<sup>199</sup> the Obama administration has made clear its intent to keep American boots off the ground.<sup>200</sup> As President Obama stated to troops at MacDill Air Force Base in September 2014, “The American forces that have been deployed to Iraq do not and will not have a combat mission.... I will not commit you and the rest of our armed forces to fighting another ground war in Iraq.”<sup>201</sup> For now, “ISIS is likely to

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<sup>191</sup> *Transcript of Obama’s Remarks on the Fight Against ISIS*, *supra* note 4.

<sup>192</sup> See Matthew Weaver, *U.S. Hails Recapture of Mosul Dam as Symbol of United Battle Against ISIS*, THE GUARDIAN (Aug. 19, 2014, 7:51 AM), <http://www.theguardian.com/world/2014/aug/19/us-mosul-dam-isis-iraq-kurd-pentagon-obama>.

<sup>193</sup> Tom Vanden Brook & William M. Welch, *U.S. Airstrikes Target Islamic State in Iraq*, USA TODAY (Sept. 15, 2014, 8:07 PM), <http://www.usatoday.com/story/news/2014/09/15/us-airstrikes-against-islamic-state/15692767/>.

<sup>194</sup> *Transcript of Obama’s Remarks on the Fight Against ISIS*, *supra* note 4.

<sup>195</sup> Aaron David Miller, *Obama’s Search for an ISIS Strategy Neither Too Hot Nor Too Cold*, WALL STREET JOURNAL (Feb. 11, 2015, 5:33 PM), <http://blogs.wsj.com/washwire/2015/02/11/obamas-search-for-an-isis-strategy-neither-too-hot-nor-too-cold/>.

<sup>196</sup> Gordon Lubold, *U.S. to Send More Troops to Iraq to Train Iraqi Forces*, DEFENSE ONE (Jan. 6, 2015), <http://www.defenseone.com/threats/2015/01/us-send-more-troops-iraq-train-iraqi-forces/102345/>.

<sup>197</sup> *Id.*

<sup>198</sup> See Miller, *supra* note 195.

<sup>199</sup> Mark Landler & Jeremy Peters, *U.S. General Open to Ground Forces Against ISIS in Iraq*, N.Y. TIMES, Sept. 16, 2014, at A1, <http://www.nytimes.com/2014/09/17/world/middleeast/isis-airstrikes-united-states-coalition.html>.

<sup>200</sup> See Lubold, *supra* note 196.

<sup>201</sup> Michael D. Shear, *Obama Insists U.S. Will Not Get Drawn Into Ground War in Iraq*, N.Y. TIMES,

be combated largely through preemption, prevention, containment using U.S. air power, intelligence, special operations, and local and regional allies—not via nation building with massive use [of] ground forces.”<sup>202</sup>

Ongoing efforts to retake control of Tikrit and Samarra provide a practical example of current United States operations in Iraq.<sup>203</sup> An “overwhelming” number of ground troops have been introduced to expel a much smaller group of ISIL militants in the region.<sup>204</sup> Forces on the ground include soldiers from Iraq and Iran—a country that has deployed approximately 100,000 troops to battle ISIL militants in Iraq.<sup>205</sup> While Iraq and Iran provide the necessary ground force, the United States has focused on training, strategic planning, and airstrikes.<sup>206</sup> Throughout the Tikrit offensive, the United States conducted approximately 26 airstrikes, successfully destroying key military targets and routing ISIL fighters away from supporting structures and into the open fight.<sup>207</sup>

This three-tiered approach has proven a relatively sound strategy thus far, with much of the success attributed to U.S.-led air operations. As then-Chairman of the Joint Chiefs of Staff General Dempsey stated, ““If it weren’t for the (U.S.-led coalition) air campaign...the current campaign (in Tikrit) as currently constructed would not be militarily feasible.””<sup>208</sup> Kurdish and Iraqi forces are also planning for a large-scale offensive to recapture Mosul in the near future.<sup>209</sup> However, ISIL’s recent capture of Ramadi has shifted the focus to the Anbar province.<sup>210</sup> Though much depends on the result of existing operations in certain key areas, the United States has not demonstrated any intent to alter its current strategy in Iraq.

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Sept. 17, 2014, <http://www.nytimes.com/2014/09/18/world/middleeast/obama-speech-central-command-isis-military-resolve.html>.

<sup>202</sup> Miller, *supra* note 195.

<sup>203</sup> See Mahmud Saleh & Agence France-Presse, *Iraq Forces Face IS Resistance But U.S. Says Tikrit Will Fall*, RAPPLER (Mar. 7, 2015, 8:25 PM), <http://www.rappler.com/world/regions/middle-east/86093-iraq-forces-face-is-resistance-us-tikrit-fall>.

<sup>204</sup> *Id.*

<sup>205</sup> *Without U.S. Help, Iraq Struggles to Push Into Tikrit*, CBS NEWS (Mar. 4, 2015, 6:17 AM), <http://www.cbsnews.com/news/isis-iraq-iran-shiite-militias-tikrit-questions-about-mosul/>.

<sup>206</sup> See Miller, *supra* note 195.

<sup>207</sup> Saleh & Agence France-Presse, *supra* note 203.

<sup>208</sup> *Battle for Tikrit: U.S.-Iran-Iraq Too Strong for Daesh*, EMIRATES 24|7 (Mar. 7, 2015), <http://www.emirates247.com/news/battle-for-tikrit-us-iran-iraq-unity-too-strong-for-daesh-2015-03-07-1.583362>.

<sup>209</sup> Mark Landler, *Disclosure of Battle Plan by Pentagon Startle Many*, N.Y. TIMES, Feb. 21, 2015, at A10, <http://www.nytimes.com/2015/02/22/world/disclosures-of-battle-plan-by-pentagon-startle-many.html>.

<sup>210</sup> Felicia Schwartz & Julian E. Barnes, *U.S. Shifts Iraq Focus to Western Province*, WSJ.COM (May 20, 2015, 7:19 PM), <http://www.wsj.com/articles/sunnis-need-more-iraqi-support-in-fighting-islamic-state-u-s-general-says-1432149953>.

## B. The United States in Syria

The threat posed by ISIL is not limited to the territorial boundaries of Iraq. Capitalizing on the weakened position of Syria amidst an uprising of rebels against the Assad regime beginning in 2011, ISIL captured “large areas of northeastern Syria, where it continues to clash with forces opposed to and aligned with the government of Bashar al Assad.”<sup>211</sup> As a result, over three million Syrians have fled to neighboring countries in order to avoid the terrorist organization.<sup>212</sup> In response to the threat posed by ISIL in Syria, the United States began an air campaign within Syria’s borders in September 2014, shortly after President Obama’s address to the nation.<sup>213</sup> Airstrikes within Syria have focused on ISIL strongholds within the region as well as strategic targets, such as oil fields, in an attempt to disrupt financial assets currently held by the organization.<sup>214</sup>

The United States is not alone in its aerial attacks within Syria. A United States-led coalition of five nations, including Bahrain, Jordan, Saudi Arabia, and the United Arab Emirates, are responsible for strategic airstrikes within the war-torn region.<sup>215</sup> In October 2014, alone, the United States conducted more than 135 airstrikes against ISIL forces threatening Kobani, ultimately rescuing the Kurdish city from capture by the organization.<sup>216</sup> As of December 2014, approximately 572 airstrikes were conducted within Syrian borders,<sup>217</sup> resulting in the deaths of thousands of ISIL militants as well as the loss of approximately 50 percent of the organization’s top leaders.<sup>218</sup>

In addition to the air campaign, U.S. efforts have focused on training and equipping moderate rebels within Syria in order to wage offensive and defensive ground campaigns within the region.<sup>219</sup> Specifically, the Obama administration

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<sup>211</sup> CHRISTOPHER M. BLANCHARD ET AL., CONG. RESEARCH SERV., RL33487, ARMED CONFLICT IN SYRIA: OVERVIEW AND U.S. RESPONSE 2 (Sept. 17, 2014).

<sup>212</sup> *Id.*

<sup>213</sup> *U.S.-Led Air Strikes on Syria Have Killed More Than 500 ISIS and Al-Nusra Fighters*, THE GUARDIAN (Oct. 23, 2014, 11:48 PM), <http://www.theguardian.com/world/2014/oct/23/kobani-death-us-air-strikes-550-isis-syria>.

<sup>214</sup> *See id.*

<sup>215</sup> *Coalition Airstrikes Hit ISIL in Syria, Iraq*, GLOBALSECURITY.ORG (Feb. 27, 2015), <http://www.globalsecurity.org/military/library/news/2015/02/mil-150227-afps01.htm>.

<sup>216</sup> Eric Schmitt, *U.S. Airdrops Weapons and Supplies to Kurds Fighting in Kobani*, N.Y. TIMES, Oct. 20, 2014, <http://www.nytimes.com/2014/10/20/world/middleeast/us-airdrops-weapons-and-supplies-to-kurds-fighting-in-kobani.html>.

<sup>217</sup> Luis Martinez, *U.S. Airstrikes in Iraq and Syria Have Cost \$1 Billion*, ABC NEWS (Dec. 19, 2014, 7:06 PM), <http://abcnews.go.com/Politics/us-airstrikes-iraq-syria-cost-billion/story?id=27728260>.

<sup>218</sup> KENNETH KATZMAN ET AL., CONG. RESEARCH SERV., R43612, THE “ISLAMIC STATE” CRISIS AND U.S. POLICY 10 (Feb. 11, 2015).

<sup>219</sup> *Id.* at 13.

plans to “train and equip an initial force of 5,400 vetted Syrians in the first year of a three-year program....”<sup>220</sup> Training will not take place within Syrian borders but rather at off-site locations in surrounding countries including Turkey, Jordan, Saudi Arabia, and, potentially, Qatar.<sup>221</sup> As in Iraq, forces deployed to the region will not provide ground offensive capability but merely serve in supporting roles focused on carrying out the “train and equip” mission.<sup>222</sup>

Unlike the United States’ efforts in Iraq, operations within Syria have not come at public request or consent of the Syrian government. Rather, the day after President Obama delivered his address to the nation vowing to take the fight to ISIL “wherever they exist,”<sup>223</sup> Syria and Russia released statements opposing U.S. missions within Syrian airspace, labeling any such operation “an act of aggression.”<sup>224</sup> These statements failed to deter U.S. efforts in Syria. To date, the United States continues operations within Syrian territory. The Assad regime remains “in the black” on U.S. engagement of the terrorist organization within its country. Simply put by Syrian President Bashar al-Assad, ““They don’t talk to us, and we don’t talk to them.””<sup>225</sup> However, in the months following the early statements made by the Assad regime, little has been provided in opposition to current U.S. operations within Syria. Rather than publically condemn military action taken by the United States and other countries against ISIL, the Assad regime has remained silent.

Military operations conducted against ISIL in Syria present an interesting dilemma for the Assad regime. On the one hand, preventing the United States from conducting an air campaign within Syria would result in destruction to its own military force. In response to early concerns that Syria would attempt to engage aircraft that breach Syrian airspace, President Obama declared “he would order

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<sup>220</sup> *Id.* at 17.

<sup>221</sup> *U.S. Begins Vetting Syrian Rebels for Military Training: Pentagon*, INTERNATIONAL BUSINESS TIMES (Feb. 27, 2015, 8:23 PM), <http://www.ibtimes.com/us-begins-vetting-syrian-rebels-military-training-pentagon-1831526>.

<sup>222</sup> THE “ISLAMIC STATE” CRISIS AND U.S. POLICY, *supra* note 218, at 17. As of October 2015, the United States suspended its formal “train and equip” operations and replaced it with an approach that provides “military aid to opposition leaders fighting ISIS....” Despite this suspension, the United States “remains committed” to the idea of training Syrian opposition forces to combat ISIS and has not ruled out the possibility of a modified return to such operations in the future. Barbara Starr, Tal Kopan, & Jim Acosta, *U.S. Suspending Program to Train and Equip Syrian Rebels*, CNN.COM (Oct. 9, 2015, 5:21 PM), <http://www.cnn.com/2015/10/09/politics/us-syria-rebels-arms-program-suspended/>.

<sup>223</sup> *Transcript of Obama’s Remarks on the Fight Against ISIS*, *supra* note 4.

<sup>224</sup> *Syria, Russia Oppose Unilateral U.S. Strikes Against ISIL*, PRESSTV (Sept. 11, 2014, 3:15 PM), <http://www.presstv.ir/detail/2014/09/11/378417/us-attack-in-syria-act-of-aggression/> (quoting Russian Foreign Ministry spokesman Alexander Lukashevich’s statement).

<sup>225</sup> Jane Onyanga-Omara, *Syria Says It Gets Info on Airstrikes Against ISIL*, USA TODAY (Feb. 10, 2015, 11:08 AM), <http://www.usatoday.com/story/news/world/2015/02/10/syria-coalition-third-parties/23159669/>.

American forces to wipe out Syria's air defense system."<sup>226</sup> As a result, any attempt to engage U.S. air forces would result in certain devastation of Syria's air capability, significantly weakening its defensive posture and hindering its own efforts to eliminate rebel forces within its homeland.<sup>227</sup> On the other hand, coalition efforts to eliminate ISIL within Syria provide a strategic advantage to the Assad regime, which undoubtedly sees ISIL's attempt to establish an Islamic Caliphate within its territory equally as concerning. Therefore, it seems that silence remains the best, and only, real option.

Regardless of Syria's motivation for acquiescing to airstrikes within its territory, the fact remains that the United States currently engages in extraterritorial warfare against ISIL without first seeking or obtaining Syria's public consent. Whether the United States is legally justified in doing so lies at the heart of this Article.

#### IV. AN ARGUMENT *FOR* UNITED STATES OPERATIONS AGAINST ISIL IN SYRIA

In light of existing facts, the question remains: Can the United States take the fight to ISIL *wherever they exist*?<sup>228</sup> Does international law provide an avenue for unilateral strikes within the territory of a non-consenting nation-State? Though predominant academic views appear to conclude that United States operations in Syria exceed legal parameters,<sup>229</sup> this Article takes an opposing position. In light of the circumstances with ISIL in Syria, United States actions to defeat this expanding terrorist organization firmly lie within the boundaries of international law.

##### A. Extraterritorial Operations Against Non-State Actors: A History

Extraterritorial engagement of non-State actors is not a new concept. History is replete with instances of cross-border campaigns conducted by nation-States in response to a non-State actor taking refuge across the border. At the turn of the twentieth century, military forces from the United States, United Kingdom, France, Japan, and Russia deployed to China in order assist that government with quelling the Boxer Rebellion.<sup>230</sup> In 1916, United States military forces "launched an abor-

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<sup>226</sup> Peter Baker, *Paths to War, Then and Now, Haunt Obama*, N.Y. TIMES, Sept. 13, 2014, at A1, <http://www.nytimes.com/2014/09/14/world/middleeast/paths-to-war-then-and-now-haunt-obama.html>.

<sup>227</sup> See ARMED CONFLICT IN SYRIA: OVERVIEW AND U.S. RESPONSE, *supra* note 211.

<sup>228</sup> See *Transcript of Obama's Remarks on the Fight Against ISIS*, *supra* note 4.

<sup>229</sup> See Bellinger, *supra* note 9 (the United States lacked Syria's consent to conduct military operations within its sovereign territory); see also Deeks, *supra* note 10 (lack of UN Security Council Operations for U.S. military operations in Syria) and Bandow, *supra* note 11 (threat posed by ISIL is not sufficient to trigger self-defensive operations in accordance with Article 51 of the UN Charter).

<sup>230</sup> GARY D. SOLIS, THE LAW OF ARMED CONFLICT: INTERNATIONAL HUMANITARIAN LAW IN WAR 151

tive expedition into Mexico” in order to capture Mexican revolutionary Francisco “Pancho” Villa.<sup>231</sup> In the Soviet-Afghan War, beginning at the end of 1979, Soviet forces invaded Afghanistan to wage combat against the Mujahedeen in an attempt to bring stability to the region.<sup>232</sup> In the early to mid-1980s, the United States conducted covert operations within Nicaragua to destabilize the rogue Sandinista government.<sup>233</sup> The following decade, Ugandan forces engaged irregular forces within the territory of the Democratic Republic of the Congo (DRC) in order to quell cross-border attacks from terrorists residing in the DRC.<sup>234</sup>

Recently, extraterritorial operations have generally focused on the War on Terror, arguably creating a new “category of armed conflict relating to terrorism, to non-State actors, and to a state’s right of self-defense.”<sup>235</sup> The War in Afghanistan amounted to an extraterritorial campaign conducted by the United States to eliminate the Taliban and Al Qaeda within the region.<sup>236</sup> In 2006, Israeli forces conducted a rescue mission within the territory of Lebanon after Hezbollah militants captured and killed several members of the Israeli Defense Force.<sup>237</sup> The cross-border rescue campaign eventually “escalated into a thirty-three-day armed conflict involving thousands of Israeli air strikes and artillery fire missions, on Hezbollah’s part, thousands of rockets fired into Israel.”<sup>238</sup> In 2010, Osama bin Laden was killed by U.S. forces engaged in an extraterritorial strike in Pakistan.<sup>239</sup> A drone strike conducted within Pakistani airspace in September 2010 killed the head of Al Qaeda in Pakistan and Afghanistan, Sheikh Fateh al-Masri.<sup>240</sup> One year later, a drone strike in Yemen killed infamous terrorist, and U.S. citizen, Anwar al-Awlaki.<sup>241</sup> On-going drone strike operations conducted throughout the Middle East—to include Pakistan,

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(2010); see also Jennifer Rosenberg, *1900-Boxer Rebellion: A Rebellion in China Against All Foreigners*, ABOUT EDUCATION, <http://history1900s.about.com/od/1900s/qt/boxer.htm>.

<sup>231</sup> SOLIS, *supra* note 230.

<sup>232</sup> Robert F. Baumann, *Compound War Case Study: The Soviets in Afghanistan*, GLOBALSECURITY.ORG, [http://www.globalsecurity.org/military/library/report/2001/soviet-afghan\\_compound-warfare.htm](http://www.globalsecurity.org/military/library/report/2001/soviet-afghan_compound-warfare.htm).

<sup>233</sup> See *Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)*, 1986 I.C.J. 14 (June 27).

<sup>234</sup> See *Case Concerning Armed Activities on the Territory of the Congo (DRC v. Uganda)*, 2005 I.C.J. 168 (Dec. 19).

<sup>235</sup> SOLIS, *supra* note 230, at 159.

<sup>236</sup> *U.S. State Department Briefing 5th Annual “Live from L” on ISIL and the Use of Force*, *supra* note 6 (in his address Dorosin noted the extraterritorial nature of the campaign).

<sup>237</sup> SOLIS, *supra* note 230, at 159-60.

<sup>238</sup> *Id.*

<sup>239</sup> See *Operation Neptune Spear*, GLOBALSECURITY.ORG, <http://www.globalsecurity.org/military/ops/neptune-spear.htm>.

<sup>240</sup> *Prominent Terrorist Suspects Killed in Drone Strikes*, USA TODAY (Mar. 19, 2015, 6:59 PM), <http://www.usatoday.com/story/news/world/2015/03/19/drone-graphic/25023059/>.

<sup>241</sup> *Id.*

Yemen, Iraq, and Syria—demonstrate continued use of extraterritorial warfare within the War on Terror.

Understandably, extraterritorial operations raise legitimate concern for many, particularly related to ongoing operations within the War on Terror. However, it is important to emphasize that extraterritorial operations are not *per se* unlawful. While history has shown that some extraterritorial operations amounted to violations of international law, the *extraterritorial* nature of the military operation did not render such action unlawful.<sup>242</sup> Other past extraterritorial campaigns remain firmly within the boundaries of international law. As a result, determining the lawful (or unlawful) nature of a particular campaign requires looking beyond the extraterritoriality of the operation and conducting a full analysis of the *jus ad bellum* principles therein.

Finding an international legal foundation for unilateral military operations against ISIL in Syria begins with an analysis of the United Nations Charter. Within the pages of this important international document emerge the individual bricks that, when placed together, provide strong support for the United States' operations against ISIL in Syria.

Developed in the wake of World War II, the United Nations Charter forged an international bond between independent nation-States with the intent to “save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind.”<sup>243</sup> Currently 193 nations have signed and ratified the Charter, thereby becoming members of the United Nations.<sup>244</sup> The United States serves as a founding member, signing the Charter on June 26, 1945 and depositing its instrument of ratification on August 8 of that year.<sup>245</sup> Syria joined the United Nations as an independent state on October 13, 1961.<sup>246</sup> The UN Charter serves as a foundational document designed to create an international system of cooperation that allows nations to “live together in peace with another as good neighbors, and to unite our strength to maintain international peace and security.”<sup>247</sup>

Fundamental to the principle of peace established within the Charter is its emphasis on the respect for the sovereign territory of member States within the United Nations. Firmly established by Article 2(4) of the Charter, “All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner

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<sup>242</sup> See *Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)*, 1986 I.C.J. 14 (June 27); see also *Case Concerning Armed Activities on the Territory of the Congo (DRC v. Uganda)*, 2005 I.C.J. 168 (Dec. 19).

<sup>243</sup> U.N. Charter preamble.

<sup>244</sup> See *Member States of the United Nations*, UN.ORG, <http://www.un.org/en/members/index.shtml>.

<sup>245</sup> *Founding Member States*, UN.ORG, <http://www.un.org/depts/dhl/unms/founders.shtml>.

<sup>246</sup> *Id.*

<sup>247</sup> U.N. Charter preamble.

inconsistent with the Purposes of the United Nations.”<sup>248</sup> As such, any breach of a member-State’s territorial sovereignty must be limited to the exceptions established within the Charter.

Though the Charter largely focuses on resolving conflict through peaceful methods, it is important to note that the first purpose of the Charter is to “maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace.”<sup>249</sup> As a result, the Charter recognizes that there are times in international history when conflict cannot be eradicated through utilization of peaceful methods, and armed conflict becomes necessary to ensure proper “removal of threats to the peace.”<sup>250</sup> The Charter lists several ways in which a nation-State may lawfully engage in military operations, thus providing a foundation for the legal argument in favor of United States operations against ISIL in Syria.

#### B. Syria’s Implicit Consent Through “Strategic Silence”

An optimal approach to conducting military operations within the sovereign territory of another is to gain the host nation-State’s consent. To do so avoids international law concerns, as military operations conducted with the consent of the host nation cannot be regarded as acts “against the territorial integrity or political independence of [the host] state.”<sup>251</sup> Rather, it strictly adheres to the tenets of the Charter by placing at the forefront an acknowledgment and respect for the territorial sovereignty of the host nation-State.<sup>252</sup>

In this case, Syria implicitly consented to military operations against ISIL within its territory in a manner that satisfies international law. This approach extends beyond the stated position of the United States previously articulated by Joshua L. Dorosin of the State Department’s Office of Political-Military Affairs, providing an additional, viable option. Despite early assertions by Syria that military operations within its sovereign territory violate international law,<sup>253</sup> little has been provided

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<sup>248</sup> UN Charter art. 2, para. 4.

<sup>249</sup> UN Charter art. 1, para. 1.

<sup>250</sup> *Id.*

<sup>251</sup> UN Charter art. 2, para. 4.

<sup>252</sup> Prolonged military operations against Taliban forces within Afghanistan were accomplished at the consent of the host nation. Airstrikes against Al Qaeda forces within Yemen are accomplished with the consent of the Yemeni government. Nation-States partnering with the United States in its efforts against ISIL; including Saudi Arabia, Jordan, Bahrain, the United Arab Emirates, and Iraq; provide consent for the United States to conduct airstrikes within their sovereign territories as necessary. Though consent has not been achieved for every extraterritorial strike conducted by the United States in the War on Terror, this option provides the best possible approach to respecting national sovereignty and remaining firmly within the limits of the Charter.

<sup>253</sup> *See Syria, Russia Oppose Unilateral U.S. Strikes Against ISIL*, *supra* note 224.

by the Assad regime to condemn such ongoing operations since that time. This “strategic silence” provides the requisite level of consent necessary to avoid any breach of Article 2(4) of the Charter.

Opponents to this position may rightly assert that Syria has, in fact, publically condemned United States operations within its territory, thus removing any notion of general consent. However, such an argument ignores the complexity of the current situation facing the United States in Syria. One may understand why neither Syria nor the United States seeks to publically stand together on actions taken against ISIL within the country. Syria’s alignment with the United States may hinder its strategic alliance with Russia. However, external efforts to defeat the terrorist organization in Syria benefit the Assad regime by removing ISIL’s threat to the existing governmental structure. Likewise, any connection between the United States and Syria would negatively affect the United States’ standing in the international community in light of Assad’s recent atrocities committed against the Syrian population in violation of international law.<sup>254</sup> Moreover, doing so would significantly impact U.S. alliances with various Middle Eastern nations by appearing to support the fractious Assad regime. Therefore, while both nation-States maintain strong interest in deterring and defeating ISIL within Syria, neither is in a position to publically align itself with the other. For these reasons, the only option is to obtain consent through private channels and/or maintain a position of strategic silence.

The United States previously employed this method within the War on Terror. For example, despite statements to the contrary, reports demonstrate that Pakistani leadership privately consented to Operation NEPTUNE SPEAR<sup>255</sup> prior to commencement of the Seal Team Six mission.<sup>256</sup> Additional operations within Pakistan were likely conducted in a similar manner. That a nation-State may not publically consent to such operations does not remove that nation’s actual consent, allowing the United States to bypass Article 2(4) of the Charter and operate within the boundaries of international law.

As history demonstrates, consent may come in several forms. International law does not specifically require a nation-State to publically consent to a breach

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<sup>254</sup> See ARMED CONFLICT IN SYRIA: OVERVIEW AND U.S. RESPONSE, *supra* note 211, at 17 (discussing how the “Syrian government has used chemical weapons repeatedly against opposition forces and civilians in the country” in violation of international law).

<sup>255</sup> See *Operation Neptune Spear*, GLOBALSECURITY.ORG, <http://www.globalsecurity.org/military/ops/neptune-spear.htm> (discussing the official name of the raid of Osama Bin Laden’s compound in Abbottabad, Pakistan, on the night of May 1, 2011 that resulted in the death of the infamous Al Qaeda leader).

<sup>256</sup> Declan Walsh, *Osama bin Laden Mission Agreed in Secret 10 Years Ago by U.S. and Pakistan*, THE GUARDIAN (May 9, 2011, 2:06 PM), <http://www.theguardian.com/world/2011/may/09/osama-bin-laden-us-pakistan-deal> Leaders within Pakistan, to include General Musharraf, continue to publically insist that consent was never given for Operation NEPTUNE SPEAR. Such public declarations, however, are common in the aftermath of an extraterritorial strike in order to avoid potential political instability within the nation. *Id.*

of its territorial sovereignty. When public alliances threaten the geopolitical position of certain nations, consent must come in another form. In this case, the Assad regime's strategic silence in the face of continuous military operations against ISIL within its territory demonstrates the requisite level of consent necessary to avoid any violation of international law.

### C. Syria's Inability to Achieve "Willing and Able" Status

Even if Syria has not adequately consented to military operations within its territory, the United States' legal position accurately identifies the Assad regime as neither willing nor able to deter the ISIL threat in Syria, thus rendering an external military response necessary in defense of Iraq and the United States regardless of the nation's consent. A fundamental premise of international law is respect for sovereign territory.<sup>257</sup> However, territorial sovereignty cannot be used as a means to prevent a nation-State from defending itself against the aggressive actions of individuals residing across the border. As articulated by renowned military law scholar Gary D. Solis,

If a nonstate terrorist group attacks a state from a safe haven in another host state that will not or cannot take action against the nonstate armed group, the attacked state may employ armed force against the terrorist group within the borders of the host state. Extraterritorial law enforcement is not an attack on the host state, but on its parasitical terrorist group.<sup>258</sup>

The need to exert extraterritorial use of force hinges on the willingness and capability of the host nation-State to internally resolve the threat.<sup>259</sup> Though an

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<sup>257</sup> See U.N. Charter art. 2, para. 4.

<sup>258</sup> SOLIS, *supra* note 230, at 162.

<sup>259</sup> Additional scholars support this general principle as well. Michael Schmitt notes,

[T]he only sensible balancing of the territorial integrity and self-defense rights is one that allows the State exercising self-defense to conduct counter-terrorist operations in the State where the terrorists are located *if* that State is either unwilling or incapable of policing its own territory. A demand for compliance should precede the action and the State should be permitted an opportunity to comply with its duty to ensure its territory is not being used to the detriment of others. If it does not, any subsequent nonconsensual counter-terrorist operations into the country should be strictly limited to the purpose of eradicating the terrorist activity... and the intruding force must withdraw immediately upon accomplishment of its mission....

SOLIS, *supra* note 230, at 161 (quoting Michael N. Schmitt, *Targeting and Humanitarian Law: Current Issues*, 33 ISRAEL YEARBOOK ON HUMAN RIGHTS 59, 88-89 (2003) (emphasis in original)). Professor Yoram Dinstein offers additional support to this position through the following hypothetical:

If the Government of Acadia does not condone the operations of armed bands of terrorist emanating from within its territory against Utopia, but it is too weak

“armed attack” may be deemed sufficient in scale and effect to justify responsive use of force under Article 51, it “does not mean that such attacks automatically warrant the exercise of self-defence *within* the State of the external link.”<sup>260</sup> Therefore, if the nation-State in which the threat resides proves “willing and able” to adequately alleviate the threat, extraterritorial use of force may not be necessary or appropriate.<sup>261</sup>

It is important to emphasize that this principle requires that a nation-State be willing *and* able to respond.<sup>262</sup> It is not one or the other; both criteria must be evident. Assertive claims of “willingness” made by the host nation may result in little or no effect. Likewise, though a nation may be willing to respond, they may not possess the necessary level of personnel, training, or equipment to render them capable.

Determining whether a host nation-State is truly “willing and able” to respond to threats within its territory may prove difficult. There is no generally recognized amount of time required for the nation-State to internally resolve the matter. Rather, as in many areas, the law appears to utilize the “reasonableness” standard.<sup>263</sup> Such decisions require careful deliberation and extensive consideration of all political, diplomatic, and military consequences. Regardless, the nation-State urging extraterritorial use of force must first provide the host nation with an opportunity to resolve the issue. If that nation proves unwilling or unable to adequately respond to the threat, extraterritorial use of force may be justified.

If a nation-State determines an extraterritorial strike necessary, any application of force within the territory of the host nation-State must be limited to the non-State threat.<sup>264</sup> To target personnel or property not directly linked to the perpetrators of the armed attack cannot be justified as a legitimate self-defense operation. As

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(militarily, politically or otherwise) to prevent these operations, Arcadian responsibility *vis-à-vis* Utopia (if engaged at all) may be nominal. Nonetheless, it does not follow that Utopia must patiently endure painful blows, only because no sovereign State is to blame for the turn of events.

SOLIS, *supra* note 230, at 162 (quoting YORAM DINSTEIN, *WAR, AGGRESSION, AND SELF-DEFENCE* 245 (4th. ed. 2011)). Though not specifically articulated within existing international case law, general consensus within the legal community suggests that the “willing and able” principle is emerging as customary international law.

<sup>260</sup> TOM RUYS, ‘ARMED ATTACK’ AND ARTICLE 51 OF THE UN CHARTER 502 (2010).

<sup>261</sup> *See generally id.* at 502-10 (discussing the limitations of the “willing and able” principle).

<sup>262</sup> *U.S. State Department Briefing 5th Annual “Live from L” on ISIL and the Use of Force*, *supra* note 6 (Dorosin emphasized the need to assess both the “willing” and “able” status of the host-nation when applying this principle.).

<sup>263</sup> SOLIS, *supra* note 230, at 162 (“If a cross-border response...is considered lawful, before exercising self-defense in the form of a nonconsensual violation of a...host state’s sovereignty, an attacked state must allow the host state a *reasonable* opportunity to take action....”) (emphasis added).

<sup>264</sup> *See* SOLIS, *supra* note 230, at 163 (“If [extraterritorial use of force] by the attacked state follows, care must be taken that only objects connected to the [threat] be targeted.”).

a result, painstaking effort must be exerted to limit the scope and breadth of any defensive strike.

At best, Syria may be seen as a “willing, but *unable*” nation-State. While Syria may present a willing facade, its inability to contain, let alone eliminate, ISIL within its borders renders them “unable.” Simply stated, the Assad regime is defunct. Internal violence waged by rebel forces within Syria over the course of several years has exhausted military efforts and significantly destabilized the nation. Capitalizing on the instability, ISIL forces captured, and continue to hold, a vast expanse of Syrian territory, to include Syria’s second largest oil field.<sup>265</sup> ISIL currently controls approximately half of Syria.<sup>266</sup> The Assad regime has exerted little, if any, effort to eliminate ISIL within its territory. Syrian tribesmen have taken up the banner in response.<sup>267</sup> However, all efforts to remove ISIL strongholds within the country have proven fruitless, rendering an external military response necessary.

An additional argument may be made that Syria’s lack of any legitimate political or governmental structure over certain regions within its territory removes those portions of land from Syrian control. Though not currently adopted by the United States, this approach offers a novel defense of U.S. operations against ISIL in those specific regions. Simply stated, you cannot control that which you do not have. In this case, not only has ISIL captured approximately half of Syria’s total territory, the militant group operates an independent governmental system therein. Because the Assad regime does not maintain “territorial integrity or political independence” over such areas, the United States may be able to engage in military operations within those regions without violating Article 2(4) of the Charter.<sup>268</sup> Such an approach presents an interesting quandary for ISIL, in that establishing governmental and political control over vast swaths of territory carries with it the unintended consequence of further conforming military operations against the group to international law.

Though a possible legal argument, this likely does not prove an optimal approach. Establishing this position would require, at least in part, a public acknowledgement of the success and potential legitimacy of the ISIL government in Syria. Such an approach may highlight the terrorist organization’s accomplishments on the ground while unintentionally bolstering the ISIL’s reputation and recruitment capability. The United States may attempt to focus solely on the loss of Syrian control while avoiding the question of any further ISIL legitimacy. However, doing so may inadvertently highlight the extent of ISIL’s control within the region, thereby drawing attention to the organization’s forward progress—something that, perhaps,

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<sup>265</sup> Aisch et al., *supra* note 23.

<sup>266</sup> *ISIL Fighters Capture Syrian City of Palmyra, Site of Famed Ruins*, *supra* note 78.

<sup>267</sup> *Syria Tribes Join Army in Fighting ISIL*, GLOBALSECURITY.ORG (Dec. 29, 2014, 8:32 AM), <http://www.globalsecurity.org/wmd/library/news/syria/2014/syria-141229-presstv01.htm>.

<sup>268</sup> U.N. Charter art. 2, para. 4.

the United States and Syria do not wish to do. Though this approach provides a possible legal argument, the bang is likely not worth the buck.

For these reasons, Syria's failure to achieve "willing and able" status likely provides the better legal option. As a result of the minimal effort and zero effect of Syrian forces against ISIL, the organization continues to gain unprecedented strength. The nation's porous borders have resulted in thousands of individuals and immense numbers of weapons reaching ISIL-controlled locations despite repeated requests from the United Nations Security Council to tighten border security. ISIL established a caliphate-based system of government throughout its captured territories and brutally murdered thousands of innocent Syrian citizens. Millions of Syrian citizens have fled to surrounding nations in the hope of avoiding caliphate control and/or death. The Assad regime's failure to establish itself as a "willing and able" nation-State capable of deterring and defeating ISIL within its territory renders an external military response necessary and appropriate under international law.

#### D. Self-Defense: the United States, Iraq, and ISIL

The United States correctly cites Article 51 of the Charter as authorization for military operations against ISIL in Syria under the doctrines of collective and individual self-defense. In light of the significant threat posed by ISIL in Syria, extraterritorial attacks are authorized by international law regardless of Syrian consent. The notion of self-defense is regarded as "one of the hallmarks of international law."<sup>269</sup> "Self-help is a characteristic feature of all primitive legal systems, but in international law it has been honed to an art form."<sup>270</sup> Specifically, Article 51 of the Charter provides:

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 the measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defense shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.<sup>271</sup>

In light of Article 2(4), which "promulgates the general obligation to refrain from the use of inter-State" applications of military power, "Article 51 introduces an

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<sup>269</sup> YORAM DINSTEIN, *WAR, AGGRESSION, AND SELF-DEFENCE* 175 (2d. ed. 1994).

<sup>270</sup> *Id.*

<sup>271</sup> U.N. Charter, art. 51 (emphasis added).

exception to this norm by allowing Member States to employ force in self-defence in the event of an armed attack.<sup>272</sup>

### 1. Identifying an “Armed Attack” Under Article 51

Operations conducted in self-defense under Article 51 first require the presence of an “armed attack.”<sup>273</sup> Despite the importance of this particular term, the Charter fails to define what actions actually amount to an “armed attack.” International case law has also failed to supply an adequate standard. Nonetheless, three important principles have emerged to assist in identifying the level of “armed attack” worthy of an Article 51 response: *rationae materiae*, *rationae temporis*, and *rationae personae*.<sup>274</sup> In this case, determining whether Article 51 authorizes the United States to engage in military operations against ISIL in Syria requires an analysis of each of these important principles.

#### (a) *Rationae Materiae: The Gravity of Attack*

Certainly not every act of aggression against a nation-State justifies an Article 51 response. The principle of *rationae materiae* addresses this concept by identifying those acts that rise to the level of “armed attack.”<sup>275</sup> Unlike Article 42 of the Charter, which allows the Security Council to authorize military force when they determine the existence of “any threat of peace, breach of the peace, or act of aggression,”<sup>276</sup> Article 51 requires the higher standard of responding to an “armed attack.”<sup>277</sup> Therefore, determining the level of aggression necessary to justify use of force under this Article becomes a preeminent issue.

In its 1986 decision, *Nicaragua v. United States of America*, the International Court of Justice (ICJ) attempted to articulate what circumstances amount to an “armed attack” that justify a military response under Article 51.<sup>278</sup> In that case, the nation of Nicaragua brought action in the ICJ for alleged violations of international law surrounding military operations conducted by the United States within its sovereign territory.<sup>279</sup> After the ouster of President Anastasio Somoza Debayle by the Frente Sandinista de Liberacion Nacional (Sandinistas), opponents to the

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<sup>272</sup> DINSTEIN, *supra* note 269, at 177.

<sup>273</sup> U.N. Charter, art. 51.

<sup>274</sup> See generally RUYSS, *supra* note 260, at 126-485 (discussing the intricacies of these three important principles).

<sup>275</sup> See RUYSS, *supra* note 260, at 126.

<sup>276</sup> U.N. Charter, art. 42.

<sup>277</sup> STEPHEN DYCUS, ARTHUR L. BERNEY, WILLIAM C. BANKS, & PETER RAVEN-HANSEN, NATIONAL SECURITY LAW 215 (Vicki Been et al. eds., 5th ed. 2011).

<sup>278</sup> See *Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)*, 1986 I.C.J. 14 (June 27).

<sup>279</sup> *Id.*

Sandinista government “formed themselves into irregular military forces” known as the “Contras.”<sup>280</sup> Partially in response to intelligence “reports that the Sandinistas were supplying arms and other logistical support to guerrillas in El Salvador, the Reagan administration began covert aid to the Contras.”<sup>281</sup> Additional U.S. operations to deter the Sandinistas included the “mining of Nicaraguan ports or waters in early 1984; and certain attacks on, in particular, Nicaraguan port and oil installations in late 1983 and early 1984.”<sup>282</sup>

The United States justified its involvement in Central America through assertion of the collective self-defense doctrine. The ICJ rejected this argument because, inter alia, the acts committed by the Sandinistas did not rise to an “armed attack” under Article 51.<sup>283</sup> As stated by the ICJ, “[T]he Court does not believe that the concept of ‘armed attack’ includes not only acts by armed bands where such acts occur on a significant scale but also assistance to rebels in the form of the provision of weapons or logistical or other support.”<sup>284</sup> Within their decision, the ICJ appeared to distinguish “between ‘armed attacks’ and less grave forms of the use of force,” finding that application of military force is “primarily one of scale and effects.”<sup>285</sup> Though the actions of Nicaragua did not amount to an “armed attack” justifying a military response by the United States, the ICJ, in dicta, “raise[d] the question whether *forcible* counter-measures may sometimes be undertaken against less grave uses of force.”<sup>286</sup> As a result, despite the ICJ’s lengthy analysis in *Nicaragua*, one is still left wondering what actions amount to an “armed attack.” In the end, the only definitive answer offered by the ICJ was that “provision of weapons or logistical or other support” is simply not enough.<sup>287</sup>

Scholars have repeatedly criticized the ICJ’s decision in *Nicaragua*. As stated by legal expert Tom Ruys:

Most authors accept that the *Nicaragua* case establishes the broad guidelines for the evaluation of the ‘armed attack’ requirement and agree that not every use of force warrants the exercise of the right of self-defence. Nonetheless, a considerable group of scholars has expressed strong discomfort with the Court’s approach, and has

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<sup>280</sup> Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14, ¶ 18 (June 27).

<sup>281</sup> DYCUS ET AL., *supra* note 277, at 62.

<sup>282</sup> Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14, ¶ 75 (June 27).

<sup>283</sup> *Id.* at ¶ 195.

<sup>284</sup> *Id.*

<sup>285</sup> RUYS, *supra* note 260, at 140.

<sup>286</sup> *Id.* at 141.

<sup>287</sup> Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14, ¶ 195 (June 27).

either tried to bend the Court's dicta so as to limit the implications of its reasoning to indirect military aggression or collective self-defence, or has simply rejected the Court's categorization.<sup>288</sup>

As a result of the ambiguous approach to the concept of "armed attack" provided by the ICJ, scholars have taken three possible positions regarding the gravity of attack necessary to merit an Article 51 response: (1) "Article 51 requires a 'substantial/massive' attack," (2) "a 'small-scale' attack is sufficient to activate Article 51," and/or (3) "any unlawful use of force permits a proportionate defensive response."<sup>289</sup> To apply these options to customary practice, Ruys suggests the answer likely falls within the first two options, with "considerable grey area" in between.<sup>290</sup>

(b) *Rationae Temporis: The Imminence of Attack*

Where the principle of *rationae materiae* addresses the gravity of physical attack that justifies a military response under Article 51, *rationae temporis* identifies circumstances where a nation-State may lawfully defend itself under the Charter without first experiencing the blows of a physical attack. In other words, "(1) are there situations where self-defence can be exercised prior to the occurrence of an armed attack?; and (2) at what moment does an armed attack begin to take place?"<sup>291</sup> As will be demonstrated below, the first question is firmly answered in the affirmative. The second question is a different story altogether.

As history demonstrates, there are moments when nation-States may lawfully exert military force against an aggressor without first experiencing a physical attack. This international principle dates back to the 1830s during the *Caroline* affair. In 1837, British forces crossed from Canada into American territory to attack the *Caroline*, an American steamship that had prior aided Canadian rebels in actions against Britain.<sup>292</sup> Although the *Caroline* was at times used for military operations against British forces, the vessel was not actively engaged in any operation at the moment British forces invaded American territory and seized the vessel. The *Caroline* was set ablaze by British troops and subsequently sent "hurling over the Niagara Falls."<sup>293</sup>

Over the course of the next four years, United States and British ambassadors sent correspondence to one another discussing the legality, or illegality, of

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<sup>288</sup> Ruys, *supra* note 260, at 147.

<sup>289</sup> *Id.* at 145.

<sup>290</sup> *Id.* at 155.

<sup>291</sup> *Id.* at 251.

<sup>292</sup> See *1837-Caroline Affair*, HISTORY CENTRAL (Sept. 12, 2013), <http://www.historycentral.com/Ant/caroline.html>.

<sup>293</sup> *Id.*

Britain's actions.<sup>294</sup> One of the preeminent issues discussed were the conditions that would render military action necessary and appropriate under the self-defense doctrine. Though Britain's Ambassador Henry Stephen Fox described the attack as a necessary self-defense measure in response to repeated abuses by the *Caroline*,<sup>295</sup> the United States' Daniel Webster articulated the reasons why such an attack violated international principles of war.<sup>296</sup> Ambassador Webster asserted that the right of self-defense required the Government "show a necessity of self-Defense, *instant, overwhelming, leaving no choice of means, no moment for deliberation.*"<sup>297</sup> Since the *Caroline* did not present an imminent concern at the moment British forces seized the vessel, such actions could not be characterized as necessary for the nation's self-defense, thus resulting in a violation of international law. History demonstrates that Ambassador Webster's argument won the day. Known as the "Caroline Doctrine," this legal principle of anticipatory self-defense is firmly established within customary international law and authorizes a nation-State to engage in defensive measures when an attack against that nation is considered "imminent."<sup>298</sup>

Applying the Caroline Doctrine to Article 51 requires a fusion of the Charter and customary international law. Doing so in this case yields the conclusion that attacks of sufficient gravity that are yet to occur, but deemed "imminent," may fall under the definition of an "armed attack." In other words, the definition of "armed attack" under Article 51 includes attacks that are yet to occur but which future occurrence is deemed "imminent." Such attacks justify an anticipatory response under Article 51.

The International Court of Justice appears to accept this general understanding of self-defense. The ICJ's opinion in *Nicaragua* demonstrates the applicability of anticipatory self-defense to Article 51. As noted by legal scholar Yoram Dinstein:

The International Court of Justice, in the *Nicaragua* case, based its decision on the norms of customary international law concerning self-defence as a sequel to an armed attack. However, the Court stressed that this was due to the circumstances of the case, and it passed no judgment on 'the issue of the lawfulness of a response to the imminent threat of armed attack.'<sup>299</sup>

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<sup>294</sup> HENRY SHUE & DAVID RODIN, PREEMPTION 118-19 (Henry Shue & David Rodin eds., 2007).

<sup>295</sup> DINSTEIN, *supra* note 269, at 243.

<sup>296</sup> See SHUE & RODIN, *supra* note 294.

<sup>297</sup> SHUE & RODIN, *supra* note 294 (emphasis added) (quoting Letter from Daniel Webster, to Ambassador Henry Stephen Fox (Apr. 24, 1841) in 1 THE PAPERS OF DANIEL WEBSTER: DIPLOMATIC PAPERS, 1841-1843, at 62 and 67-68 (1983)).

<sup>298</sup> See DINSTEIN, *supra* note 269, at 182.

<sup>299</sup> DINSTEIN, *supra* note 269, at 183.

By specifically limiting its decision to the facts at issue in *Nicaragua*, and further acknowledging the anticipatory self-defense doctrine, the ICJ affirmed the continued existence of this important defensive option within Article 51.

Support for the applicability of the Caroline Doctrine within Article 51 is not limited to ICJ opinion. According to Yoram Dinstein, “It would be absurd to require that a defending State should sustain and absorb a devastating (perhaps fatal) blow, only to prove an immaculate conception of self-defence.”<sup>300</sup> Former UN Secretary General Kofi Annan further acknowledged this right, stating “Imminent threats are fully covered by Article 51, which safeguards the inherent right of sovereign States to defend themselves against armed attack. Lawyers have long recognized that this covers an imminent attack as well as one that has already happened.”<sup>301</sup> Thus, the current international position supports the doctrine of anticipatory self-defense as applied to Article 51 for circumstances where an attack is “imminent.”

Over the course of recent history, the Caroline Doctrine has evolved into a general theory of “preemption.”<sup>302</sup> Use of this term emerged with the War on Terror and subsequent release of the 2002 National Security Strategy (NSS). Therein, the United States “embrac[ed] for the first time as public policy ‘the option of *preemptive* actions to counter a sufficient threat to our national security.’”<sup>303</sup> Known today as the “Bush Doctrine,” this approach may be “summarized by [the] phrase that the best defense against terrorists and rogue states is a good offense.”<sup>304</sup> The doctrine of preemption against terrorism resonates within the NSS: “While the United States will constantly strive to enlist the support of the international community, we will not hesitate to . . . exercise our right of self-defense by acting preemptively against such terrorists, to prevent them from doing harm against our people and our country.”<sup>305</sup> Prior to the United States’ 2003 invasion of Iraq, the Bush administration repeatedly asserted the principles articulated within the 2002 NSS as a foundation for the Iraqi War.<sup>306</sup>

Despite a change in terminology, however, the preemption doctrine utilized within the NSS actually mirrors the customary international law principle of anticipatory self-defense. The NSS itself recognizes its *rationae temporis* limitations

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<sup>300</sup> *Id.* at 190.

<sup>301</sup> SHUE & RODIN, *supra* note 294, at 105-06 (quoting Kofi Annan, Report of the Secretary General, In Larger Freedom: Towards Development, Security, and Human Rights for All, Address Before the United Nations General Assembly (Mar. 21, 2005)).

<sup>302</sup> See SHUE & RODIN, *supra* note 294, at 93.

<sup>303</sup> DYCUS ET AL., *supra* note 277, at 362 (citing OFFICE OF THE WHITE HOUSE, THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES (Sept. 2002)).

<sup>304</sup> See SHUE & RODIN, *supra* note 294, at 93.

<sup>305</sup> OFFICE OF THE WHITE HOUSE, THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES 6 (Sept. 2002).

<sup>306</sup> See SHUE & RODIN, *supra* note 294, at 90.

imposed by international law: “[N]ations need not suffer an attack before they can lawfully take action to defend themselves against forces that present an imminent danger of attack.”<sup>307</sup> In today’s international legal landscape, “the dominant view is that preemption may be considered legitimate under circumstances captured by Daniel Webster’s 1841 formulation: preemption is justified only when there is ‘a necessity of self-Defense, instant, overwhelming, leaving no choice of means, and no moment for deliberation.’”<sup>308</sup> As a result, interchangeable use of these two terms appears to present an accurate representation of current international law.

In addition to the doctrine of preemption, the Bush Doctrine is often associated with another proposed principle of *jus ad bellum*, that of “prevention.” While occasionally misunderstood as the same principle,<sup>309</sup> the two doctrines of self-defense are wholly distinguishable. As defined by Hew Strachan, “‘Preemption was an idea that grew from the operational level of war; it was a military concept, whereas preventive war was a political one.... Linked to stratagem, ruse and deception, it [preemption] embodied the core strategic principle of surprise in war.’”<sup>310</sup> On the other hand, “Preventive intervention is not a response to actual aggression, but to aggression expected at some indefinite time in the future.”<sup>311</sup> Unlike the Caroline Doctrine, which characterized the level of imminence necessary for self-defense as “instant, overwhelming, leaving no choice of means, no moment for deliberation,”<sup>312</sup> preventive self-defense responds to a potential threat lying beyond the horizon, leaving available multiple means of response and ample time for deliberation.

The doctrine of prevention most often links itself to the threat of weapons of mass destruction (WMD).<sup>313</sup> Though preventive self-defense falls within the *rationae temporis* argument, the primary justification for this approach to the threat of WMDs closely aligns itself with the principle of *rationae materiae* as well. That is, though preventive measures take place prior to any physical “armed attack,” the gravity, or potential devastation, of a WMD attack is so overwhelming as to necessitate a preventive response. Israel’s strategic strike on Iraq’s Osirak nuclear reactor in 1981 provides an on-point example of preventive self-defense in action.<sup>314</sup> In 2003, the

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<sup>307</sup> OFFICE OF THE WHITE HOUSE, THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES 15 (Sept. 2002).

<sup>308</sup> SHUE & RODIN, *supra* note 294, at 118.

<sup>309</sup> See generally SHUE & RODIN, *supra* note 294, at 23-39 (providing a historical perspective that appears to blur the lines between these two theories of anticipatory self-defense).

<sup>310</sup> SHUE & RODIN, *supra* note 294, at 27.

<sup>311</sup> STEVEN P. LEE, INTERVENTION, TERRORISM, AND TORTURE 119 (Steven P. Lee ed., 2007).

<sup>312</sup> Letter to Ambassador Henry Stephen Fox (Apr. 24, 1841), 1 THE PAPERS OF DANIEL WEBSTER: DIPLOMATIC PAPERS, 1841-1843, at 62 and 67-68 (1983).

<sup>313</sup> See generally OFFICE OF THE WHITE HOUSE, THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES 15 (Sept. 2002). The 2002 National Security Strategy states, “We must be prepared to stop rogue states and their terrorist clients before they are able to threaten or use weapons of mass destruction against the United States and our allies and friends.” *Id.*

<sup>314</sup> See Malfrid Braut-Hegghammer, *Attacks on Nuclear Infrastructure: Opening Pandora’s Box?*,

Bush administration's focus on WMDs in Iraq became a notable motivator for use of force against the Hussein regime.<sup>315</sup> This may be one reason for the confusion between preemption and prevention, as both principles are exerted within the Bush Doctrine in a separate, and rather imprecise, manner.

Despite President Bush's departure from office in 2008, the United States continues to maintain a policy of preventive self-defense as related to weapons of mass destruction. This may be most recently evidenced by the 2014 Quadrennial Defense Review.<sup>316</sup> As a result, the doctrine of prevention remains an important piece of U.S. public policy today.

Regardless of the position held by nation-States such as the United States and Israel, prevailing legal opinion views preventive strikes as a violation of international law. Though the gravity of a future threat may be great, Article 51 requires establishment of an actual, imminent threat prior to initiating a military response. Any use of force prior to establishing an "imminent" threat would result in a violation of, both, Article 2(4) and Article 51 of the UN Charter. Simply put, "While preemption may sometimes be justified, preventive war is not justified."<sup>317</sup>

(c) *Rationae Personae: Attacks by Non-State Actors*

The final principle for consideration when approaching an "armed attack" under Article 51 is whether the Charter extends to attacks committed, not by a nation-State, but by non-State actors. Resolving this issue, known as *rationae personae*,<sup>318</sup>

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QUARTERLY JOURNAL: INTERNATIONAL SECURITY (Harvard Kennedy School, Belfer Center for Science and International Affairs), Oct. 2011.

<sup>315</sup> See DYCUS ET AL., *supra* note 277, at 360. In his March 19, 2003 address to the nation, President Bush stated:

Our nation enters this conflict [in Iraq] reluctantly—yet, our purpose is sure.... The people of the United States and our friends and allies will not live at the mercy of an outlaw regime that threatens the peace with weapons of mass murder. We will meet that threat now...so that we do not have to meet it later with armies of firefighters and police and doctors on the streets of our cities.

*Id.*

<sup>316</sup> See DEPARTMENT OF DEFENSE, 2014 QUADRENNIAL DEFENSE REVIEW (Mar. 4, 2014) "Global prevention, detection, and response efforts are essential to address dangers across the WMD spectrum before they confront the homeland.... This includes preventing the acquisition of, accounting for, securing, and destroying as appropriate WMD abroad...." The document further notes, "Advances in missile technology and the proliferation of these capabilities to new actors represent a growing challenge to the U.S. military's defense of the homeland. We must stay ahead of limited ballistic missile threats from regional actors such as North Korea and Iran, seeking to deter attacks or prevent them before they occur." *Id.* (emphasis added) As ballistic missiles provide the delivery capability in which to conduct a nuclear attack, preventive strikes as proposed here may be viewed by synonymous with preventive measures directly against nuclear weapons.). *Id.*

<sup>317</sup> SHUE & RODIN, *supra* note 294, at 118.

<sup>318</sup> See RUYS, *supra* note 260, at 368.

is crucial to determining whether a nation-State may assert its right to self-defense under Article 51 against terrorist organizations such as ISIL. Unfortunately, similar to the legal development of *rationae materiae*, international resolution of this principle is quite dissatisfying.

In 2004, the ICJ approached the applicability of Article 51 to non-State actors in its *Israeli Wall Advisory Opinion*.<sup>319</sup> In *Israeli Wall*, the General Assembly of the United Nations sought an advisory opinion from the ICJ regarding “the legal consequences arising from the construction of the wall being built by Israel, the occupying Power, in the Occupied Palestinian Territory, including in and around East Jerusalem....”<sup>320</sup> Israel asserted its right to construct the wall as a necessary and appropriate self-defense measure in accordance with Article 51 of the Charter.<sup>321</sup> The ICJ flatly rejected this argument by asserting, “Article 51 of the Charter, the Court notes, recognizes the existence of an inherent right of self-defence in the case of armed attack by one State against another State.”<sup>322</sup> Since the Occupied Palestinian Territory was not a foreign state, but rather a territory within Israel’s territory, “Article 51 of the Charter has no relevance in this case.”<sup>323</sup>

The ICJ’s advisory opinion was not unanimous. The dissenting opinions by three ICJ judges specifically “criticized the Court’s State-centric reading of Article 51.”<sup>324</sup> In his dissenting opinion,

Judge Kooijmans, for instance, conceded that it has been the generally accepted interpretation for more than fifty years that ‘armed attacks’ should be committed by another State. In his view, however, [Security Council] resolutions 1368 and 1373 (2001)<sup>325</sup> has introduced a completely new element vis-à-vis ‘acts of international terrorism.’<sup>326</sup>

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<sup>319</sup> See Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 2 (Jul. 9).

<sup>320</sup> Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 2, 1 (Jul. 9).

<sup>321</sup> See RUYS, *supra* note 260, at 473.

<sup>322</sup> Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 2, 12 (Jul. 9).

<sup>323</sup> *Id.*

<sup>324</sup> RUYS, *supra* note 260, at 475.

<sup>325</sup> See RUYS, *supra* note 260, at 473 (In 2001, the United Nations Security Council issued resolutions 1368 and 1373 that “clearly recognized the right of States to use force in self-defence against terrorist attacks....”).

<sup>326</sup> RUYS, *supra* note 260, at 475.

Additionally, “Judge Buergenthal noted that resolutions 1368 and 1373 supported a more flexible construction of Article 51.”<sup>327</sup>

The *Israeli Wall* decision received staunch criticism from the international legal community. Legal scholar Tom Ruys notes that *Israeli Wall* “has rightly been criticized for raising more questions than it solves and for constituting a missed opportunity to clarify the *rationae personae* controversy.”<sup>328</sup> International law professor Sean Murphy states,

At best, the [majority] position represents imprecise drafting, and thus calls into question whether the advisory opinion process necessarily helps the Court ‘to develop its jurisprudence and to contribute to the progress of international law.’ At worst, the position conflicts with the language of the UN Charter, its *travaux préparatoires*, the practice of states and international organizations, and common sense.<sup>329</sup>

Scholar Yoram Dinstein bluntly provides, “Armed attacks by non-State armed bands are still armed attacks, even if commenced only from—and not by—another State.”<sup>330</sup> Further,

[I]t does not follow that Utopia must patiently endure painful blows, only because no sovereign State is to blame for the turn of events.... Just as Utopia is entitled to exercise self-defence against an armed attack by Arcadia, it is equally empowered to defend itself against armed bands operating from within the Arcadian territory.<sup>331</sup>

The following year, the ICJ had a second opportunity to resolve this issue in *DRC v. Uganda*.<sup>332</sup> In *DRC*, “the Court examined whether the presence of Ugandan troops on Congolese territory... amounted to a breach of Article 2(4) UN Charter.”<sup>333</sup> Though Uganda admitted to military operations within the territory of the DRC, it asserted that, among other things, operations were lawful under Article 51 of the Charter to defend itself from attacks by (non-State) irregular forces within the

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<sup>327</sup> *Id.*

<sup>328</sup> RUYS, *supra* note 257, at 476.

<sup>329</sup> Sean D. Murphy, *Self-Defense and the Israeli Wall Advisory Opinion: An Ipse Dixit from the ICJ?*, 99 AM. J. INT’L L. 62, 62 (2005).

<sup>330</sup> DINSTEIN, *supra* note 269, at 238.

<sup>331</sup> *Id.* at 240.

<sup>332</sup> See Case Concerning Armed Activities on the Territory of the Congo (*DRC v. Uganda*), 2005 I.C.J. 168 (Dec. 19).

<sup>333</sup> RUYS, *supra* note 260, at 479.

DRC.<sup>334</sup> The ICJ again rejected the self-defense argument.<sup>335</sup> However, as noted by international law scholar Sean Murphy, the manner in which the ICJ delivered its opinion “may have signaled a retreat from its position” in *Israeli Wall*.<sup>336</sup> Rather than specifically reject the argument that Article 51 applies to attacks by non-State actors, it determined “the Court has no need to respond to the contentions of the Parties as to whether and under what conditions contemporary international law provides for a right of self-defence against large-scale attacks by irregular forces.”<sup>337</sup> Though the ultimate holding suggested continued support of *Israeli Wall*, the approach adopted by the majority suggests a softening of its position.

Separate opinions provided by two ICJ judges in *DRC* suggest that a strict application of Article 51 to only state actors is “out-of-step with both the Security Council and state practice.”<sup>338</sup> In a separate opinion, Judge Kooijmans specifically recognized the needed expansion of Article 51 to attacks committed by non-State actors:

If the activities of armed bands present on a State’s territory cannot be attributed to that State, the victim State is not the object of an armed attack by it. But if the attacks by [armed bands present on a State’s territory] would, because of their scale and effects, have [been] classified as an armed attack had they been carried out by regular armed forces, there is nothing in the language of Article 51 of the charter that prevents the victim State from exercising its *inherent* right of self-defence.<sup>339</sup>

Judge Simma of the ICJ went further in his separate opinion, criticizing the majority for once again rendering an incomplete and erroneous decision regarding the issue. “The Court should not have avoided dealing with the issue of self-defence against large-scale cross-boundary armed attacks by non-State actors but rather it should have taken the opportunity to clarify a matter to the confused state of which it has itself contributed.”<sup>340</sup> Judge Simma then articulated a need for the ICJ to align itself with predominant international opinion and practice:

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<sup>334</sup> Case Concerning Armed Activities on the Territory of the Congo (DRC v. Uganda), 2005 I.C.J. 168, ¶ 128 (Dec. 19).

<sup>335</sup> *Id.* at ¶ 147.

<sup>336</sup> E-mail from Sean D. Murphy, International Law Professor, The George Washington University Law School to author (Mar. 8, 2015) (on file with author).

<sup>337</sup> Case Concerning Armed Activities on the Territory of the Congo (DRC v. Uganda), 2005 I.C.J. 168, ¶ 128 (Dec. 19).

<sup>338</sup> E-mail from Sean D. Murphy, International Law Professor, The George Washington University Law School to author (Mar. 8, 2015) (on file with author).

<sup>339</sup> Concerning Armed Activities on the Territory of the Congo (DRC v. Uganda), 2005 I.C.J. 168, 314 (Dec. 19) (separate opinion of Judge Kooijmans).

<sup>340</sup> Concerning Armed Activities on the Territory of the Congo (DRC v. Uganda), 2005 I.C.J. 168, 334 (Dec. 19) (separate opinion of Judge Simma).

Such a restrictive reading of Article 51 [held by the ICJ in *Israeli Wall* and *DRC*] might well have reflected the state, or rather the prevailing interpretation, of the international law on self-defence for a long time. However, in the light of more recent developments not only in State practice but also with regard to accompanying opinion juris, it ought urgently to be reconsidered, also by the Court. As is well known, these developments were triggered by the terrorist attacks of September 11, in the wake of which claims that Article 51 also covers defensive measures against terrorist groups have been received far more favourably by the international community than other extensive re-readings of the relevant Charter provisions.... Security Council resolutions 1368 (2001) and 1373 (2001) cannot but be read as affirmations of the view that large-scale attacks by non-State actors can qualify as ‘armed attacks’ within the meaning of Article 51.<sup>341</sup>

Opposing views surrounding this issue demonstrate that international opinion regarding the application of Article 51 to non-State actors remains unresolved today; however, the ICJ’s position likely articulates a minority viewpoint in today’s international legal landscape. Although *Israeli Wall* and *DRC* provide the most recent discussions on the issue by the ICJ, over a decade has passed since the Court rendered these decisions. Since that time, international terrorism has continued to rise to unprecedented levels, as seen with the formation and expansion of ISIL. Countless operations have been waged against ISIL within Iraq and Syria to date with little, or no, objection from the international community. As a result, Judge Simma’s position in *DRC* likely articulates the present-day viewpoint held by the international community in law and practice, thus supporting Article 51’s application to attacks waged by non-State actors.

## 2. Collective Self-Defense: The United States and Iraq

Article 51 of the United Nations Charter first provides a lawful basis for United States military operations in Syria through the doctrine of collective self-defense. Under Article 51, the Charter authorizes “the use of force by one or more states to assist another state that is the victim of unprovoked aggression.”<sup>342</sup> Such is the case with ISIL in Iraq.

Recent history is replete with instances of lawful military operations under the collective self-defense doctrine. The United States’ response to the Iraqi invasion of Kuwait in 1990 provides one such example. “The military action taken by the American-led coalition against Iraq in support of Kuwait...shows that ‘any state

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<sup>341</sup> *Id.* at 337.

<sup>342</sup> DYCUS ET AL., *supra* note 277, at 324.

may come to the aid of a state that has been illegally attacked.”<sup>343</sup> Other examples of collective self-defense include the United States and Lebanon in 1958, the United Kingdom and Jordan in 1958, and the United States in Vietnam from 1961 to 1975, just to name a few.<sup>344</sup>

Though collective self-defense maintains similarities with the notion of consent, the two concepts differ in several respects. First, consent does not trigger Article 51 of the Charter. Importantly, a nation that consents to extraterritorial force within its territory may not, itself, be the victim of an “armed attack.” As a result, Article 51 may not come into play. Second, in a similar vein, a consenting host nation-State may not itself be in any danger in a consent-based scenario. Rather, the nation-State seeking consent for extraterritorial operations within another nation’s territory does so in response to its own, individual self-defense concerns. Third, consent typically comes in the form of spontaneous agreement rather than establishment of pre-existing, formal agreements negotiated between nation-States.<sup>345</sup> Use of military force under the collective self-defense doctrine often arises from pre-established international agreements, such as Mutual Assistance Treaties, military alliances, or Treaties of Guarantee. However, international law does not require such pre-ordained response agreements.<sup>346</sup>

Regardless of its origin, one important factor remains with the implementation of the collective self-defense doctrine: military operations conducted under the notion of collective self-defense generally hinge on the host nation’s continued request for military assistance.<sup>347</sup> As the ICJ ruled in *Nicaragua v. United States of America*, “in customary international law, . . . there is no rule permitting the exercise of collective self-defence in the absence of a request by the State which regards itself as the victim of an armed attack.”<sup>348</sup> While some international agreements may include language alleviating this primary concern,<sup>349</sup> generally collective self-

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<sup>343</sup> DINSTEIN, *supra* note 269, at 251 (citing O. Schachter, *United Nations Law in the Gulf Conflict*, 85 AM. J. INT’L. L. 452, 457 (1991)).

<sup>344</sup> See CHRISTINE GRAY, *INTERNATIONAL LAW AND THE USE OF FORCE* 120 (Malcolm Evans & Phoebe Okowa eds., 2000).

<sup>345</sup> See DINSTEIN, *supra* note 269, at 251.

<sup>346</sup> See *id.* (“Collective self-defence may be exercised either spontaneously (as an unplanned response to an armed attack after it had become a reality) or premeditatedly (on the footing of a prior agreement contemplating a potential armed attack).”).

<sup>347</sup> See Deeks, *supra* note 10.

<sup>348</sup> *Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)*, 1986 I.C.J. 14, ¶ 199 (June 27).

<sup>349</sup> See DINSTEIN, *supra* note 269, at 255 (“[A] multilateral mutual assistance treaty, in creating a collective *duty* of collective self-defence, does not diminish from the individual *right* of collective self-defence under the Charter. This right may be exercised by any contracting party to the mutual assistance treaty, unwilling to wait inertly while the victim of an armed attack is gradually strangled.”).

defense remains “contingent on [the host nation-State’s] consent, which it could withdraw” at any time.<sup>350</sup>

As applied to United States operations in Syria, establishing a legal argument for collective self-defense requires a three-part analysis. First, one must definitively establish that the threat posed by ISIL appropriately triggers Iraq’s assertion of self-defense under Article 51. Second, one must establish an Iraqi request for support under the doctrine of collective self-defense. Third, the circumstances surrounding ISIL’s position within Syria must support extraterritorial application of force to alleviate the cross-border threat. For the reasons articulated below, all factors are met with the dire situation currently facing Iraq.

To begin with, the threat posed by ISIL triggers Iraq’s assertion of self-defense under Article 51, as ISIL’s actions against Iraq clearly fall within the parameters of an “armed attack.” First, the gravity of the attacks committed within Iraqi territory satisfies all *rationae materiae* concerns. ISIL’s attacks within Iraq go far beyond the relatively isolated attacks committed by non-State actors in the past, to include attacks against the United States on September 11, 2001. These forms of isolated attack tended to trigger debate surrounding whether such aggression sufficiently reached a level of gravity to be considered an “armed attack.” Here, the level of attack is unprecedented. ISIL’s capture of vast swaths of Iraqi territory, brutal murder of innocent civilians, control of significant financial assets, and destruction of property create an entirely new category of terrorist attack, the gravity of which cannot be overstated.

Second, the *rationae temporis* of imminence is unquestionable. This principle primarily addresses situations where an attack is yet to occur. In this case, significant attacks take place on a daily basis within Iraq by a formidable and relentless enemy.

Third, that such attacks occur by a non-State actor does not remove the applicability of Article 51 to the ISIL threat. One must note that existing international opinions, such as *Israeli Wall* and *DRC*, take an opposing position, leading some to argue that Iraq’s legal right to assert Article 51 does not extend to its fight against non-State actors. Such an argument, however, defies logic and existing international practice. These ICJ opinions approached an entirely different set of facts and came well before the emergence of ISIL and the new breed of terror campaign. They represent an antiquated understanding of the capabilities and limitations of non-State actors and simply do not address the present situation facing Iraq and the Middle East with ISIL. While the law remains unresolved in this area as a result of such outdated positions, the general consensus surrounding the *rationae personae* principle within the international community supports the notion that a nation may assert its inherent right to self-defense against non-State actors. For these reasons,

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<sup>350</sup> Deeks, *supra* note 10.

ISIL's actions meet the definition of an "armed attack" under Article 51, thus triggering an inherent right to self-defense.

As Iraq maintains a right to defend itself under Article 51 of the Charter, the second question approaches the United States' ability to engage ISIL under the doctrine of collective self-defense. As outlined by the ICJ in *Nicaragua*, properly asserting collective self-defense under the Charter hinges upon the victim nation-State's request for support.<sup>351</sup> In this case, Iraq has continuously requested United States support in quelling the spread of ISIL within its territory. As a result, the United States is authorized by international law to engage the terrorist organization in accordance with Article 51.

The final question approaches the use of extraterritorial strikes within Syria under the doctrine of collective self-defense. The threat facing Iraq with ISIL's presence in Syria justifies such cross-border operations. ISIL's strategic position in Syria significantly threatens the safety and security of Iraq. As previously noted, the situation posed by ISIL departs from typical concerns surrounding cross-border attacks. ISIL does not represent a small contingent of dissidents threatening the safety of a few nationals across the border. In this case, a formidable army amasses territory within two neighboring nations, determined to expand their empire and establish a caliphate-based government within Iraqi and Syrian territory. The threat posed by ISIL re-defines the influence and capability of motivated non-State actors and demands an immediate response in order to protect the entire nation of Iraq. Removing the threat in Iraq requires eradication of ISIL forces in both nations, as ISIL's position in Syria provides a continuous flow of new recruits, weapons, and financial resources—all of which are used against Iraq in daily operations. In order to support extraterritorial strikes within Syria, international law loosely requires declassification of Syria as a "willing and able" nation-State. As discussed above, Syria has sufficiently established itself as neither willing nor able to quell the ISIL threat despite ample opportunity and months of United States and Iraqi acquiescence in respect of its sovereign status. With each passing day, ISIL's control and operations within Syria further expand its capability to conduct armed attacks within Iraqi territory. As a result, extraterritorial strikes within Syria became vital to the defense of the nation.

Iraq's request for United States support in defending itself against the unprovoked attacks committed by ISIL appropriately triggers the inherent right of self-defense under Article 51. Moreover, the circumstances surrounding ISIL's position within Syria necessitates extraterritorial use of force in defense of Iraq. As a result, United States operations within Syria represent a lawful exercise of

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<sup>351</sup> See *Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)*, 1986 I.C.J. 14, ¶ 199 (June 27) ("At all events, the Court finds that in customary international law, whether of a general kind or that particular to the inter-American legal system, there is no rule permitting the exercise of collective self-defense in the absence of a request by the State which regards itself as the victim of an armed attack.").

the collective self-defense doctrine in accordance with Article 51 of the Charter, regardless of Syria's consent.

It is important to emphasize that the United States' use of force against ISIL under the collective self-defense doctrine requires Iraq's continued request for assistance.<sup>352</sup> By relying on the principle of collective self-defense alone, United States engagement of ISIL ceases to maintain its lawful status the moment Iraq removes its invitation for support.<sup>353</sup> This unilateral approach to engaging ISIL within Syria weakens the United States' ability to provide sustained operations in the region. As law professor Ashley Deeks notes, "As a political matter, it seems doubtful that the United States would find this to be an appealing approach, particularly if it perceives its own national interests to be at stake."<sup>354</sup> In light of this principle, and in consideration of the threat directly posed to the United States, full reliance on the doctrine of collective self-defense does not present an optimal, or fully accurate, approach to justifying unilateral strikes against ISIL in Syria.

### 3. Individual Self-Defense: The United States and ISIL

Though existing international law supports United States' engagement of ISIL in Syria under the collective self-defense doctrine, such an approach is not necessary. International law provides an equally applicable option through the United States' right to individual self-defense under Article 51 of the Charter. Unlike collective self-defense, which applies to Iraq's inherent right to defend itself against ISIL, the individual self-defense doctrine specifically focuses on the threat facing the United States. While this argument may find significant opposition, existing circumstances adequately trigger the United States' ability to act independently under Article 51 of the Charter to eliminate the threat posed by ISIL.

Individual self-defense refers to a nation-State's right to protect itself from an armed attack. Noted by one scholar, "One of the most sacred trusts placed in the government of any state by its people is to defend that country from its enemies."<sup>355</sup> In 1758, renowned legal scholar Emmerich de Vattel stated, "Self-defense against an unjust attack is not only a right which every Nation has, but it is a duty, and one of its most sacred duties."<sup>356</sup>

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<sup>352</sup> *Id.*

<sup>353</sup> See Deeks, *supra* note 10.

<sup>354</sup> *Id.*

<sup>355</sup> NIGEL D. WHITE, *ADVANCED INTRODUCTION TO INTERNATIONAL CONFLICT AND SECURITY LAW* 36 (2014).

<sup>356</sup> *Id.* (quoting E. de Vattel, *The Law of Nations, or the Principles of Natural Law, Applied to the Conduct and to the Affairs of Nations and of Sovereigns* 246 (T. Nugent trans., Indianapolis: Liberty 2008)).

For thousands of years, history has been filled with instances where one nation defended itself against the aggressive actions of another. In 480 B.C., an army of 4,900 Greek soldiers under the command of Leonidas defended itself against an invasion of approximately 2.6 million men led by Persian King Xerxes.<sup>357</sup> Though Leonidas' efforts failed to halt invading forces, the Battle of Thermopylae provides an excellent historical example of individual self-defense.

Arguably the most influential case to provide early development of customary international law surrounding the doctrine of self-defense emerged through the *Caroline* affair.<sup>358</sup> As previously discussed, this principle authorizes a nation-State to engage in defensive measures when an attack against that nation is deemed "imminent."<sup>359</sup> Aside from its status as customary international law, the doctrine emerged in 1945 as international law with the formation of the United Nations Charter.<sup>360</sup>

The United States maintains an inherent right to engage in military operations against ISIL in Syria under the doctrine of individual self-defense. Over the course of the past year, ISIL has brutally murdered numerous United States citizens. Videos of the horrific deaths of James Foley and Steven Sotloff continue to reverberate within social media. And ISIL's presence no longer remains in distant lands. On May 3, 2015, two "soldiers" of ISIL conducted an "armed assault on an art fair in Texas where cartoons of the Prophet Mohammed were set to be exhibited."<sup>361</sup> The recent attack in Garland, Texas represents the "first time the group has claimed responsibility for an attack on U.S. soil."<sup>362</sup> Along with the recent Texas shooting, an ISIL spokesperson declared that "what is coming is worse and more bitter, and you will see from the soldiers of Islamic State what ill will come."<sup>363</sup> This attack further demonstrates that threats against the United States go beyond mere rhetoric. While the short-term goal of ISIL focuses on establishment of the regional caliphate, the United States certainly remains a long-term and inescapable enemy of the Islamic State. The deaths of United States citizens and continued threats to the homeland

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<sup>357</sup> See *Greco-Persian Wars: Battle of Thermopylae*, HISTORYNET (Jun. 16, 2006), <http://www.historynet.com/greco-persian-wars-battle-of-thermopylae.htm>.

<sup>358</sup> See DINO KRITSIOTIS ET AL., RESEARCH HANDBOOK ON INTERNATIONAL CONFLICT AND SECURITY LAW 182 (Nigel D. White & Christian Henderson eds., 2013).

<sup>359</sup> See SHUE & RODIN, *supra* note 294, at 105-06.

<sup>360</sup> Some continue to hold the position that the Caroline Doctrine of anticipatory self-defense does not apply to Article 51 of the Charter. However, as previously discussed, past ICJ opinions, the statements of former UN Secretary-General Kofi Annan, and contemporary practice yield conclusion that the Caroline Doctrine applies to Article 51 in cases of "imminent" attack.

<sup>361</sup> Karen Leigh, *Islamic State Claims Responsibility for Attack on Muhammad Cartoon Art Fair in Texas*, WALL STREET JOURNAL (May 5, 2015, 1:23 PM), <http://www.wsj.com/articles/islamic-state-claims-responsibility-for-attack-on-muhammad-cartoon-art-fair-in-texas-1430817956>.

<sup>362</sup> Karen Leigh & Devlin Barrett, *supra* note 179.

<sup>363</sup> Leigh, *supra* note 361.

reiterate and confirm the end-goal of ISIL: establishment of a world-wide, extremist caliphate and the destruction of the United States.

In light of the existing threat posed by ISIL to the United States, one must return to the *rationae materiae* and *rationae temporis* principles of “armed attack” found in Article 51. Do these atrocities committed against the United States represent an “armed attack” under international law, thereby justifying military response under self-defense doctrine? Some may argue they do not. As tragic as any death may be, some may find that isolated attacks and mere threats do not rise to a level of severity or imminence necessary to justify use of force against a non-State actor. This Article, however, argues the contrary.

Turning first to the *rationae materiae* principle of “armed attack,” the gravity of existing attacks against United States citizens, in itself, justifies a military response under the self-defense doctrine. An attack against United States citizens represents an attack against the United States. Moreover, one cannot rely on the number of deaths alone; the nature of the death requires additional consideration. Brutally beheading and executing American citizens in the name of the Islamic State provides further detrimental impact to the nation as a whole. As a result, ISIL’s actions justify a military response.

The *rationae materiae* argument, however, does not end with the isolated deaths of American citizens and the recent, minor attack on the homeland. This myopic approach to assessing the gravity of attack ignores the larger conceptualization of the terrorist organization as defined by the United Nations Security Council. Utilizing the broader conceptualization of ISIL provided by the Security Council significantly changes the nature of the “armed attack,” further meriting a defensive response under Article 51.

According to the United Nations Security Council, ISIL is not an independent organization but a “splinter group”<sup>364</sup> or organization “associated” with Al Qaeda.<sup>365</sup> Rather than separating the two organizations for purposes of international characterization, the Security Council specifically, and repeatedly, links the two organizations together. As a result, the actions of one organization may be seen as directly linked, categorized, or “associated” with the other. Under this characterization of ISIL, the recent actions committed by ISIL are but a few instances of the “attacks” historically committed by the larger terrorist organization against the United States. No longer does the argument focus solely on the horrific deaths of several American citizens but the full swath of atrocities committed against the United States by the larger Al Qaeda network. Rather than focusing on the recent atrocities committed by ISIL, identifying the “armed attack” should encapsulate the

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<sup>364</sup> S.C. Res. 2170, para. 18, U.N. Doc. S/RES/2170 (Aug. 15, 2014).

<sup>365</sup> S.C. Res. 2178, para. 7, U.N. Doc. S/RES/2178 (Sept. 24, 2014); S.C. Res. 2195, para. 22, U.N. Doc. S/RES/2195 (Dec. 19, 2014); S.C. Res. 2199, para. 1, U.N. Doc. S/RES/2199 (Feb. 12, 2015).

actions of the entire, connected body of Al Qaeda as defined by the United Nations Security Council, thus significantly altering the *rationae materiae* analysis and further strengthening the argument for military operations in Syria.

That some may argue that ISIL represents a separate, singular organization becomes moot. It does not change the definition provided by the international body, which offers a more comprehensive classification of ISIL. When facing an impasse between two opposing characterizations, especially when approaching a question of international law, the position of the international body becomes significant. Here, the UN Security Council's characterization of ISIL as associated with Al Qaeda tips the scale in favor of continued operations under Article 51.

Like analysis may be applied to the *rationae temporis* element of an "armed attack." Because the United Nations Security Council characterizes ISIL as directly associated with Al Qaeda, the *rationae temporis* element of an "armed attack" becomes moot, as Al Qaeda has already attacked the United States. Assessing the "imminence" of an impending attack, therefore, becomes no longer necessary. Adopting the characterization of ISIL provided by the international body adequately establishes the existence of an "armed attack" under Article 51.

Even if ISIL was not linked with Al Qaeda, as provided by the United Nations Security Council, the direct threat posed by the organization to the United States satisfies the *rationae temporis* element. ISIL's technological reach and recruiting capability spans the globe. Appeals through social media campaigns have inspired lone wolf attackers to commit atrocities around the world. Recently, ISIL released the names, photos, and addresses of one hundred United States military members, calling ISIL sympathizers to "take the final step" in ensuring their execution.<sup>366</sup> Over one hundred United States citizens have joined the extremist organization, prompting fears of a return to the homeland in order to wage additional attacks—a fear that came to fruition in May of 2015. Moreover, the unprecedented financial resources held by ISIL further exacerbate the situation, yielding the possibility that ISIL could legitimately obtain weapons capable of serious devastation at home and abroad.

Events around the world suggest a "when, not if" approach to larger attacks on the United States by ISIL. As a result, terror conditions support the level of imminence necessary to unilaterally engage and eliminate the terrorist organization. In light of the *rationae materiae* and *rationae temporis* analyses, ISIL's actions sufficiently demonstrate an "armed attack" against the United States, thereby justifying individual self-defense operations against ISIL in Syria in accordance with Article 51 of the Charter.

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<sup>366</sup> 'ISIL Website' Names and Urges Killing of 100 U.S. Troops, AL JAZEERA (Mar. 22, 2015, 4:23 AM), <http://www.aljazeera.com/news/2015/03/website-names-urges-killing-100-troops-150321214110673.html>.

#### 4. Additional Considerations

Though the self-defense doctrine establishes an inherent right for a nation-State to defend against an imminent attack, the right is not void of limitation. Certain underlying principles defined within international law curtail the manner in which a nation-State may assert the right of self-defense. These additional restraints must be applied to the case at hand.

##### (a) *Necessity*

Any use of force requires strict adherence to the principle of necessity.<sup>367</sup> This concept of necessity differs from the *jus in bello* principle of military necessity.<sup>368</sup> Rather than measuring action to ensure “the complete submission of the enemy,”<sup>369</sup> necessity in this form generally assesses a nation-State’s need to resort to the use of force. Necessity here pays respect to the foundational element of the Charter that demands “[a]ll Members ... refrain from the threat or use of force against the territorial integrity or political independence” of any other State.<sup>370</sup> “[F]orce should not be considered necessary until peaceful measures have been found wanting or when they clearly would be futile.”<sup>371</sup> As required under the Charter, use of military force is simply a last resort to conflict resolution.

In this light, necessity is closely related to the factors defining an “armed attack,” particularly *rationae materiae* and *rationae temporis*. The gravity and imminence of an attack must be such that use of force becomes the only option. Attempts should be made to avoid military conflict if at all possible. “Before the defending State opens the flood-gates to full-scale hostilities, it is obligated to verify that a reasonable settlement of the conflict in an amicable way is not attainable.”<sup>372</sup> Only in the event that all political and/or diplomatic efforts cease to serve as an effective deterrent does use of force become truly necessary in accordance with international law.

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<sup>367</sup> See DINSTEIN, *supra* note 269, at 231.

<sup>368</sup> U.S. DEP’T OF THE ARMY, FIELD MANUAL 27-10, THE LAW OF LAND WARFARE para. 3.a. (18 July 1956), defines military necessity as “that principle which justifies those measures not forbidden by international law which are indispensable for security the complete submission of the enemy as soon as possible.”

<sup>369</sup> *Id.*

<sup>370</sup> U.N. Charter art. 2, para. 4.

<sup>371</sup> DINSTEIN, *supra* note 269, at 202 (quoting O. Schachter, *The Right of States to Use Armed Force*, 82 MICH. L. REV. 1620, 1635 (1984)).

<sup>372</sup> *Id.* at 231.

(b) *Proportionality*

When considering possible options for employing extraterritorial warfare as a means of self-defense, the principle of proportionality also plays an important role. As with necessity, proportionality here differs from its *jus in bello* counterpart.<sup>373</sup> While proportionality discussed within the *jus in bello* context generally seeks to avoid the loss of civilian life and property deemed “excessive in relation to the direct and concrete military advantage anticipated,”<sup>374</sup> proportionality in the self-defense arena focuses on limiting the attack to only that necessary to dispel or alleviate the threat.

In determining a proportionate response, *rationae materiae* and *rationae temporis* factors again play an important role. The gravity of the “armed attack” occurring, or threatening to occur, defines the parameters of the counter-attack. Proportionality in this context “points to a symmetry or an approximation in ‘scale and effects’ between the unlawful force and the lawful counter-force applied.”<sup>375</sup> Excessive force in response to the threat would violate the principle of proportionality as related to Article 51.

In most scenarios, full and complete war is likely unnecessary to remove the threat that justifies defensive action. Minimal armed attacks do not require maximum responsive force, nor would such an event necessitate or justify total war. As Professor Dinstein noted, “[I]t would be utterly incongruous to permit an all-out war whenever a State absorbs an isolated armed attack, however marginal. A war of self-defense is the most extreme and lethal course of action open to a State, and it must not be allowed to happen on a flimsy excuse.”<sup>376</sup> When a nation-State resorts to use of force in order to alleviate an existing threat, the level of force applied must be proportionate to the armed attack.

The principles of necessity and proportionality are satisfied by United States operations in Syria. First, United States operations against ISIL in Syria are necessary. Again, necessity in the context of self-defense requires the exhaustion of all other peaceful methods prior to resorting to the use of force. In this case, all

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<sup>373</sup> See SOLIS, *supra* note 228, at 273. Additional Protocol I of 1977 defines the *jus in bello* form of proportionality in two articles. In Article 51.5(b), proportionality is defined as “an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian object, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.” Article 57.2(b) also provides that “an attack shall be cancelled or suspended if it becomes apparent that the objective is not a military one or...that the attack may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.”

<sup>374</sup> *Id.*

<sup>375</sup> DINSTEIN, *supra* note 269, at 231.

<sup>376</sup> DINSTEIN, *supra* note 269, at 232.

peaceful methods of quelling ISIL have proven inadequate thus far. Immediate action is necessary to defend, at a minimum, Iraq against on-going violence. A nation need not absorb continued attacks with the hope that peaceful methods will eventually resolve the threat. While application of force does not, and should not, extinguish continued attempts to seek a peaceful resolution, such efforts do not remove the necessity of immediate self-defensive military operations.

Second, extraterritorial operations within Syria are proportional to the threat posed by ISIL. Proportionality in this context requires a narrowly tailored approach to extraterritorial operations, specifically designed to alleviate the threat while avoiding all other aspects of a nation's sovereignty. In this case, extraterritorial airstrikes within Syria are singularly concentrated with, quite literally, "laser-focus" on ISIL military forces and objects. The United States currently operates a limited air campaign and exerts efforts to train and equip moderate rebel forces engaging in ground campaign against ISIL. Such operations fall far short of total war and provide an example of the proportional efforts exerted by the United States to defend itself against the rising ISIL threat while respecting Syria's sovereign territory to the greatest extent. As a result, self-defensive measures taken by the United States against ISIL in Syria adhere to both principles of international law.

#### E. General Authorization Through Existing Security Council Resolutions

Though not currently included in the official United States legal position, a final argument may be made that existing Security Council Resolutions provide the requisite authority for United States operations in Syria. At the outset, it is necessary to emphasize that no Security Council Resolution provides specific authorization for United States operations in Syria. However, when observing the series of Security Council resolutions provided since 2001 regarding "threats to international peace and security caused by terrorist acts,"<sup>377</sup> with an emphasis on those provided since the rise of ISIL, general authorization may be found in the pages therein.

Absent consent of the host nation-State, approval of military operations by the United Nations Security Council provides the optimal approach. The United Nations Security Council (Council) is the primary organ of the United Nations responsible for "maintaining international peace and security."<sup>378</sup> "The Security Council takes the lead in determining the existence of a threat to the peace or act of aggression.... In some cases, the Security Council can resort to imposing sanctions or can even authorize the use of force to maintain or restore international peace

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<sup>377</sup> See generally *Security Council Resolutions*, UN.ORG, <http://www.un.org/en/sc/documents/resolutions/index.shtml> (categorizing United Nations Security Council Resolutions 1368, 1373, 2133, 2170, 2178, 2185, 2195, and 2199 as "threats to international peace and security caused by terrorist acts" within the listing of resolutions on the official webpage of the United Nations).

<sup>378</sup> *What is the Security Council?*, UN.ORG, <http://www.un.org/en/sc/about/>.

and security.”<sup>379</sup> Decisions rendered by the Security Council are final. The Charter specifically states that “[a]ll members of the United Nations agree to accept and carry out the decisions of the Security Council.”<sup>380</sup>

The Security Council is comprised of five permanent members and ten non-permanent members that are elected by the General Assembly of the United Nations on a bi-annual basis.<sup>381</sup> Each member possesses one vote.<sup>382</sup> Decisions made by the Security Council, to include issuance of Security Council resolutions, require an “affirmative vote of seven members including the concurring votes of the permanent members.”<sup>383</sup> It is important to emphasize that each of the five permanent members of the Security Council—China, France, Russia, the United Kingdom, and the United States—possess unilateral veto power. Therefore, actions taken by the Security Council require approval of all five permanent members. Though the Security Council looks first to potential methods of dispute resolution “not involving the use of armed force,”<sup>384</sup> Article 42 provides a potential military option.<sup>385</sup>

Assessing current Security Council authorization in Syria requires a return to the original resolutions that provided a foundation for the War on Terror. The day following the terror attacks on September 11, 2001, the Security Council provided Resolution 1368.<sup>386</sup> In the preamble of this document, the Security Council expressed “its deepest sympathy”<sup>387</sup> for the victims of events that occurred the previous day as well as “recognize[d] the inherent right of individual or collective self-defense in accordance with the Charter.”<sup>388</sup> Moreover, within the binding portion of the resolution, the Security Council expressed “its readiness to take all necessary steps

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<sup>379</sup> *The Security Council*, UN.ORG., <http://www.un.org/en/sc/>.

<sup>380</sup> *What is the Security Council?*, *supra* note 378.

<sup>381</sup> *The Security Council*, *supra* note 379.

<sup>382</sup> U.N. Charter art. 27, para. 1.

<sup>383</sup> U.N. Charter art. 27, para. 3.

<sup>384</sup> Article 41 of the UN Charter states:

The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations.

<sup>385</sup> Article 42 of the UN Charter states:

Should the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, 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, or other operations by air, sea, or land forces of Members of the United Nations.

<sup>386</sup> *See* S.C. Res. 1368, U.N. Doc. S/RES/1368 (Sept. 12, 2001).

<sup>387</sup> *Id.* at para. 2.

<sup>388</sup> *Id.* at preamble.

to respond to the terrorist attacks of September 11, 2001, and to combat all forms of terrorism, in accordance with its responsibilities under the Charter of the United Nations.”<sup>389</sup>

Approximately two weeks later, the Council released UN Security Resolution 1373, which reaffirmed the “inherent right of individual or collective self-defence.”<sup>390</sup> Additionally, acting under Chapter VII of the Charter, the Council encouraged all States to “cooperate...to prevent and suppress terrorist attacks and take action against perpetrators of such acts”<sup>391</sup> and to “increase cooperation and fully implement...Security Council resolutions,” including 1368.<sup>392</sup> Taken together, these two resolutions provided the authority for United States engagement of Taliban and Al Qaeda forces during the War in Afghanistan.

Security Council resolutions released in response to ISIL’s unlawful capture of territory and horrific brutality provide general authorization for U.S. operations in Syria in two distinct ways. First, Security Council Resolution 2133 demonstrates that existing authorization used during the War on Terror continues to apply to ISIL today. In January 2014, the Council issued Resolution 2133.<sup>393</sup> This resolution specifically “reaffirm[ed] resolution 1373 (2001) *and in particular*” various detailed aspects of the 2001 document related to financing and supporting terrorist organizations.<sup>394</sup> By affirming the continued applicability of Security Council Resolution 1373, the Council brought past authorization into the present as applied to ISIL.

Some may point to the Security Council’s emphasis on combating finance and recruitment of terrorists within Resolution 2133 as evidence of their intent to limit the applicability of Resolution 1373. However, a plain reading of the text eliminates this argument. The Security Council’s use of the language “*and in particular*” demonstrates that the Security Council specifically intended to reaffirm all language within the original resolution and merely emphasized certain particular areas. Moreover, as Resolution 1373 specifically reaffirmed the applicability of 1368, both 2001 resolutions maintain their applicability today. Security Council Resolution 2133 affirmatively provides that international law applicable to United States engagement of Al Qaeda in the War in Afghanistan continues to apply to ISIL today, thus providing authorization for extraterritorial attacks within Syria.

Second, additional Security Council resolutions confirm the status quo as applied to ISIL in the War on Terror. In August 2014, as United States forces began air-

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<sup>389</sup> *Id.* at para. 5.

<sup>390</sup> S.C. Res. 1373, preamble, U.N. Doc. S/RES/1373 (Sept. 28, 2001).

<sup>391</sup> *Id.* at para. 3(c).

<sup>392</sup> *Id.* at para. 3(e).

<sup>393</sup> See S.C. Res. 2133, U.N. Doc. S/RES/2133 (Jan. 27, 2014).

<sup>394</sup> *Id.* at para. 1 (emphasis added).

strikes in Iraq against ISIL forces, the Security Council provided Resolution 2178.<sup>395</sup> Not only did this resolution once again reiterate the continued applicability and enforcement of Resolution 1373, acting under Chapter VII of the Charter, it further recognized “that countering violent extremism... is an essential element of addressing the threat to international peace and security posed by foreign terrorist fighters, and *call[ed] upon* Member States to enhance efforts to counter this kind of violent extremism.”<sup>396</sup> Importantly as related to this declaration, the Council reaffirmed the right to engage the terrorist threat through use of “international humanitarian law,” that is, the law of armed conflict.<sup>397</sup> This important declaration again confirmed the right to engage ISIL through application of military force.

In the months after the United States began conducting airstrikes in Syria, the Council again emphasized the applicability of international humanitarian law to the fight against ISIL. In the preamble of Resolution 2195, the Security Council reaffirmed “the need to combat *by all means*, in accordance with the Charter of the United Nations and international law... threats to international peace and security caused by terrorist acts....”<sup>398</sup> Moreover, acting under Chapter VII of the Charter, the Council stressed “the need to work collectively to prevent *and combat* terrorism in all its forms and manifestations....”<sup>399</sup> The continued applicability of resolutions 1368 and 1373, as well as repeated confirmation by the Security Council of the applicability of international humanitarian law and the need to “combat” ISIL “by all means necessary,” demonstrates general Security Council authorization for the United States operations in Syria.

Several counterarguments may be made to this position. First, and importantly, one may point to the fact that the Security Council has never specifically authorized the United States to engage in extraterritorial attacks within Syria. One may certainly understand why such a specific authorization has not been made by the Security Council. As Russia maintains a permanent seat on the Security Council, any attempt to amass more specific approval of United States operations within Syria would result in immediate veto due to Russia’s connections with the Assad regime. Though some may seek specific language from the Security Council, in reality, authorization of such specificity simply does not exist, nor is it required. Security Council authorization does not come through the use of specific language. The Security Council did not provide such language when authorizing the United States to conduct extraterritorial attacks against Al Qaeda in Afghanistan, nor has the Council provided any authorization for Iraq to engage in defensive operations against ISIL. However, few would contest the lawful nature of either military campaign. Rather, indirect language, as used in this case, provides the requisite authority.

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<sup>395</sup> See S.C. Res. 2178, U.N. Doc. S/RES/2178 (Sept. 24, 2014).

<sup>396</sup> *Id.* at para. 15.

<sup>397</sup> *Id.* at para. 5.

<sup>398</sup> S.C. Res. 2195, preamble, U.N. Doc. S/RES/2195 (Dec. 19, 2014) (emphasis added).

<sup>399</sup> *Id.* at para. 1.

A practical approach to identifying authorization in this case may be seen by identifying what “has” and “has not” taken place within the Council. What *has* taken place is repeated confirmation of the applicability of pre-existing resolutions as well as numerous additional resolutions occurring over the past year that provide general support. What *has not* taken place is any stated condemnation of the United States for airstrikes conducted within Iraq or Syria. The international community relies on the Security Council to provide statements of condemnation for actions that violate international law. Such statements are common-place and necessary for maintaining international order. They extend to non-State actors, such as the repeated condemnation of ISIL,<sup>400</sup> as well nation-States, such as the UN Security Council’s recent statements condemning the Assad regime for use of unlawful chemical weapons.<sup>401</sup> If the Security Council believed that the United States was acting in violation of its resolutions or international law, statements of condemnation would extend to the United States as well. They do not. Such silence by the Security Council lends further support to the existence of Security Council approval of actions taken by the United States in Syria.<sup>402</sup>

Second, some may assert that resolutions 1368 and 1373 do not apply to the present campaign against ISIL, as previous resolutions solely related to Al Qaeda. However, the language used in recent Security Council resolutions again removes this argument. Resolutions 1368 and 1373 undoubtedly relate to the threat posed by Al Qaeda. Therefore, extension of these resolutions to ISIL depends on the Security Council’s characterization of the organization as related to Al Qaeda. Since August 2014, at least five Security Council resolutions have addressed actions taken by ISIL.<sup>403</sup> Within these five resolutions, including the recent ISIL-based resolution published on February 12, 2015, the Security Council continues to characterize the threat as “ISIL, ANF, and any [or all] other individuals, groups, undertakings, and entities associated with Al-Qaida.”<sup>404</sup> By including the words “and any [or all] other individuals, groups...associated with Al-Qaida,” the Security Council distinctly

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<sup>400</sup> S.C. Res. 2133, U.N. Doc. S/RES/2133 (Jan. 27, 2014); S.C. Res. 2170, U.N. Doc. S/RES/2170 (Aug. 14, 2014); S.C. Res. 2178, U.N. Doc. S/RES/2178 (Sept. 24, 2014). S.C. Res. 2195, U.N. Doc. S/RES/2195 (Dec. 19, 2014); S.C. Res. 2199, U.N. Doc. S/RES/2199 (Feb. 12, 2015).

<sup>401</sup> S.C. Res. 2209, U.N. Doc. S/RES/2209 (Mar. 6, 2015).

<sup>402</sup> The United States maintains a permanent seat on the Security Council as well, making any official condemnation of United States operations in Syria unlikely. However, member-States within the United Nations Security Council or United Nations General Assembly could issue unofficial statements of condemnation in an individual or collective manner. No such statements have emerged from the United Nations, suggesting general support of the United States’ efforts to deter and defeat ISIL in Iraq and Syria.

<sup>403</sup> S.C. Res. 2170, U.N. Doc. S/RES/2170 (Aug. 14, 2014); S.C. Res. 2178, U.N. Doc. S/RES/2178 (Sept. 24, 2014); S.C. Res. 2192, U.N. Doc. S/RES/2192 (Dec. 18, 2014); S.C. Res. 2195, U.N. Doc. S/RES/2195 (Dec. 19, 2014); S.C. Res. 2199, U.N. Doc. S/RES/2199 (Feb. 12, 2015).

<sup>404</sup> S.C. Res. 2170, para. 4, U.N. Doc. S/RES/2170 (Aug. 14, 2014); S.C. Res. 2178, para. 10, U.N. Doc. S/RES/2178 (Sept. 24, 2014); S.C. Res. 2192, preamble, U.N. Doc. S/RES/2192 (Dec. 18, 2014); S.C. Res. 2195, para. 22, U.N. Doc. S/RES/2195 (Dec. 19, 2014); S.C. Res. 2199, para. 1, U.N. Doc. S/RES/2199 (Feb. 12, 2015).

characterizes the ISIL threat as falling under the general umbrella of Al Qaeda. As if to resolve the matter altogether, Security Council Resolution 2170 specifically states: “ISIL is a splinter group of Al-Qaida.”<sup>405</sup> As a result, according to the Security Council, the two organizations remain one.

Some may respond that ISIL no longer exists under the leadership of Al Qaeda, as the elder organization disavowed ISIL in early 2014. However, this fact does not impact the manner in which the Security Council continues to characterize the organization. Such characterization by the Security Council began in August 2014, approximately six months after Al Qaeda publicly distanced itself from ISIL, and presently remains unchanged. This steadfast classification of ISIL as a part of Al Qaeda does not represent error on behalf of the Security Council, which undoubtedly knows in great detail the alignment of both organizations. Rather, it reflects a calculated and deliberate decision by the UN Security Council to extend the applicability of resolutions related to Al Qaeda to the current threat posed by ISIL, thus lending further support to the applicability of Resolutions 1368 and 1373 to ISIL today. It cannot be mere consequence that four of five Security Council resolutions specifically referencing ISIL maintain an identical characterization of the organization as an extension of Al Qaeda. Though debatable, the fifth likely does so as well.<sup>406</sup> Resolutions drafted by the UN Security Council are not haphazard. Every word maintains significant import and carries with it extensive consideration and deliberation. When drafting international law, an error may occur once. It does not happen four, or five, times.

A third argument against UN Security Council authorization may note the numerous requests by the Council to respect the territorial sovereignty of other nations. In several of the recent UN Security Council resolutions, verbiage reaffirms the Council’s “respect for the sovereignty, territorial integrity and political independence of all States in accordance with the Charter.”<sup>407</sup> Importantly, this statement began appearing within Security Council resolutions after commencement of airstrikes within Syria. The significance of this language is not lost on the author. However, inclusions of such requests are not dispositive of the issue. While this language does appear in at least three recent resolutions,<sup>408</sup> the Council also includes seemingly contradictory statements. For example, in UN Security Council Resolution 2178, statements respecting the territorial sovereignty of all nations come after the

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<sup>405</sup> S.C. Res. 2170, para. 18, U.N. Doc. S/RES/2170 (Aug. 14, 2014).

<sup>406</sup> Of the five Security Council resolutions previously identified, all but Security Council Resolution 2178 include the language “ISIL...and all other individuals, groups, undertakings and entities associated with Al-Qaida.” Security Council Resolution 2178 provides the language “ISIL, ANF, and other cells, affiliates, splinter groups or derivatives of Al-Qaida....”

<sup>407</sup> See, e.g., S.C. Res. 2178, preamble, U.N. Doc. S/RES/2178 (Sept. 24, 2014).

<sup>408</sup> S.C. Res. 2178, preamble, U.N. Doc. S/RES/2178 (Sept. 24, 2014); S.C. Res. 2195, preamble, U.N. Doc. S/RES/2195 (Dec. 19, 2014); S.C. Res. 2199, preamble, U.N. Doc. S/RES/2199 (Feb. 12, 2015).

Council reaffirms the need to combat terrorism “by all means.”<sup>409</sup> Resolution 2195 contains similar contradictory language.<sup>410</sup>

These statements emerge in the preambular language as well as the binding portions of the document, depending on the resolution.<sup>411</sup> Both concepts carry equal import, and yet, are seemingly positioned on opposite ends of the spectrum. This dichotomy notes the difficulty in eliminating a non-State threat that pervades national boundaries. However, one statement does not eliminate the other; they must be taken together. By affirming both principles, the Security Council attempts to emphasize the balance that must take place when assessing potential extraterritorial operations.

Few would disclaim the importance of respecting territorial sovereignty. However, there are moments when use of force operations prove necessary, regardless of the consent of the host nation-State. That the Security Council, or any notable body within the United Nations, has not condemned United States operations in Syria further supports the lawful nature of military efforts against ISIL. In this case, silence by the United Nations in the face of military operations in Syria by various nation-States demonstrates UN approval of the current balance.

A final argument against Security Council authorization may be found in the additional requests of the Security Council to seek resolution by means other than the use of force. Peaceful methods of control, such as freezing assets, imposing sanctions, and developing robust police forces, continue to reach the pages of Security Council resolutions.<sup>412</sup> However, as previously noted, contradictory language appears in each of the Council’s resolutions. Providing statements that encourage peaceful resolution while acknowledging the need for a military option represents the difficulty in approaching the international threat posed by ISIL. The Charter requires exhaustion of all peaceful methods prior to engaging the military option.<sup>413</sup> However, repeated requests to establish, for example, successful sanction regimes and border enforcement mechanisms demonstrate that such peaceful methods have not adequately mitigated the threat thus far. As a result, continued use of force operations become necessary. The international community’s on-going silence regarding operations against ISIL in Syria, again, demonstrates recognition that such operations are not only necessary, but also authorized.

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<sup>409</sup> S.C. Res. 2178, preamble, U.N. Doc. S/RES/2178 (Sept. 24, 2014).

<sup>410</sup> S.C. Res. 2195, para. 1, U.N. Doc. S/RES/2195 (Dec. 19, 2014).

<sup>411</sup> S.C. Res. 2178, preamble, U.N. Doc. S/RES/2178 (Sept. 24, 2014); S.C. Res. 2195, para. 1, U.N. Doc. S/RES/2195 (Dec. 19, 2014).

<sup>412</sup> See, e.g., S.C. Res. 2195, para. 10, U.N. Doc. S/RES/2195 (Dec. 19, 2014).

<sup>413</sup> See generally U.N. Charter art. 42 (noting that military action may be authorized “[s]hould the Security Council consider that measures provided for in Article 41 would be inadequate....”).

## V. LOOKING BEYOND SYRIA

The pervasive War on Terror does not justify extraterritorial use of force in every situation. There are limitations. Solutions must be appropriately tailored in order to avoid future abuse of policy. Identifying such limitations must be resolved when applying these principles beyond Syria. The final section of this Article asserts that the proper limits to such extraterritorial use of force may be found in the dynamics presented by the Syrian campaign. Applying such factors to future extraterritorial operations ensures continued adherence to international law.

### A. Proposed Guideposts for Future Unilateral Intervention

When identifying the limits of military operations within the territory of a non-consenting nation-State, the answer lies in Syria. The dynamics of the current situation in Syria provide several potential guideposts that may be applied to future scenarios. As with Syria, assessing the legality of unilateral military operations requires careful consideration of three particular entities: (1) the terrorist organization, (2) the engaged nation-State, and (3) the host nation-State. These guideposts assist in providing the necessary check to an otherwise extensive war power.

First, one must assess the capability of the terrorist organization. Factors may include the organization's capture of territory, imposition of a governmental structure, financial resources, number of forces, military capability, and brutality. In this case, ISIL possesses unprecedented strength in each of these areas. Applying these factors to future threat scenarios may appropriately limit the ability to unilaterally engage relatively minor, non-State aggressors.

Second, focus must be placed on the threat posed by the terrorist organization to the attacking nation-State and surrounding international body. This Article does not advocate for unlimited capability of nation-States to invade the territorial sovereignty of another. In this case, ISIL presents a direct, and powerful, threat to the security of Iraq, the United States, and the international community at large. In lesser circumstances where the threat is less pervasive, military engagement may be inappropriate.

Third, one must assess the stability of the host nation-State and its ability to independently alleviate the threat. Particular emphasis must be placed on this aspect of the analysis in order to avoid violations of Article 2(4) of the United Nations Charter. This notion further eliminates extraterritorial application of force within secure nation-States capable of adequately addressing future threats. In this case, Syria does not possess the "willing and able" status necessary to respond to the ISIL threat. The instability of the Assad regime, in light of the threat posed by ISIL to the Middle East and beyond, justifies use of force regardless of consent.

Undoubtedly this simple analysis does not alleviate all concerns associated with unilateral, extraterritorial use of force. Significant deliberation must take place regarding the geopolitical, diplomatic, and moral implications of breaching the territorial sovereignty of another nation. At most, these guideposts provide a starting point to addressing the legality of military operations within the territory of a non-consenting nation-State. This Article does not intend to imply that extraterritorial use of force is necessary or appropriate under all circumstances. Resort to such applications of force must continue to strictly apply to the direst of scenarios. However, when circumstances permit, international law provides an option for military engagement.

## B. On Terrorism: The Need for Enhanced International Effort

Looking beyond Syria in the age of terror requires two further points, both of which focus on the international community's response to worldwide terrorism. Simply stated, more is needed. The current international approach is inadequate for the following two reasons.

First, current action taken by the United Nations to quell the rise of ISIL and worldwide terror is insufficient. Since the beginning of 2014, the United Nations Security Council provided no less than eight resolutions directly related to the ISIL threat.<sup>414</sup> Each of these resolutions focus, in large part, on implementation of peaceful measures aimed at deterring the terror threat, such as freezing assets, imposing sanctions, and encouraging robust police forces.<sup>415</sup> These efforts accomplished little, if anything. In September 2014, the Council released a statement expressing "grave concern over the acute and growing threat posed by foreign terrorist fighters... and resolv[ed] to address this threat."<sup>416</sup> The Council then released three follow-on resolutions over the course of the next five months that encouraged member-States to implement measures previously imposed by the Council.<sup>417</sup> In February 2015, the Council acknowledged once more with "grave concern...the increased incidents" committed at the brutal hands of ISIL and condemned "those heinous and cowardly murders which demonstrate that terrorism is a scourge impacting all of humanity and people from all regions and religion or belief."<sup>418</sup> However, as before, the UN Security Council did not escalate their efforts beyond rhetoric and resolve to keep the status quo. While one may commend the United Nations for attempting to

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<sup>414</sup> See *Security Council Resolutions*, UN.ORG, <http://www.un.org/en/sc/documents/resolutions/index.shtml>.

<sup>415</sup> See, e.g., S.C. Res. 2178, para. 6, U.N. Doc. S/RES/2178 (Sept. 24, 2014) (Despite urging adoption and implementation of peaceful measures, several Security Council resolutions also acknowledge the right to use force, as previously discussed.).

<sup>416</sup> S.C. Res. 2178, preamble, U.N. Doc. S/RES/2178 (Sept. 24, 2014).

<sup>417</sup> S.C. Res. 2185, U.N. Doc. S/RES/2185 (Nov. 20, 2014); S.C. Res. 2195, U.N. Doc. S/RES/2195 (Dec. 19, 2014); S.C. Res. 2199, U.N. Doc. S/RES/2199 (Feb. 12, 2015).

<sup>418</sup> S.C. Res. 2199, preamble, U.N. Doc. S/RES/2199 (Feb. 12, 2015).

resolve the ISIL threat through peaceful means, in reality, such efforts have proven woefully unsuccessful in deterring the rise of ISIL.

Such a white-gloved response to the unspeakable atrocities committed by ISIL presents the United Nations as nothing more than an international watch-dog that responds with an occasional bark and no bite. One tragic example came in August 2014 when the Security Council released Resolution 2170. At the time, ISIL's brutality already wreaked havoc over the Middle East, resulting in the execution of thousands of innocent civilians, the migration of millions, and the capture of territory expanding across two nations. In response, the Security Council released a resolution demanding "that ISIL, ANF, and all other individuals, groups, undertaking and entities associated with Al-Qaida cease all violence and terrorist acts, and disarm and disband with immediate effect."<sup>419</sup> When this resolution failed to achieve any positive result, the Council responded with additional demands that have also proven ineffective. One expects more from the international organization charged with maintaining "international peace and security"<sup>420</sup> throughout the world. For the sake of the legitimacy of this vital international body, more is necessary.

Second, if the international body does not itself provide a physical response, individual nation-States must be given adequate authority and clear legal parameters to appropriately defend themselves from terror threats facing their homeland under Article 51 of the Charter. International law has failed to evolve its application of the *rationae temporis* principle to the new, asymmetric world of warfare in two ways.

To begin with, assessing the "imminence" of an attack under the Caroline Doctrine continues to embrace a traditional, symmetric understanding of warfare, an approach inapplicable to today's threat scenario. Unlike traditional threats, imminence of terror attacks may not be established by the building-up of forces at the border, nor do asymmetric forces provide clear evidence that an attack against an entity or nation-State is imminent. Unlike scenarios facing nation-States during the age of the telegraph, when attacks came at dawn by formations of uniformed soldiers, attacks in the modern day come from all sides, by anyone, at any time, and in absolute darkness. Intelligence officials exert monumental effort towards assessing the imminence of terror attack, attempting to protect our nation from the next 9-11. However, such efforts cannot uncover every terrorist plot, nor can they adequately identify every imminent threat. It only takes one rogue airline pilot to point an aircraft toward the Twin Towers, or the French Alps,<sup>421</sup> to change a nation's

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<sup>419</sup> S.C. Res. 2170, para. 4, U.N. Doc. S/RES/2170 (Aug. 15, 2014).

<sup>420</sup> U.N. Charter art. 24, para. 1.

<sup>421</sup> See Monica Houston-Waesch & Natasha Divac, *Mystery Surrounds Possible Motive for Germanwings Co-Pilot Andreas Lubitz*, WALL STREET JOURNAL (Mar. 26, 2015, 5:58 PM), <http://www.wsj.com/articles/germanwings-co-pilot-named-as-andreas-lubitz-1427370009>. The author does not intend to imply that Andreas Lubitz possessed terror-related motives in causing the crash of Germanwings Flight 9525. Rather, the intended point is that tragedy can come from anyone at any time. Moreover, understanding the true motives or mental intentions of seemingly innocent

state of affairs. Attempting to apply nineteenth century doctrine to the modern-day terror threat amounts to attempting to fit a round peg into a square hole.

Not only does the Caroline Doctrine fail to take into consideration today's asymmetric threat, it also fails to offer a practical solution to the doctrine of anticipatory self-defense. Under *Caroline*, a victim nation-State only possesses defensive authority at the moment intelligence officials identify a threat scenario as "instant, overwhelming, leaving no choice of means, no moment for deliberation."<sup>422</sup> Similar to the tale of *Goldilocks and the Three Bears*, international law suggests that evidence of attack can be neither "too cold" nor "too hot"; it must be "just right." However, this approach proves impractical as related to intelligence collection. In reality, intelligence professionals either capture evidence of attack well before execution of the operation (too cold) or after it is too late (too hot). The former leaves no option for anticipatory strike, thus leaving the attacking terrorist organization open to plan future operations with little recourse. The latter defeats the purpose of *anticipatory* self-defense. Maintaining such a restrictive approach to self-defense against terrorism rewards terror organizations that are able to successfully conceal their operations until the moment of attack. Moreover, it endangers the global population, as innocent lives will undoubtedly and unnecessarily be lost as a result. Therefore, as applied to today's terror threat, a modern-day approach to the principle of anticipatory self-defense becomes necessary.

Adopting a modified risk-assessment model offers one possible way to re-define imminence as related to asymmetric threats. Used by corporations for decades, the risk-assessment model calculates overall risk by weighing the probability that an incident will occur against the magnitude of harm that would result if the incident actually occurred. As applied to the *rationae temporis* principle, imminence may be calculated by weighing the likelihood of attack against the gravity of such a potential attack.

Some may argue this approach to calculating imminence merely reiterates principles of preventive self-defense, as low-probability threat scenarios may nevertheless achieve the level of imminence justifying a defensive first-strike simply based on the potential gravity of such an attack. However, several points may be made in response. First, the proposed imminence assessment model only applies to the terrorist threat, thus limiting its total reach. Application of this model to situations lying outside the terror-based scenario simply falls beyond this Article's parameters. Second, although the gravity of potential attack provides a factor in the analysis, the probability of such an attack also plays a vital role. Extremely low probability scenarios would likely fail to trigger the level of imminence required to justify an

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individuals placed in positions of significant responsibility proves impossible in today's world.

<sup>422</sup> SHUE & RODIN, *supra* note 294 (quoting Letter from Daniel Webster to Ambassador Henry Stephen Fox (Apr. 24, 1841),<sup>1</sup> THE PAPERS OF DANIEL WEBSTER: DIPLOMATIC PAPERS, 1841-1843, at 62 and 67-68 (1983)).

anticipatory strike. Alternatively, high-probability attacks of minimal gravity would also fail to satisfy the imminence requirement, further limiting instances where anticipatory attack becomes necessary. Third, while the proposed model provides an imminence calculation, this Article does not propose a threshold calculation of imminence that would legally justify a defensive attack under Article 51. Determining the imminent threshold level remains an open issue, thus providing additional options for international control and modification.

While the imminence-assessment model may not provide a perfect solution, it offers a solid starting point to addressing this very serious problem. At a minimum, it provides a logical approach to today's threat scenario. One cannot reasonably or rationally apply the *Caroline* standard of imminence to today's asymmetric battlefield, thus demanding reconsideration of customary international law principles related to self-defense against the terror threat.

## VI. CONCLUSION

Over the past year, the Islamic State in Iraq and the Levant has amassed an unprecedented level of power in the Middle East. Their brutality has the mysterious effect of invoking fear in entire regions of people while simultaneously prompting thousands of individuals across the globe to join their terror campaign. The broader fight against ISIL now extends well beyond the territory of Iraq and Syria. In varying degrees, ISIL's presence spans the globe, from Yemen to the United Kingdom, from Pakistan to Canada and the United States.

The expanding reach of ISIL within the global community requires a return to President Obama's original declaration. May the United States bring the fight to ISIL *wherever they exist*?<sup>423</sup> As related to ISIL in Syria, the Assad regime's implicit consent, their inability to achieve "willing and able" status, the inherent right to collective and individual self-defense under Article 51 of the Charter, and general authorization by the United Nations Security Council provide ample authority for the United States to engage ISIL in accordance with international law. However, future military operations against non-State actors located within the sovereign territory of other nation-States may yield a different conclusion.

The conditions currently found in Syria provide a template for analyzing future military engagement of non-State actors within the territory of other non-consenting nation-States. The appropriateness of future military operations may depend on: (1) the success and capabilities of the terror organization, (2) the threat posed by the terror organization to the attacking nation-State, and (3) the ability of the host nation-State to appropriately alleviate the threat within its territory. Additionally, as in all cases involving military use of force, necessity and proportionality play an important role.

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<sup>423</sup> See Transcript of Obama's Remarks on the Fight Against ISIS, *supra* note 4.

President Obama’s bold declaration may not apply to every situation, but it likely applies to some. Extraterritorial operations would certainly not prove necessary in, say, the United Kingdom. The ISIL threat posed to the United States by the fairly minimal presence in that nation does not necessitate an external military response. Moreover, intelligence, law enforcement, and military capabilities within the United Kingdom firmly establish the UK as a “willing and able” nation-State. On the other hand, ISIL’s presence in countries such as Libya may yield the opposite conclusion. Though ISIL maintains a less-significant presence within Libya than Iraq and Syria at this time, governmental instability within that nation provides the terrorist organization with ample opportunity to rapidly expand. Moreover, Libya’s current classification as a borderline “failed state”<sup>424</sup> suggests it would not be “willing and able” to adequately alleviate ISIL’s presence within its territory. As a result, unlike the UK, extraterritorial attacks within that country may prove necessary in the future, regardless of the nation’s consent.

This Article seeks not to express an opinion on whether the United States *should* engage ISIL in any territory; it merely provides a *jus ad bellum* argument for extraterritorial use of force in the limited circumstances presented by ISIL’s presence in Syria. The ultimate decision to exert extraterritorial force without the consent of the host nation-State extends far beyond legal boundaries, requiring full deliberation of all diplomatic and geopolitical concerns. Peace usually is the best option. However, as demonstrated by the Islamic State, peace may prove impossible. If not peace, the law favors consent by the host nation-State. When neither exists, international law provides another option.

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<sup>424</sup> Giorgio Cafiero & Daniel Wagner, *Libya’s Descent to a Failed State*, THE WORLD POST (Apr. 7, 2015, 5:03 AM), [http://www.huffingtonpost.com/giorgio-cafiero/libyas-descent-to-a-faile\\_b\\_7012680.html](http://www.huffingtonpost.com/giorgio-cafiero/libyas-descent-to-a-faile_b_7012680.html).



U.S. v. HODGE<sup>1</sup>: A CASE STUDY IN THE USE OF THE COGNITIVE INTERVIEW AS A MEANS TO PROMOTE THERAPEUTIC JURISPRUDENCE IN SEXUAL ASSAULT CASES UNDER THE UNIFORM CODE OF MILITARY JUSTICE (UCMJ)

CAPTAIN CARMAN A. LEONE\*

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\* Captain Carman A. Leone (B.A., *cum laude*, New York University; J.D., *cum laude*, Villanova University School of Law) is the Area Defense Counsel at Grand Forks Air Force Base, North Dakota. As an assistant staff judge advocate in the 319th Air Base Wing Legal Office, he served as one of the trial counsel on *U.S. v. Hodge* and represented the Government at all stages of the case, including the pretrial confinement hearing, the Article 32 hearing, and the General Court-Martial. Much of the factual and procedural background information in the article comes from the author's first-hand knowledge of the events that transpired. The author acknowledges Major Jennifer Holmes, Special Agent Mark Walker, Dr. Robert Fisher, Mr. Russell Strand, Major Jason Gunnell and Lieutenant Colonel Brian Thompson for their time and valuable contributions. Finally, the author thanks Lieutenant Colonel Mike Safko, for his mentorship, inspiration and guidance in making this article possible.

<sup>1</sup> *U.S. v. Hodge* has concluded all appeals. See generally *United States v. Hodge*, 2015 CCA LEXIS 99 (A.F.C.C.A 2015)(denying relief) *petition denied*, 2015 CAAF LEXIS 567 (C.A.A.F. 2015).

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## I. INTRODUCTION

Sometime after midnight on 10 August 2013, a man broke into the on-base residence of Ms. A.H.<sup>2</sup> located at Grand Forks Air Force Base (AFB).<sup>3</sup> Her husband, Senior Airman (SrA) J.H., an active duty Airman, was deployed at the time.<sup>4</sup> After breaking in, the man brutally raped, sodomized, and tortured A.H. in her bedroom, while her toddler-aged daughter lay asleep in a nearby room.<sup>5</sup> After sexually violating A.H., the man left the house.<sup>6</sup> Because of how dark her room was, A.H. was never able to see the face of her assailant.<sup>7</sup>

Within days of the assault, the victim participated in a “cognitive interview” with an agent from the Office of Special Investigations (OSI).<sup>8</sup> The interview yielded five hours of sensory-specific data that ultimately led investigators to identify the rapist as SrA Jory D. Hodge, an Airman who served in the same unit as SrA J.H. where the two worked closely with one another.<sup>9</sup> Senior Airman Hodge also lived on Grand Forks AFB.<sup>10</sup> When he was caught, he was placed into pretrial confinement.<sup>11</sup> Months later he was convicted and sentenced at a General Court-Marital.<sup>12</sup>

The cognitive interview was not just a step in the investigation, but it was used throughout the pretrial proceedings by the prosecution team.<sup>13</sup> Specifically, the cognitive interview permitted the prosecution to build its case, meet its legal burdens, and promote the mental and emotional health of the victim by reducing the number of times she had to relive the specific details of the sexual assault. Relying on the cognitive interview instead of the victim’s live, in-court testimony during the pre-trial proceedings also protected the victim from harsh cross-examination.<sup>14</sup> This process of pursuing justice through the criminal judiciary while minimizing the re-traumatization of the victim in the pursuit of this goal promotes “therapeutic

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<sup>2</sup> The victim and her husband will be referred to by initials only to maintain their privacy.

<sup>3</sup> See *Hodge*, 2015 CCA LEXIS 99 at \*2.

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

<sup>5</sup> *Id.* at \*3-\*4.

<sup>6</sup> See *Hodge*, 2015 CCA LEXIS 99 at \*3.

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

<sup>8</sup> Interview by Special Agent Rosa Chapman with A.H., victim, at Grand Forks AFB, N.D. (Aug. 13, 2014) [hereinafter *Chapman Interview*].

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

<sup>10</sup> See *U.S. v. Hodge*, No. 38563 (Expeditionary Center, Joint Base McGuire-Dix-Lakehurst Jan. 14, 2013) [hereinafter *Hodge R. of Trial*].

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

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

jurisprudence,” a theory that considers the law’s role in promoting emotional and psychological wellbeing.<sup>15</sup>

This case study will explore the use of the cognitive interview as a therapeutic jurisprudence tool to be used in military sexual assault cases. It will do so by first outlining the factual background of the sexual assault beginning with the night of the incident. It will then explore the psychology and theories of the cognitive interview and its viability as an alternative form of interviewing victims of traumatic experiences. Next, the case study will analyze the effectiveness of the use of the cognitive interview in *U.S. v. Hodge* with respect to the investigation, the prosecution as well as the mental health of the victim. Finally, the case study will explore the lessons learned from the case and suggest concrete steps that commanders, investigators and prosecutors can use when faced with a case similar to *U.S. v. Hodge*.

## II. FACTUAL BACKGROUND OF U.S. V. HODGE

### A. The Party

On 9 August 2013, SrA Hodge attended a party on Grand Forks AFB.<sup>16</sup> Two friends from his squadron picked SrA Hodge up from his house, which was located only a mile or two away from where the party was held.<sup>17</sup> SrA Hodge was casually dressed: he wore a black cotton hoodie with a large North Face logo which stretched across its front.<sup>18</sup> When SrA Hodge arrived at the party, he began drinking.<sup>19</sup> People at the party later told investigators that SrA Hodge had been drinking beer.<sup>20</sup> They described his behavior as being annoying and hyper.<sup>21</sup> He was running round the yard and into adjacent woods.<sup>22</sup> At one point, SrA Hodge lay down on the ground.<sup>23</sup> Someone from the party called security forces to escort SrA Hodge back to his home.<sup>24</sup>

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<sup>15</sup> Bruce J. Winick, *Therapeutic Jurisprudence and the Civil Commitment Hearing*, 10 J. CONTEMP. LEGAL ISSUES 37, 38 (1999) (defining therapeutic jurisprudence as “an interdisciplinary field of legal scholarship and approach to law reform that focuses attention upon law’s impact on the mental health and psychological functioning of those it affects.”) Although therapeutic jurisprudence originated as a concept geared toward mental health law, it has been applied in several disciplines under the law, including criminal law, tort law and family law. David B. Wexler, *Two Decades of Therapeutic Jurisprudence*, 24 TOURO L. REV. 17, 26 (2008).

<sup>16</sup> See *Hodge R. of Trial*, *supra* note 10.

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

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

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

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

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

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

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

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

When two security forces members arrived, SrA Hodge gave a bit of resistance; he was not ready to leave the party despite what others thought.<sup>25</sup> He ultimately acquiesced and accepted a courtesy ride back home.<sup>26</sup> The police dropped SrA Hodge off at his house at approximately 0025 on 10 August 2013.<sup>27</sup> It was only after he walked up to his front door from the driveway and let himself inside his house that the police left SrA Hodge's house and went about their night.<sup>28</sup>

## B. The Sexual Assault

A.H. woke to the rustling sound of papers, which were stacked next to A.H.'s bed, or the cracking sound of her iPad splintering under the weight of an intruder's foot.<sup>29</sup> Once startled awake, A.H. was confused, unsure if she was dreaming that she heard a sound or if it was real.<sup>30</sup> The intruder stood silently at the side of her bed, breathing deeply.<sup>31</sup> As her eyes adjusted to consciousness and the blackness of her room, she could only perceive the shadowy silhouette of a man.<sup>32</sup>

She screamed.<sup>33</sup> She asked who was there and what he wanted.<sup>34</sup> She demanded that he leave immediately.<sup>35</sup> The intruder balled his fist and struck her in the face once, then again, then a third time.<sup>36</sup> A.H. fell silent as her face swelled with pain.<sup>37</sup> She begged him to stop.<sup>38</sup> She asked him what he wanted and offered to do anything so long as he would just stop striking her.<sup>39</sup>

The assailant said nothing at first.<sup>40</sup> He did not need to.<sup>41</sup> He took hold of A.H.'s clothes and began to peel them off her.<sup>42</sup> Significantly, A.H. was wearing her religion's undergarments, blessed clothing issued by religious leaders of the

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<sup>25</sup> *Id.*

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

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

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

<sup>29</sup> See *Chapman Interview*, *supra* note 8.

<sup>30</sup> *Id.*

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

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

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

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

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

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

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

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

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

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

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

Church of Jesus Christ of Latter-day Saints (LDS), worn by those members of the church who are in particularly close communion with God.<sup>43</sup> A.H. and SrA J.H. were active LDS members.<sup>44</sup> The assailant removed the shirt, then the bottoms.<sup>45</sup> A.H. was naked.<sup>46</sup> He then removed his own clothing.<sup>47</sup>

Over the course of the next two hours or so, the man raped and sodomized A.H.<sup>48</sup> He would switch from one position to another, threatening that if she did not move quickly enough he would kill her.<sup>49</sup> At one point, he forced his penis inside of her mouth after vaginally raping her.<sup>50</sup> At trial, A.H. described how she gagged as she tasted “herself” while he forced her mouth onto his penis.<sup>51</sup> When she gagged, he threatened to kill her if she vomited on him.<sup>52</sup> When she cried as he raped her, he yelled at her to “shut the fuck up.”<sup>53</sup> SrA Hodge spoke to A.H. between intervals of forced sex, asking her personal questions regarding her sex life with her husband, for example.<sup>54</sup>

When the assailant had satisfied himself, A.H. offered that he could leave and that he did not need to kill her.<sup>55</sup> She explained to him that because she never saw his face due to the darkness of the room, there would be no way for him to get caught.<sup>56</sup> She would never be able to pick him out of a line-up.<sup>57</sup> He agreed and decided to leave without killing A.H.<sup>58</sup> As suddenly as he arrived, he was gone.<sup>59</sup> He left through the front door and disappeared into the night.<sup>60</sup>

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<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

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

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

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

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

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

<sup>51</sup> See *Hodge R. of Trial*, *supra* note 10.

<sup>52</sup> See *Chapman Interview*, *supra* note 8.

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

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

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

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

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

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

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

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

### C. The Investigation

It did not take long for the police to arrive.<sup>61</sup> Security Forces were the first to arrive after the call was made, followed shortly by OSI and downtown authorities.<sup>62</sup> An agent from OSI conducted a brief field interview to get the basics: What happened? Who did it? Where is the intruder? Who else is inside the house?<sup>63</sup>

A.H. was in shock.<sup>64</sup> As police and investigators turned her house into a red-and-blue flashing crime scene, A.H. curled into a ball against the wall of her foyer just inside her front door.<sup>65</sup> A.H. called a friend to come sit with her until the medics arrived.<sup>66</sup>

A.H. was transported to a local hospital where a Sexual Assault Nurse Examiner (SANE) conducted a five-hour intrusive exam into A.H.'s broken body.<sup>67</sup> One of the purposes of the examination was to collect forensic evidence for testing.<sup>68</sup> At the onset of the exam, the SANE conducted an interview of A.H.<sup>69</sup> The interview helped focus the SANE on swabbing particular parts of the patient's body for forensic evidence as well as helped gauge what treatment was necessary for A.H. at that time.<sup>70</sup>

Immediately following the SANE examination, local civilian authorities along with an agent from OSI interviewed A.H.<sup>71</sup> By this point, it was approximately 0830 and A.H. had only slept for a couple hours before the nightmare began.<sup>72</sup> Many of the investigators' questions were narrow, calling for tight answers.<sup>73</sup> The interview lasted approximately one hour and provided a starting point for the investigators to begin their search.<sup>74</sup> Three days passed.<sup>75</sup> When details elicited by the civilian investigators did not produce the leads necessary to catch the rapist, OSI then

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

<sup>62</sup> *See id.* *See also Hodge R. of Trial, supra* note 10.

<sup>63</sup> *See Hodge R. of Trial, supra* note 10.

<sup>64</sup> *See Chapman Interview, supra* note 8.

<sup>65</sup> *See Hodge R. of Trial, supra* note 10.

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

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

<sup>68</sup> *Id.*

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

<sup>70</sup> *Id.*

<sup>71</sup> *See* Interview by Investigator Larry Hoffman and Special Agent Stephen Smith with A.H., victim, in Grand Forks, N.D. (Aug. 10, 2013) [hereinafter *Hoffman and Smith Interview*].

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

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

<sup>74</sup> *Id.*

<sup>75</sup> *See Hodge R. of Trial, supra* note 10.

decided to call A.H. back for another interview, one that the investigators referred to as the cognitive interview.<sup>76</sup>

Special Agent Rosa Chapman flew in from Buckley AFB, where she was stationed, to Grand Forks, North Dakota, specifically to conduct the cognitive interview of A.H.<sup>77</sup> The cognitive interview was more than five times longer than the initial standard police investigative interview (“standard interview”) that was conducted by the civilian investigator hours following the assault.<sup>78</sup> The cognitive interview was video-recorded in an OSI interview room.<sup>79</sup> All of the information that was elicited during the standard interview was drawn from A.H. during the cognitive interview, plus much more.<sup>80</sup> The details she gave during the cognitive interview were richer and more specific than those gleaned from the standard interview.<sup>81</sup>

Based on the details generated from the cognitive interview, OSI was able to identify SrA Hodge as a suspect on 14 August 2013, only approximately 48 hours following the cognitive interview.<sup>82</sup> That same day, a military magistrate granted search authorization to search his home for articles of jewelry and clothing that A.H. mentioned her assailant wore during the cognitive interview.<sup>83</sup> Inside SrA Hodge’s house, investigators discovered clothing and a watch that matched the items A.H. identified.<sup>84</sup> Later that day, SrA Hodge was placed into pretrial confinement.<sup>85</sup>

### III. THEORIES UNDERLYING THE COGNITIVE INTERVIEW

Scholars have devoted hours of research and discussion to explore the utility of the cognitive interview as a means to elicit credible information and as a technique in promoting therapeutic jurisprudence.<sup>86</sup> Two fundamental theories have emerged: (1) the cognitive interview, if conducted properly, will yield more information than a standard police investigative interview; and (2) the cognitive interview fosters therapeutic jurisprudence because the techniques used to administer the interview promote the victim’s psychological health.<sup>87</sup>

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

<sup>77</sup> See *Chapman Interview*, *supra* note 8.

<sup>78</sup> *Id.*

<sup>79</sup> See *Hodge R. of Trial*, *supra* note 10.

<sup>80</sup> Compare *Hoffman and Smith Interview*, *supra* note 71 with *Chapman Interview*, *supra* note 8.

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

<sup>82</sup> See *Hodge R. of Trial*, *supra* note 10.

<sup>83</sup> See *Hodge R. of Trial*, *supra* note 10 and *Chapman Interview*, *supra* note 8.

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

<sup>85</sup> See *Hodge R. of Trial*, *supra* note 10.

<sup>86</sup> See Ronald P. Fisher & R. Edward Geiselman, *The Cognitive Interview Method of Conducting Police Interviews: Eliciting Extensive Information and Promoting Therapeutic Jurisprudence*, 33 INT’L J.L. & PSYCHIATRY 321, 321 (2010).

<sup>87</sup> See *infra* text accompanying notes 88-114.

## A. Theory 1: The Cognitive Interview Will Elicit More Information than the Standard Interview.

The cognitive interview was designed for criminal investigators to elicit more credible information from witnesses than the standard interview.<sup>88</sup> One problem with the standard interview is the way it is administered. The standard interview usually involves an investigator asking a series of pre-scripted, narrow questions to which the victim provides rote answers.<sup>89</sup> The victim's answers are rote not because the victim has little to say, but because the style and administration of the questions subconsciously establish a superior-subordinate relationship.<sup>90</sup> In these standard interviews, the interviewer assumes the superior position while the victim is relegated to the subordinate role; one asks, the other answers.<sup>91</sup> The interviewer needs information that the victim has in order to meet the investigative goal.

This power balance construct leads to a variety of problems: the interviewer ends up doing most of the talking while the victim simply “helps out;” the questions often only call for true/false, yes/no answers; the order of the questions and the flow of information is entirely controlled by the interviewer; the interview often times begins very formally (i.e., “what is your full name” and “what is your address”) which is usually geared toward helping the investigator fill out police reports; the interviewer will interrupt the victim to ask follow-up questions before the victim is finished with a particular thought; and the interviewer will frequently ask questions in a way that calls for a specific answer, often times an answer that will help support a hypothesis formed by the interviewer.<sup>92</sup>

The cognitive interview is designed to remedy each of these flaws. The interview is organized around the three psychological processes of cognition, social dynamics and communication.<sup>93</sup>

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<sup>88</sup> Fisher & Geiselman, *supra* note 86, at 321.

<sup>89</sup> *Id.*

<sup>90</sup> *See id.*

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

<sup>92</sup> *Id.* at 322. One study attributed to Dr. Ronald Fisher revealed that the average “standard” police interview had three open-ended questions and 26 closed-ended questions with an average of only one-second pauses between each question. *See* Russell Strand, webcast from Fort Leonard Wood, Mo. (Mar. 14, 2014) (unpublished webcast) [hereinafter *Strand webcast*] (citing Ronald Fisher, *Interviewing Victims and Witnesses of Crime*, 1 PSYCHOL. PUB. POL’Y & L. 732, 735 (1995)). The study further revealed that during these standard interviews, investigators interrupted responses to open-ended questions after seven and a half seconds with an average of four interruptions per response. *Id.* In the study, no interview was complete without the investigator interrupting a witness response to a question. *Id.*

<sup>93</sup> Fisher & Geiselman, *supra* note 86, at 323.

The cognitive interview maximizes memory retrieval by urging the victim to emotionally and mentally return to the time of the trauma.<sup>94</sup> Investigators may choose to encourage the victim to close her<sup>95</sup> eyes and return to the traumatic event. Because a heightened emotional state can limit the victim's ability to process information, interviewers should ask few-open ended questions to allow the victim to search through her memory and take time to recall the event before answering the question.<sup>96</sup>

Social dynamics must also be considered during the cognitive interview. In an interview between two people, each person's behavior will influence the other.<sup>97</sup> Victims must have a certain level of trust and comfort with the interviewer before they decide to relive the trauma.<sup>98</sup> Interviewers, therefore, must make a conscious effort to build rapport with the victim before delving into specific questions about the trauma.<sup>99</sup> Once the questioning does begin, the interviewer should be as empathetic or sympathetic to the victim as possible to continue to build the trust during the interview and reduce anxiety.<sup>100</sup> Moreover, when questioning, interviewers should be flexible with the questions they ask, allowing the victim to lead the interview without interruption.<sup>101</sup> The interviewer can also play a helpful role in unburdening the victim by assuring them their behavior is not in question, but rather, only the behavior of the subject of the investigation.<sup>102</sup>

Finally, the cognitive interview's success depends on the witness's extensive, detailed responses.<sup>103</sup> To elicit extensive and detailed responses, interviewers should instruct her to report everything she thinks about, whether it is insignificant, out of chronological order, or even if it is contradictory to something previously said.<sup>104</sup> Victims should also feel free to use nonverbal communication. For example, if an event largely centers around the layout of a room, then victims should respond

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

<sup>95</sup> While not all victims are women, the pronoun "she" will be used throughout the article when referring to victim in the abstract simply for ease of writing and reading.

<sup>96</sup> Fisher & Geiselman, *supra* note 86, at 323.

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

<sup>98</sup> *Id.* at 324.

<sup>99</sup> *Id.*

<sup>100</sup> *Id.* See also *Strand webcast, supra*, note 92 (explaining that it is incumbent upon the interviewer to help the victim trust the interviewer—for the victim to know the interviewer is listening; the interviewer must be empathetic, and this is a skill which must be practiced in order to get good at it).

<sup>101</sup> Fisher & Geiselman, *supra* note 86, at 324.

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

<sup>103</sup> *Id.*

<sup>104</sup> *Id.* Fisher also recommends, however, that interviewers refrain from applying pressure on witnesses to answer questions they are uncertain about. *Id.* Interviewers should instruct their victims to not guess, but simply indicate when they do not know the answer to a question. *Id.*

spatially, by drawing a sketch of the room or arranging objects to recreate the room at the time of the assault.<sup>105</sup>

Research shows that when properly administered, the cognitive interview can generate substantially more correct details than a standard interview.<sup>106</sup> In some studies, cognitive interviews elicited between 25% and 40% more information when compared to standard interviews.<sup>107</sup> In terms of amount and accuracy of information, some scholars have concluded that the worst possible effect in administering a cognitive interview in lieu of a standard interview is simply that the same information is elicited.<sup>108</sup>

## B. Theory 2: The Cognitive Interview Promotes Therapeutic Jurisprudence.

Victims of sexual assault can feel powerless, shame and guilt simply as a result of cooperating with those who are part of the legal system, a process that often begins with the first “standard interview.”<sup>109</sup> The cognitive interview is designed to remedy this problem. Specifically, the cognitive interview fosters therapeutic jurisprudence by promoting the psychological health of the victim. It does so in a number of ways. First, helping victims tap into their cognitive well of rich detail may contribute to their better psychological functioning.<sup>110</sup> Extensive recall suggests to victims that they have “mastered the event,” and therefore, provides a feeling of greater control in an otherwise unstable time.<sup>111</sup> Permitting victims to control the speed of the interview, the topic, the direction of the interview and the manner in

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<sup>105</sup> *Id.*

<sup>106</sup> Gunter Kohnken et al., *The Cognitive Interview: A Meta-Analysis*, 5 PSYCHOL. CRIME & L. 3, 20 (1999).

<sup>107</sup> Fisher & Geiselman, *supra* note 86, at 325.

<sup>108</sup> See Kohnken et al, *supra* note 106, at 20. (“[I]t can be concluded that the worst possible effect that may be obtained when a cognitive interview instead of a standard interview is applied is simply no effect at all.”). *But see Strand webcast, supra* note 92 (explaining that because the cognitive interview was not designed for interviewing victims of highly stressful or traumatic experiences, it may be a relatively unreliable method of interviewing). Strand suggests that victims of traumatic events, like sexual assault, be interviewed using the Forensic Experiential Trauma Interview (“FETI”). Strand explained that while the cognitive interview and FETI have many similarities—i.e., both minimize leading and direct questions, both attempt to gain understanding of the experience, both have components that attempt to understand the sensory information associated with the experience, and both attempt to minimize re-traumatization—there are several differences. *See id.* Strand suggests that one limitation of the cognitive interview, among others, is that it tends to “focus on the peripheral details,” which, in theory, “are far more susceptible to suggestion and are far less reliable.” *Id.* This can lead to producing error when the victim recounts the incident. *Id.* Ultimately, Strand concludes that the FETI works “far better [compared to the cognitive interview] in obtaining the information we need to prove or disprove[] the elements of proof, particularly in sexual assault investigations and prosecutions.” *Id.*

<sup>109</sup> Rebecca Campbell, *The Psychological Impact of Rape Victims’ Experiences With the Legal, Medical, and Mental Health Systems*, 63 AM. PSYCHOL. 702, 703 (2008).

<sup>110</sup> Fisher & Geiselman, *supra* note 86, at 325.

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

which they choose to respond (i.e., verbally or non-verbally) provide victims with means to have their voices heard.<sup>112</sup>

Similarly, while rapport building via empathy and sympathy help garner the trust needed for interviewers to elicit rich information, it also helps develop a strong sense of personal concern for the personhood of the victim.<sup>113</sup> This, in turn, promotes a sense of dignity for the victim and allows the victim to believe the interviewer is concerned about the victim and is not just using her to solve a case.<sup>114</sup> The cognitive interview helps avoid the unintended collateral consequences that result from “standard interview,” which sometimes leave victims feeling dehumanized, intimidated and blamed.<sup>115</sup>

### C. Balancing Competing Interests under the Therapeutic Jurisprudence Model

With the emergence of reportedly effective therapeutic treatment options—like Eye Movement Desensitization and Reprocessing (EMDR)<sup>116</sup>—available to

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<sup>112</sup> *Id.* at 326.

<sup>113</sup> *Id.*

<sup>114</sup> *Id.*

<sup>115</sup> See Campbell, *supra* note 109, at 704-05. Campbell reports alarming statistics about victims’ opinions of their cooperation and interaction with legal system: “In self-reporting characterizations of their psychological health, rape survivors indicated that as a result of their contact with the legal system personnel, they felt bad about themselves (87%), depressed (71%), violated (89%), distrustful of others (53%), and reluctant to seek further help (80%).” *Id.* at 705. Campbell explains that victims are often questioned repeatedly about elements of the crime to check for consistency in their accounts, leaving the victims emotionally unsettled which can further impede their concentration and memory. See *id.* at 704. Worse, they are questioned about what they were wearing while assaulted, about their prior sexual history, and about whether they responded sexually to the assault. See *id.*

<sup>116</sup> EMDR is an evidence-based psychological treatment for posttraumatic stress disorder. Isabel Fernandez, *EMDR After a Critical Incident: Treatment of a Tsunami Survivor with Acute Posttraumatic Stress Disorder*, 2 J. EMDR PRAC. & RES. 156, 156 (2008). It facilitates the accessing and processing of traumatic memories and brings them to adaptive resolution. *Id.* A clinician guides the patient through eight phases of treatment, divided among three or more sessions. *Id.* at 157. The first two phases involve taking a full history, assessing the patient’s readiness for EMDR, and then developing a treatment plan by identifying the worst part of the traumatic memory, which serves as a “target” for EMDR reprocessing. *Id.* These phases also consist of creating an appropriate therapeutic relationship between patient and clinician as well as preparing the patient for EMDR. *Id.*

The rest of the phases focus on having the patient process the most disturbing aspect of the traumatic memories in order to release the trauma created by the emotional impact of his or her experience. *Id.* During these phases, the patient is instructed to follow eye movements at the direction of the clinician while internally focusing on a “negative cognition” phrase that the patient conjured while focusing on the worst memory of the trauma. *Id.* at 158. The patient is also instructed to focus on the negative body sensation experienced when focusing on the memory. *Id.* This is repeated many times in a series of sets, after each of which, the patient gives feedback.

Through repetition of the eye movement sets, the patient reprocesses the memory—smells and physical sensations associated with the memory of the trauma—until all fragments of the experience are reintegrated. *Id.* A positive cognition then takes the place of the negative cognition.

victims of sexual assault who suffer from post-traumatic stress disorder (PTSD), an important question worth raising is to what extent should investigators, prosecutors and commanders pursue therapeutic jurisprudence goals as applied to victims of sexual assault at the expense of other goals like the investigation or prosecution of the accused?

The answer depends on whom you ask. A mental health practitioner, like a clinical social worker or a psychiatrist, may suggest that in nearly all circumstances, treatment such as EMDR should be initiated immediately after identification of PTSD symptoms if the patient has expressed difficulty in coping with post-trauma reality. The argument would be that if investigators, prosecutors, and commanders are truly concerned with the wellbeing of the victim, then psychological treatment that reduces pain, like EMDR, should be immediately initiated at any cost.

Seasoned practitioners of therapeutic jurisprudence, however, acknowledge that therapeutic jurisprudence does not necessarily suggest that the pursuit of therapeutic goals should “trump” other goals.<sup>117</sup> While investigators, prosecutors and commanders should have concern for the mental health of the victim, all interests at play should be considered before making a decision about mental health treatment that may affect the victim’s ability to testify at trial.

For example, if successful, EMDR will not only eliminate symptoms of PTSD, it will also allow the victim to be able to remember what she experienced at the time of the trauma in a detached way without triggering disturbing or anxiety-provoking emotions.<sup>118</sup> Come trial, if the victim testifies about the sexual assault in a way that is stripped of all emotion, jurors with misguided and preconceived notions of how victims should act (i.e., cry while testifying about the sexual assault) may be led to believe the victim is not telling the truth or exaggerating the severity of the trauma experienced. Jurors may see a victim whose lack of emotion betray her testimony. Ultimately, the goal in all circumstances is to balance the sometimes competing interests of the Government with the victim’s emotional and psychological health.

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Following the reprocessing, the goal is to eliminate all tension and negative association with the memory in the patient. *Id.*

<sup>117</sup> David B. Wexler, *Therapeutic Jurisprudence: An Overview*, 17 T.M. COOLEY L. REV. 125, 125 (2000) (“It is important to recognize that therapeutic jurisprudence does not itself suggest that therapeutic goals should trump other ones.”).

<sup>118</sup> Fernandez, *supra* note 116, at 158.

#### IV. APPLICATION AND USE OF THE COGNITIVE INTERVIEW IN U.S. V. HODGE

##### A. The Superiority of the Cognitive Interview

SA Chapman and A.H. met at the OSI Det. 320 building approximately three days after the sexual assault for the cognitive interview.<sup>119</sup> At the onset of the interview, SA Chapman explained the difference between a standard interview and a cognitive interview:

**SA Chapman:** [T]his interview is a little bit different. And the reason why it's different is because we're not going to rush through it.... You are in control...you do most of the talking.... I don't have a checklist. I don't go question by question, asking you, "did you see this," "what did you do?"...Focus. Take as much time as you need to. Close your eyes if you need to.

**A.H.:** ...I'm not sure if I want to.

**SA Chapman:** [I]t is really hard. It is absolutely difficult and I understand that. You know...we need you, absolutely need you. You are the most important part for us in this investigation, and we truly want to find whoever did this.... I will minimize my questions... [J]ust sit back and close your eyes and take five minutes, 10 minutes, an hour, however long you need to put yourself back in that situation again.... What's most important about this is understanding that the room, it was dark. Was it dark?

**A.H.:** I have room-darkening curtains.... They're really thick. So, it was...it was really dark in that room so I couldn't really see very much.

**SA Chapman:** So, understanding that your eyesight [was] limited at this point because you have no light in the room. It's going back to focusing on things that you smell; the things that you touched; the things that you heard, so all your sensory skills; all of your sensory memory.... So, it's going to be a lot of going through everything and then, going back and revisiting certain portions within that.... I think that will be, at this point, it's the only way for us to get more information on this person.

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<sup>119</sup> See *Hodge R. of Trial*, *supra* note 10.

A.H.: Okay, I'm remembering a couple things that I sort of thought of....<sup>120</sup>

A.H. talked for approximately five hours, with few questions from SA Chapman.<sup>121</sup> A.H. did not recite the facts chronologically, but rather, jumped back and forth from one part of the assault to another.<sup>122</sup> She focused on senses that SA Chapman asked her to concentrate on.<sup>123</sup> During the cognitive interview, many of the details that A.H. had previously provided to the civilian authorities during the standard interview were provided again.<sup>124</sup> This time, however, A.H. gave much more detail, building on the information that was generated during the standard interview.<sup>125</sup>

Comparing the transcripts of the two interviews side by side, it is clear the cognitive interview yielded not only more information but also valuable, specific information that directly advanced the investigation and prosecution of the case against SrA Hodge.<sup>126</sup>

For example, during the standard interview, A.H. described that her assailant's "chest was smooth" and that his body was "toned" and "firm."<sup>127</sup> In the cognitive interview, however, A.H. described her attacker by saying

[it is like] when you've seen those muscle guys, like they're oiled... and they're perfectly hairless? Like can you imagine running your finger on that? Like that's what it was, but he wasn't like the big muscle, muscularly, muscle type person. It was very lean, and I could feel that he was well toned.<sup>128</sup>

During the cognitive interview, not only did A.H. describe his chest was smooth, but later added that his entire torso, including his shoulders, fingers, back and face were all smooth.<sup>129</sup> When OSI took pictures of SrA Hodge's body later pursuant to search authorization, they discovered that he was virtually hairless from his waist to his neck, to include his arms and hands.<sup>130</sup>

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<sup>120</sup> *Chapman Interview*, *supra* note 8.

<sup>121</sup> *See Chapman Interview*, *supra* note 8 and *Hodge R. of Trial*, *supra* note 10.

<sup>122</sup> *Chapman Interview*, *supra* note 8.

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

<sup>124</sup> *See Hoffman and Smith Interview*, *supra* note 71 and *Chapman Interview*, *supra* note 8.

<sup>125</sup> *Compare Hoffman and Smith Interview*, *supra* note 71 with *Chapman Interview*, *supra* note 8.

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

<sup>127</sup> *Hoffman and Smith Interview*, *supra* note 71.

<sup>128</sup> *Chapman Interview*, *supra* note 8.

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

<sup>130</sup> *See Hodge R. of Trial*, *supra* note 10.

A.H. said during her standard interview that her intruder wore a watch that glowed in the dark and a hoodie, without providing much further detail about either item.<sup>131</sup> She described the same items in the cognitive interview but added that the watch had a “green glow” and that the hoodie felt like it was made of cotton except for the front, which had “the plastic feel of like a design.”<sup>132</sup> Days later, when special agents searched SrA Hodge’s house for evidence linking him to the scene of the crime, they discovered an analogue watch which glowed bright green in the dark as well as a North Face black cotton hoodie that had a large plastic logo stretching across its front.<sup>133</sup>

During the standard interview, A.H. said that her assailant initially “screamed at [her]” but did not specifically say what he screamed.<sup>134</sup> The investigator simply never asked, “What did he scream?” In the cognitive interview, however, she explained that the first words that the intruder yelled at her were “shut the fu[--] up.”<sup>135</sup> She went into great detail in the cognitive interview about how he pronounced this phrase, about how he placed particular emphasis on the “u” in “fu[--].”<sup>136</sup>

This was significant because when investigators were narrowing their suspect pool the day following the cognitive interview, the investigators had each suspect say this specific phrase into a recording device.<sup>137</sup> OSI investigators then played the voices back for A.H. in a blind audio lineup later that day.<sup>138</sup> When A.H. heard SrA Hodge’s voice, she had a visceral reaction.<sup>139</sup> She said she almost vomited when she heard it.<sup>140</sup>

A.H. told the civilian investigator during the standard interview only that he smelled of “alcohol.”<sup>141</sup> During the cognitive interview, however, she explained that the smell was “[n]ot like wine or like a wine cooler... I have smelled something like Jack Daniels before, it didn’t smell like that. It smelled like beer to me.”<sup>142</sup> A witness testified at a pretrial hearing that SrA Hodge was, in fact, drinking beer

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<sup>131</sup> See *Hoffman and Smith Interview*, *supra* note 71.

<sup>132</sup> Compare *Hoffman and Smith Interview*, *supra* note 71 with *Chapman Interview*, *supra* note 8.

<sup>133</sup> See *Hodge R. of Trial*, *supra* note 10.

<sup>134</sup> *Hoffman and Smith Interview*, *supra* note 71.

<sup>135</sup> *Chapman Interview*, *supra* note 8.

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

<sup>137</sup> See *Hodge R. of Trial*, *supra* note 10.

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

<sup>139</sup> *Id.*

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

<sup>141</sup> *Hoffman and Smith Interview*, *supra* note 71.

<sup>142</sup> *Chapman Interview*, *supra* note 8.

while at the party he attended in the evening of 9 August 2013, hours before the assault on A.H.<sup>143</sup>

The standard interview differed from the cognitive interview also in the phraseology used to construct the questions.<sup>144</sup> In the standard interview, for example, many of the questions were narrow and called for limited answers.<sup>145</sup> Examples include: “do you know exactly what time the assault took place?” and “did you get a good look at the attacker?”<sup>146</sup> When A.H. described his hair as being curly, the investigator asked, “could it be maybe he had a perm?” and then “do you recall if it was more oily or dry.”<sup>147</sup> Such questions called for suffocated answers of “yes,” “no,” option A or option B. SA Chapman, on the other hand, encouraged A.H. to mentally return to the assault during the cognitive interview.<sup>148</sup> Her questions were based on focusing in on specific points in time.<sup>149</sup> For example, SA Chapman said “put yourself back into that moment when you’re touching this person. And you’re feeling, you’re thinking in your head, this is really soft. And you’re feeling around... what do you feel? Or do you feel any bumps, or potential [] tattoos?”<sup>150</sup>

The timing and order of questions was drastically different between the two interviews as well.<sup>151</sup> During the standard interview, the investigator asked what seemed like pre-scripted questions that he asked in succession of one another, regardless of the answers he received from A.H.<sup>152</sup> For example, the following colloquy took place at one point during the standard interview:

**Q: Do you know if he kissed your neck or...**

A: He, he did [...] like [,] he [...] I mean he was kissing, kissing my lips and tongue and in my mouth and stuff but like he did like small kisses[,] but he wasn’t like giving me a hickey on my neck or anywhere else, just on my mouth.

**Q: Did you know if the nurses swabbed your neck at all...**

A: [S]he swabbed back here [because] he was like biting a little bit... I don’t think she did my neck

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<sup>143</sup> *Hodge R. of Trial*, *supra* note 10.

<sup>144</sup> Compare *Hoffman and Smith Interview*, *supra* note 71 with *Chapman Interview*, *supra* note 8.

<sup>145</sup> See *Hoffman and Smith Interview*, *supra* note 71.

<sup>146</sup> *Hoffman and Smith Interview*, *supra* note 71.

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

<sup>148</sup> See *Chapman Interview*, *supra* note 8.

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

<sup>150</sup> *Chapman Interview*, *supra* note 8.

<sup>151</sup> Compare *Hoffman and Smith Interview*, *supra* note 71 with *Chapman Interview*, *supra* note 8.

<sup>152</sup> See *Hoffman and Smith Interview*, *supra* note 71.

**Q: Okay...when he was kissing you do you recall...any distinguishing features of his breath?**

A: Alcohol.

**Q: Alcohol?**

A: Like strong enough like I can still sor[t] of smell it on myself like there was enough alcohol...

**Q: His voice, did you, did you recognize his voice? You ever heard it?**

A: Uh-uh (negative) I didn't know him at all.

**Q: Was it a distinct voice that you would remember if you heard it again?**

A: Maybe, I mean, if you would ask me a couple hours ago, I might have been able to give you a better answer but I don't remember any more about what he sounded like....

**Q: What about his clothing description? Do you, can you...explain what he was wearing?**

A: I know he was wearing a hoodie. I felt that...because he kept making me put his arms around...him and I felt the hood on the back of it....

**Q: Was it a dark-colored hoodie?**

A: I couldn't, I have...in my room, my curtains are the room darkening curtains so it was pitch black in my room except like a tiny little bit of light and it wasn't enough to see anything.

**Q: What side of the bed do you sleep on?**

A: The whole thing. I kind of sprawl out...

...

**Q: Do you remember...even thinking about scratching or hurting the offender when he was...?<sup>153</sup>**

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<sup>153</sup> *Hoffman and Smith Interview, supra note 71.*

A majority of questions seemed to not consider the answers that A.H. provided to the previous question. Many of the answers called for follow-up questions, but instead of delving deeper into any one particular answer A.H. provided, the interviewer moved in another direction by asking a non sequitur. Simply put, the investigator drove the direction of the standard interview despite the answers or natural flow of the question-and-answer exchange. This technique stands in stark contrast to the cognitive interview model SA Chapman employed, where she empowered A.H. to steer the interview and discuss what she wanted to discuss, when she wanted to discuss it.

Most importantly in this case, the investigator who conducted the standard interview was a man who A.H. never met before.<sup>154</sup> Also present in the room where the interview took place was another investigator—also a man who A.H. never met before—and a victim advocate assigned to A.H. from Grand Forks AFB, who was also a man A.H. had never met before that night.<sup>155</sup> Essentially, A.H. was placed in a room with three strange men, two of whom asked her questions about how she was sexually violated at the hands of a stranger just hours before. Further, the interview followed hours of security forces and OSI investigators securing the scene of the crime, all of whom were men. When the standard interview began, the investigator matter-of-factly explained that he was going to ask “a series of questions” and that A.H. was to “try and answer to the best of [her] knowledge.”<sup>156</sup> He began with asking the basics: name, place of assault, address, etc.<sup>157</sup> Virtually no rapport was built with the victim.<sup>158</sup>

Not surprisingly, the rapport building with A.H. by SA Chapman at the beginning of the interview was off to a tremendous start simply because SA Chapman was a woman:

**SA Chapman:** I’m going to begin. I’m Rosa. (The Special Agent showed what appeared to be identification to [A.H.]) I’m the agent with OSI.

**A.H.:** Oh, okay. Can I ask a question?

**SA Chapman:** Go ahead.

**A.H.:** Is there a reason why you weren’t one of the agents there that night?

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<sup>154</sup> See *Hoffman and Smith Interview*, *supra* note 71.

<sup>155</sup> See *Hoffman and Smith Interview*, *supra* note 71 and *Chapman Interview*, *supra* note 8.

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

<sup>157</sup> See *Hoffman and Smith Interview*, *supra* note 71.

<sup>158</sup> See *id.*

**SA Chapman:** Because I'm not stationed here.

**A.H.:** Oh. I was not really very happy that man after man kept walking into my house, and I'm like, where are all of the females? I know they exist. I was a little annoyed. So, I was like, don't we have a female OSI agent?

...

**SA Chapman:** And right here, right now, they don't have any female agents here.... We try to get them in the units, but sometimes it doesn't work.

**A.H.:** Yeah, I mean, if there's not enough females that are qualified or whatever, then you can't...you guys can have only so many, I understand that. I just—I wasn't—I didn't know that you were from somewhere else. I thought, well, there's a female OSI there, where were you?<sup>159</sup>

A.H.'s comfort level and trust of the interviewer during the cognitive interview was crucially important. Had she not felt comfortable closing her eyes and mentally returning to the night of the sexual assault, the rich details, which the cognitive interview was designed to elicit, may not have been discovered.

## B. Use of the Cognitive Interview during the Pretrial Stage of the Court-Martial

SrA Hodge was placed in pretrial confinement in the evening of 14 August 2013, based on probable cause that he committed burglary, assault consummated by a battery, multiple counts of rape, forcible sodomy, and communicating threats.<sup>160</sup> Less than a week later, a pretrial confinement hearing was held to determine whether SrA Hodge should continue to be confined or ordered released. At the hearing, the Government met its legal burden and convinced the pretrial confinement review officer to keep SrA Hodge in confinement. The Government Representative (GR) was able to do so, in large part, by playing portions of the recorded video of the victim's cognitive interview at the hearing. Specifically, the GR focused on narrow slices of video that captured A.H. giving descriptions of her assailant that perfectly matched SrA Hodge as well as descriptions of physical evidence that was later seized from his home, like the glowing watch.

The prosecution team then made the strategic decision to reduce the cognitive interview to a verbatim transcript.<sup>161</sup> Meanwhile A.H. requested and received

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<sup>159</sup> *Chapman Interview*, *supra* note 8.

<sup>160</sup> *Hodge R. of Trial*, *supra* note 10.

<sup>161</sup> *Chapman Interview*, *supra* note 8.

a Special Victim's Counsel (SVC), an attorney assigned to A.H. to represent her interests. When the Article 32 pretrial investigation hearing<sup>162</sup> was scheduled for October 2013, the prosecution team and the SVC discussed the merits of A.H. testifying at the pretrial confinement hearing.<sup>163</sup> The GR needed the testimony of A.H. to meet the Government's burden at the hearing. A.H., however, was reluctant to testify in open court, in front of her rapist, so soon after the sexual assault.<sup>164</sup> A.H. declined the invitation to testify in the hearing after consulting with her SVC.<sup>165</sup>

At the time, the Rules for Court-Martial (RCM), required live testimony from available witnesses at the Article 32 hearing, including the victim.<sup>166</sup> Only in the event that a witness was deemed unavailable, as determined by the Investigative Officer (IO) who presided over the hearing, were alternative forms of testimony, like written statements, allowed to be considered in lieu of live testimony.<sup>167</sup> Because A.H. declined the invitation to testify at the Article 32 hearing, she was determined "unavailable."<sup>168</sup> Thus, the 155-page verbatim transcript of the five-hour cognitive interview, which A.H. read and swore to as being accurate prior to the hearing, was admitted into evidence in the place of her in-court testimony.<sup>169</sup> This was arguably the most important exhibit admitted at the hearing, which the IO used in determining that

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<sup>162</sup> The Article 32 pretrial investigation hearing is a mandatory hearing in General Courts-Martial that takes place before charges are "referred" by the General Court Martial Convening Authority. Prior to the passing of the National Defense Authorization Act for Fiscal Year 2014 (NDAA), the purpose of the hearing was to have an impartial investigator review all the evidence and determine whether the evidence supports the charges preferred by the Government. *See generally* MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 405, (2012) [hereinafter *MCM*]. The hearing usually takes place in a court-room, and evidence (including witnesses) may be presented by both attorneys for the Government and the Defense.

<sup>163</sup> *See Hodge R. of Trial, supra* note 10.

<sup>164</sup> *See id.*

<sup>165</sup> *See id.*

<sup>166</sup> *See MCM, supra* note 162, R.C.M. 405(g)(2)-(4).

<sup>167</sup> *See MCM, supra* note 162, 405(g)(4)(B) ("The investigating officer may consider, over objection of the defense, when the witness is not reasonably available: (i) Sworn statements; (ii) Statements under oath taken by telephone, radio, or similar means providing each party the opportunity to question the witness under circumstances by which the investigating officer may reasonably conclude that the witness' identity is claimed; (iii) Prior testimony under oath; and (iv) Deposition of that witness; and (v) In time of war, unsworn statements.")

<sup>168</sup> *See MCM, supra* note 162, R.C.M. 405(g)(2)(B) ("The investigating officer shall decide whether a civilian witness is reasonably available to appear as a witness.") It is worth noting here that the IO lacks subpoena power to compel any civilian witness to testify at the Article 32 hearing. *See id.*, at discussion ("If the investigating officer determines that a civilian witness is apparently reasonably available, the witness should be invited to attend... If the witness refuses to testify, the witness is not reasonably available because the civilian witness may not be compelled to attend a pretrial investigation... the investigating officer [nor] any government representative... [have] authority to issue a subpoena to compel against his or her will a civilian to appear and provide testimony or documents.") This rule will now extend to military victim witnesses, as authorized under the NDAA. *See infra* note 191 and accompanying text.

<sup>169</sup> *See Hodge R. of Trial, supra* note 10.

the facts supported the charges against SrA Hodge. The IO ultimately recommended referring all charges and specifications to General Court-Martial.<sup>170</sup>

Moreover, both SrA Hodge's defense team as well as the prosecutors used the transcribed cognitive interview during motion practice leading to trial.<sup>171</sup> The Defense quoted some of the cognitive interview, which described some of the bizarre conversations that SrA Hodge had with A.H. during the assault, as a basis for requesting a formal psychological test of SrA Hodge to ensure that he understood the nature of his actions at the time of the sexual assault.<sup>172</sup> Similarly, in a responding brief to a pretrial motion by the defense team, which asked the court to consider releasing SrA Hodge from pretrial confinement until the trial date, the Government relied on the cognitive interview to convince the court that he should not be released from confinement due to his dangerousness.<sup>173</sup>

The Government and the Defense eventually reached a pretrial agreement (PTA) just weeks before the trial was scheduled to begin on 13 January 2014.<sup>174</sup> The agreement allowed the accused to receive no higher than 20 years in prison in exchange for a plea of "guilty" to all charges and specifications.<sup>175</sup> All parties to the agreement, in addition to the SVC and A.H., approved of the deal.<sup>176</sup> The General Court Martial Convening Authority (GCMCA) personally called A.H. to discuss her thoughts on the PTA. Only after he was satisfied that the PTA was in the best interest of the Government and A.H., did he accept the agreement.

At trial, SrA Hodge pled guilty to all charges and specifications.<sup>177</sup> He was sentenced to 34 years in prison, which was capped pursuant the PTA at 20 years.<sup>178</sup> Though she did not need to, A.H. testified in court during the sentencing proceedings before her assailant.<sup>179</sup> Had she wanted to, because of the PTA, A.H. could have decided to not testify at all throughout the entire case.

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<sup>170</sup> *Id.*

<sup>171</sup> *See id.*

<sup>172</sup> *See id.* This process is referred to as a "sanity board" and is permitted under regulation. *See generally MCM, supra* note 162, R.C.M. 706. A clinical psychologist conducted the sanity board on SrA Hodge, who determined that he did appreciate the nature of his misconduct at the time he committed it, thereby allowing the case to proceed to trial. *See Hodge R. of Trial, supra* note 10.

<sup>173</sup> *See Hodge R. of Trial, supra* note 10.

<sup>174</sup> *Id.*

<sup>175</sup> *Id.*

<sup>176</sup> *Id.*

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

<sup>178</sup> *Id.*

<sup>179</sup> *Id.*

### C. The Use of the Cognitive Interview as Means to Promote Therapeutic Jurisprudence in *U.S. v. Hodge*

While the cognitive interview served the needs of the investigators and the prosecutors in *U.S. v. Hodge*, it also helped A.H. The interview empowered A.H. to take as long as she needed to describe the details and parts of the event that were significant to her. In providing so much information, A.H. appeared as though the cognitive interview process was cathartic for her; she appeared to have control amidst a time of instability.

More concretely, the cognitive interview helped serve a very specific desire that A.H. had: to be kept off the witness stand for as long as possible. Early in the investigation, A.H. had expressed her deep anxiety over the thought of testifying in open court and reliving what SrA Hodge had done to her in front of him. Knowing she would be wracked with emotion as she testified, she was most concerned in giving SrA Hodge the satisfaction of victimizing her for a second time by way of showing him how he continues to haunt her thoughts even months after the assault.

Sensitive to this and fully understanding the need for her voluntary cooperation in order to succeed at trial, the prosecution team worked closely with A.H., her SVC, and the Sexual Assault Response Coordinator (SARC) in developing a pretrial plan that considered A.H.'s concerns while focusing on the mutually-shared goal of ensuring SrA Hodge was convicted at trial and sentenced to a punishment that was commensurate with his crimes.

The cognitive interview was the lynchpin of this pretrial plan that served both interests. Using the recorded cognitive interview at the pretrial confinement hearing and at the Article 32 hearing allowed A.H. to stay off the witness stand while permitting the government to meet its legal burdens. The cognitive interview was so long and detailed, that virtually any information about the assault needed for establishing proof of an element of any specification of any charge was contained in the cognitive interview.

Furthermore, the prosecution team only needed to interview the victim one time immediately before trial. While prosecutors spoke to A.H. on a weekly basis to keep her informed of the progression of the case and to answer her questions,<sup>180</sup> the thoroughness of the cognitive interview eliminated the need of the prosecution team to interview A.H. but for once days before trial. To that end, the interview

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<sup>180</sup> See AIR FORCE RULES OF PROF'L CONDUCT R. 4.2 (2014) ("In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order."). Here the prosecutors were able to directly contact and discuss the case with A.H. because when A.H. retained the services of her SVC, she accepted the SVC representation on the condition that the prosecution team had unfettered access to her. Accordingly, the SVC granted the prosecutors standing permission to contact A.H. as needed.

did not focus on the substance of her testimony as much as it was used as a time to prepare A.H., answer her questions, and introduce her to the courtroom setting. Eliminating the standard (and sometimes multiple) prosecutor interviews spared A.H. from being forced to relive the event over and over, which ultimately promoted her psychological health.<sup>181</sup>

## V. THE BLUEPRINT: A FIVE-STEP APPROACH TO APPLYING LESSONS LEARNED IN FUTURE CASES

*U.S. v. Hodge* provides investigators, prosecutors and commanders an opportunity to identify certain lessons learned, which may be useful for others when faced with a fast-breaking sexual assault case. Below are five steps recommended for every sex assault case:

### A. #1—Collaborate With One Another Early in a Case.

While OSI usually has the lead immediately following a report of sexual assault, it is never too early for the trial counsel or the SVC to get involved. Ideally, the three interests can come together immediately following the report of sexual assault to ensure each is properly considered. OSI, the prosecution team and the SVC may not always have perfectly aligned goals, but each should at least recognize and acknowledge the benefit or detriment of taking a particular course of action early in the case.

For example, immediately before conducting the cognitive interview, OSI should be consulting with the prosecutor for input about particular kinds of information needed from the victim that has legal significance (i.e., facts that support elements of potential charges, credibility, etc.). Ideally, a member of the prosecution team can be present to watch the live interview via closed circuit, before ending the

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<sup>181</sup> See Capt Richard Hanrahan, *Through Her Eyes: The Lessons Learned as a Special Victim's Counsel*, 40 THE REPORTER, no. 3, 2013 at 23, 25. Capt Hanrahan explained in his article how retelling the substantive details of a sexual assault can often re-traumatize the victim through reliving it:

You[, as a SVC,] are not only an advocate but also a protector of your client's best interests. This usually means you should work to ensure your client is not inadvertently forced to re-live the trauma of the sexual assault by retelling the story unless necessary for the case...it is usually in your client's best interest to limit unnecessary or duplicative interviews.... Even in the majority of cases where your client's interests align with the government, it is best to limit the number of substantive discussions about the sexual assault. Many of my clients have told me that they view these substantive interviews as a "hurdle" they have to overcome to make it through the case. Every time a new interview is added, you are just moving the finish line farther and farther away.

*Id.* See also Campbell, *supra* note 109, at 703 ("Although some victims have positive experiences, secondary victimization is a widespread problem that happens, in varying degrees, to most survivors who seek postassault care.").

interview, OSI should consider checking with the prosecutor to determine if any other areas of memory or angles need to be explored with the victim.

Early SVC involvement helps ensure that the victim's voice is heard at each stage of the case, beginning with the investigation. The SVC, for example, can help the victim, prosecution and investigators evaluate the potential benefits and consequences of pursuing psychological treatment like EMDR prior to trial. The SVC can also help gauge the victim's interest in testifying at preliminary hearings like the pretrial confinement hearing, the Article 32 hearing, and pretrial motion hearings.

#### B. #2—Administer a Cognitive Interview to Elicit Information from a Victim of Sexual Assault.

Research shows that the cognitive interview can be applied in virtually every case involving a sexual assault victim.<sup>182</sup> This is true even in cases where a victim was able to identify her assailant or knows him. The specific detail generated during the cognitive interview may assist in determining how charges are drafted (i.e., if there is a question about whether there was sufficient penetration or whether a particular body part, such as a finger or tongue, was used to commit a sexual assault).

It can also be particularly useful for eliciting information from a victim who was substantially incapacitated due to alcohol or some other substance. Of the little memory the victim retained in this type of scenario, the cognitive interview will maximize the return on the information gleaned from those segments of memory.

The cognitive interview's ability to process rich sensory detail will aid in building the victim's credibility. Common sense suggests that jurors are more likely to believe the testimony of a victim who is able to recall specific details like the color the assailant's watch glowed at the time of the sexual assault or the way her assailant placed emphasis on a particular syllable in a word he uttered during the sexual assault.

When administering the interview, investigators should remember the importance of putting the victim at ease and building rapport. There is no requirement that the interview must take place in an OSI investigation room. There may be more comfortable settings where the cognitive interview may be conducted. At Grand Forks AFB, for example, the SARC has a serene meeting area full of comfortable couches, warm colored walls and temperate lighting. Sometimes, victims who report sexual assault will already be familiar with the SARC's building before they speak with OSI; this, in and of itself, establishes a level of comfort for the victim. While the interview with A.H. was not conducted in this space, it could be considered

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<sup>182</sup> See Kohnken et al, *supra* note 106, at 20. Whether investigators use the cognitive interview, or the FETI, the point of this article is to explore the use of these alternative types of interview techniques, which empower victims of sexual assault rather than unnecessarily harm them.

for future interviews, so long as investigators had the means to video-record the interview in that setting.

C. #3—Interview the Victim Soon After the Sexual Assault.

It is difficult to know how soon after a sexual assault a victim should be interviewed in order to get maximum utility out of the cognitive interview. There are two competing theories: (1) interview the victim as soon as possible after the sexual assault, depending on the psychological stability of the victim,<sup>183</sup> and (2) allow the victim to have one or two sleep cycles prior to administering the cognitive interview.<sup>184</sup>

Advocates for interviewing the victim as soon as possible explain that the passing of time contributes to error in recall.<sup>185</sup> First, sensory-specific detail, like the color a watched glowed, will fade over time if not captured very soon after a traumatic incident occurs.<sup>186</sup> Second, the victim may begin to superimpose things in her memory based on history and a preconceived notion of how things “should have gone” as opposed to remembering what actually happened.<sup>187</sup>

Those who prefer to wait until a victim has had a sleep cycle or two before conducting the interview argue that detailed memory following a sexual assault and other traumatic events will be lacking or subject to error because of the excitable state of the victim.<sup>188</sup> Police officers, for example, following a police shooting will often remember the details of the shoot different from other eyewitnesses who saw it.<sup>189</sup> Internal investigation teams have come to realize that allowing a police officer to get one or two sleep cycles prior to giving a statement often produced testimony that was more aligned with that of other eyewitnesses.<sup>190</sup>

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<sup>183</sup> Telephone Interview with Dr. Ronald P. Fisher, Ph.D., Professor of Psychology and Editor of the *Journal of Applied Research in Memory and Cognition* Department of Psychology, Florida International University (Mar. 2, 2014) [hereinafter *Interview with Fisher*].

<sup>184</sup> Telephone Interview with Special Agent Mark Walker, Investigations Operations Consultant, Air Force Office of Special Investigations (Feb. 27, 2014) [hereinafter *Interview with Walker*]. See also *Strand webcast*, *supra* note 92. Strand believes it is better to wait for one to two sleep cycles before an interviewer attempts to interview a victim of a traumatic incident who appears to be overwhelmed and upset. *Id.* He explains that his belief is based on advice from many of the nationally known psychologists who Strand works with in developing and administering the FETI, including Dr. Rebecca Campbell of Michigan State University; Dr. David Lisak, formerly of University of Massachusetts, Boston; and Dr. Jim Hopper, Harvard University. *Id.*

<sup>185</sup> *Interview with Fisher*, *supra* note 183.

<sup>186</sup> *Id.*

<sup>187</sup> *Id.*

<sup>188</sup> *Interview with Walker*, *supra* note 184. See also *Strand webcast*, *supra* note 92.

<sup>189</sup> See *Interview with Walker*, *supra* note 184.

<sup>190</sup> *Id.*

The bottom line: interview the victim soon after the assault, whether that is four hours or 48 hours following the incident.

D. #4—Record the Interview.

Recording the interview proved to be one of the most helpful steps executed throughout investigation and pretrial phases of *U.S. v. Hodge*. A recorded cognitive interview provides one primary source of information containing the perspective of the victim. This eliminates the need to have the victim write what happened in an AF IMT 1168, which therefore eliminates potential inconsistent statements to be used by the defense in cross-examination at trial. The video or transcript of the cognitive interview can be used to help prepare the victim for testifying under oath by reminding her of her prior testimony. It is important to note that while not all OSI detachments make it a policy to record victim interviews, the recorded interview was vital in *U.S. v. Hodge* and would likely be vital to any case in which a cognitive interview may serve multiple functions.

The video-recorded cognitive interview may also be used at the pretrial confinement hearing, and later—if reduced to a verbatim written transcript—may be used at the Article 32 hearing and motion practice in lieu of putting the victim on the stand, as practiced in *U.S. v. Hodge*. After the new National Defense Authorization Act (NDAA), no victim, regardless of military or civilian status, will be compelled to testify and will be declared unavailable at an Article 32 hearing if she declines to participate.<sup>191</sup> Whether the victim should testify at a pretrial hearing in any given case is an issue that the prosecutor, the SVC, and most importantly, the victim, should collectively consider and discuss.

E. #5—Apply and Practice Therapeutic Jurisprudence.

This is not a step unto itself, but rather is a focus that should underlay each step taken in a sexual assault case. As seen in *U.S. v. Hodge*, the cognitive interview process—the interview itself as well as the use of the recorded interview at various stages of the case following the interview—helped attain the goals of therapeutic jurisprudence.

The competing goals of the psychological health of the victim and the pursuit of convicting her assailant need to be delicately balanced. While treatment methods like EMDR could provide rapid relief from symptoms of PTSD emerging after the sexual assault, the psychological benefit to the victim needs to be measured against the consequence of an emotionless victim testifying at trial.

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<sup>191</sup> National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66 § 1702 (2014) (making changes to the function of the Article 32 hearing during courts-martial proceedings).

What is clear, however, is that the cognitive interview advances all goals, including therapeutic jurisprudence. It eliminates the need for the victim to relive her trauma over and over again in interview after interview. It empowers the victim to help gain control over her feelings as well as her memory of the trauma itself. It protects her from cross-examination until trial. The cognitive interview can turn a cold investigation into a laser-focused hunt for a very specific person, as it did in *U.S. v. Hodge*, which ultimately gave the victim security in knowing her assailant had been caught.

With all benefit and little risk, the cognitive interview is a successful investigative method that may—and should—be used in all sexual assault cases as a way to advance the investigation, foster the prosecution, and facilitate the psychological and wellbeing of every victim of sexual assault.

