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TORTURE: A COLLECTION
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MAKING THE ACCUSED PAY FOR HIS CRIME: A PROPOSAL TO ADD RESTITUTION AS AN AUTHORIZED PUNISHMENT UNDER RULE FOR COURTS-MARTIAL 1003(b)

Lieutenant Colonel David M. Jones, USMC*

Then it shall be, because he hath sinned, and is guilty, that he shall restore that which he took violently away, or the thing which he hath deceitfully gotten. . . .¹

I. Introduction

Two weeks ago, Corporal (Cpl) Johnson's \$2,000 stereo system was stolen from his barracks room. A fellow Marine, who also lived in the barracks, overheard Lance Corporal (LCpl) Rob N. Pawn bragging about selling the stereo to a pawnshop out in town for \$1,000, which he reported to the Criminal Investigation Division (CID). CID apprehended LCpl Pawn for the theft. Charges are preferred and the case proceeds to trial. Despite a confession to CID and admissions made to fellow Marines, LCpl Pawn pleads not guilty to the larceny charge and elects a members trial. Predictably, the members find him guilty of larceny.

Both trial and defense counsel then put on their sentencing case. The government's case includes the testimony of Cpl Johnson who testifies that

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¹ *Leviticus* 6:4 (King James).

CID has not found his stereo and he has not been reimbursed by the accused. After hearing the sentencing instructions, the panel deliberates on an appropriate sentence for LCpl Pawn's exploits. After an hour, the members send word to the judge that they have a few questions. All parties reconvene in court and the judge reads the members' questions: "We don't see any mention of restitution on the sentencing worksheet. May we order LCpl Pawn to pay restitution in the amount of \$2,000 to Cpl Johnson? May we add a provision sentencing LCpl Pawn to three extra months of confinement if he doesn't make restitution?"

Unfortunately, the above hypothetical is all too familiar in military courts-martial. The judge must inform the members that restitution is not an authorized punishment under the Rules for Courts-Martial (RCM),² and is, therefore, not a sentencing option. A fine is an authorized punishment if adjudged as part of the sentence.³ The adjudged fine, however, is paid to the U.S. Treasury and not to the victim. Under the military's present punishment system, there is no judicial mechanism for victim restitution.

Victim restitution has been a part of federal law in district courts for over 20 years⁴ and mandatory victim restitution has been the federal law in sentencing cases since 1996.⁵ It is time that victim restitution be an option in military sentencing.⁶ This is especially true now that the jurisdictional limits on confinement and financial penalties at special courts-martial have doubled.⁷

² Rule for Court-Martial 1003(b) of the *Manual for Courts-Martial* allows the following authorized punishments: a reprimand, forfeiture of pay and allowances, a fine, reduction in pay grade, restriction to specified limits, hard labor without confinement, confinement, a punitive separation, and death. MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 1003(b) (2005) [hereinafter MCM].

³ *Id.*

⁴ 18 U.S.C. § 3663 (2000). This statute is entitled "Order of Restitution." It became effective upon its enactment in 1982. *Id.* This statute, along with section 1512, Title 18, are commonly referred to as the "Victim and Witness Protection Act of 1982" [hereinafter VVPA]. Section 3663, Title 18, was the first victim restitution provision passed by Congress. Restitution was optional under the Act, however, not mandatory. *Id.*

⁵ 18 U.S.C. § 3663A (2000). This Act, passed by Congress in 1996, is commonly referred to as the "Mandatory Victim's Restitution Act of 1996." This Act mirrors substantially the language of section 3663, Title 18, but makes restitution mandatory upon appropriate findings of economic loss. *Id.*

⁶ The purpose of this article is not to argue for *mandatory* victim restitution in the military system, but rather that the sentencing authority should have the *discretion* to order an accused to pay restitution. Under a discretionary system, consideration may be given to both the victim's and the accused's financial situation.

⁷ Section 577 of the National Defense Authorization Act for Fiscal Year 2000, Pub. L. No. 106-65, 113 Stat. 512 (1999), increased the jurisdictional limits of special courts-martial for both confinement and financial penalties (forfeitures and/or fines). The passage of this Act amended Article 19, UCMJ. UCMJ art. 19 (2005).

This change not only gives the government greater negotiating strength, but it also allows the government more room to maneuver when deciding the appropriate forum for a case.⁸ In other words, the convening authority has more negotiating power at a special court-martial now than under the previous system. Most importantly, the increase in special court-martial jurisdictional limits doubles the amount of money available for restitution to crime victims.⁹ Under the proposed restitution scheme explained in Part V.A.2, court ordered restitution would be unlimited for general courts-martial, but limited for special courts-martial.¹⁰

Is there a way, under the Uniform Code of Military Justice (UCMJ), to make victim restitution a viable sentencing option?¹¹ This article proposes that although there may be enforcement issues in collecting the restitution,¹² the military should adopt restitution as a sentencing option. First, the article reviews the inadequacy of the present military system in compensating victims of crimes. Next, it provides an historical overview of efforts, both in and out

⁸ The doubling of possible confinement for the accused (assuming the offenses warrant the maximum of twelve months, and most cases do) is a great change for the system. It expedites more cases in which it is uncertain as to whether the accused's conduct warrants trial by special or general court-martial (borderline cases) by allowing the government to refer the case to a special court-martial vice being stuck in the procedural trappings of a general court-martial. This change is also a benefit to the accused. If his case proceeds to a special court-martial, he is protected against extensive confinement and a general court-martial conviction.

⁹ For example, assume that LCpl Pawn has just over two years of service. Using the 2005 pay scale, he makes \$1,547.70 base pay per month. Under the old law, the maximum financial penalty (forfeitures and/or a fine) that could be awarded to LCpl Pawn was \$6,192.00 (\$1,032.00 per month x six months). Under the new law, that figure is doubled to \$12,384.00. The greater amount of money that can be taken under the new law should cover most any case involving payment of restitution to a victim. It is doubtful that a special court-martial case would have a situation where the victim would need more restitution money than that; those cases will typically be referred to a general court-martial.

¹⁰ There is no limit for fines at a general court-martial. Judges however, need to be careful not to award too large a fine as this makes it easier for the accused to claim he cannot pay it, which opens the door to an indigency hearing. *See* MCM, *supra* note 2, R.C.M. 1113(d)(3).

¹¹ One major difference between federal civilian cases and military cases is that in federal cases the judge is the sentencing authority whereas in the military a judge, or a panel of members, may sentence the accused. This appears to be a distinction without a difference, however, with regard to the appropriateness of adding victim restitution to the list of authorized punishments under RCM 1003(b). MCM, *supra* note 2, R.C.M. 1003(b). This is true for various reasons. One reason is that member panels in the military are like a "blue ribbon jury;" they are either officers who are college-educated or senior enlisted leaders, all chosen for their wisdom and experience. Given the particularities of the military system and its need for order and discipline, these members are very capable of awarding appropriate punishment. One other reason is that the military members on the panel may actually have more discretion to adjudicate a "fair" sentence than federal judges, who are hamstrung by both the mandatory federal sentencing guidelines and mandatory victim restitution. *See supra* note 5 and accompanying text.

¹² *See infra* pt. VI.

of the military, to provide for victim restitution. After providing necessary background, the article examines the federal Mandatory Victim's Restitution Act of 1996 (MVRA),¹³ which mandates court ordered restitution for victims of crimes.¹⁴ With that baseline, the article then proposes amendments to the existing military justice system to incorporate restitution as an authorized punishment. Finally, the article offers possible solutions to the most difficult problem of judicially mandated restitution—enforcement.

II. Attempting To Get Restitution In The Present Military System

At present, restitution is not an authorized punishment under RCM 1003(b) in courts-martial. There is a chance the victim may get restitution if the case is a guilty plea, the trial counsel is creative in negotiating the pre-trial agreement,¹⁵ and the accused does not receive less punishment from the judge than what was in the pre-trial agreement.¹⁶ If the case is contested, however, the victim has no chance of getting court ordered restitution. Judges have attempted to fashion a judicial remedy for this gap in sentencing by recommending to the convening authority that he grant clemency if restitution is paid by a certain date.¹⁷

It is little wonder that crime victims try to get restitution from accused servicemembers by working outside of military judicial channels, given the lack of restitution in the present system. For example, if the victim is a family member, the victim may seek transitional compensation.¹⁸ A victim may also seek assistance from the chain of command by filing an Article 139, UCMJ (Article 139) complaint.¹⁹ Alternatively, or in addition to the Article 139

¹³ 18 U.S.C. § 3663A (2000).

¹⁴ The MVRA is a federal law, applicable only for cases that are tried in federal district courts. There is no provision for it to be used in military courts. *Id.*

¹⁵ *See, e.g.,* United States v. Pineda, 54 M.J. 298 (2001); United States v. Smith, 53 M.J. 168 (2000).

¹⁶ The incentive for an accused to make restitution, pursuant to a pre-trial agreement, is lost if the judge awards a punishment which is less than the agreement negotiated between the accused and the government. For example, suppose that the pre-trial agreement caps confinement at 150 days, if the accused makes restitution to the victim within thirty days of the date of trial. If the judge awards only 145 days confinement, there is no incentive for the accused to pay restitution because the pre-trial agreement does not help him in anyway.

¹⁷ *See* MCM, *supra* note 2, R.C.M. 1107. The convening authority may approve, disapprove, suspend, or commute punishment. Military judges have recommended disapproval or suspension of some or all punishment provided the accused makes restitution to the victim. Most judges require restitution to be made by a certain date. *See* United States v. Resendiz, No. 200200748, 2002 CCA LEXIS 313 (N-M. Ct. Crim. App. Dec. 30, 2002) (unpublished) (recommending suspension of \$1,000 fine if Marine agreed to pay restitution).

¹⁸ 10 U.S.C. § 1059 (2000); *see infra* pt. II.B.3.

¹⁹ UCMJ art. 139 (2005); *see infra* pt. II.B.2.

complaint, a victim may seek redress, through the convening authority, after court proceedings have terminated, by asking the convening authority to give the accused a break on his confinement if restitution is paid.²⁰ Lastly, some victims go through the arduous process of seeking redress through local small-claims courts or civil courts because they feel they have no other recourse.²¹

A. Judicial Attempts at Restitution

1. Bargained-for Restitution Pursuant to Pre-Trial Agreements

The best way for a victim to get restitution under the present system is to make restitution a term of the pre-trial agreement between the convening authority and the accused. This requires, of course, that the accused plead guilty pursuant to a pre-trial agreement. Rule for Courts-Martial 705(c)(2)(C) succinctly states that “[a] promise to provide restitution” is an authorized provision of a pre-trial agreement and not contrary to public policy.²² Getting restitution up front, before the defendant goes to trial, is best because the victim is ensured of actually receiving the compensation.²³ The government can still hold the accused accountable however, by enforcing additional confinement if restitution is not paid in situations where the pre-trial agreement does not require complete restitution until after trial.²⁴ Military courts have consistently enforced restitution provisions in pre-trial agreements voluntarily

²⁰ See *infra* pt. II.B.1.

²¹ See *infra* pt. II.B.4.

²² MCM, *supra* note 2, R.C.M. 705(c)(2)(C). The Analysis of this short section tells us that the rule has its base in two service appellate court decisions, *United States v. Callahan*, 8 M.J. 804 (N.M.C.M.R. 1980), and *United States v. Brown*, 4 M.J. 654 (A.C.M.R. 1977). The Analysis also forewarns, however, that “[e]nforcement of a restitution clause may raise problems if the accused, despite good faith efforts, is unable to comply.” (citing *United States v. Brown*, 4 M.J. 654 (A.C.M.R. 1977)).

²³ This is accomplished by a provision in the first part of the pre-trial agreement that indicates full restitution must be paid to the victim (with the amount specifically laid out) before the date of trial. That way, if the accused does not provide full restitution before the trial date, the government may back out of the agreement without the accused claiming he has already detrimentally relied on the agreement. Of course, the reverse is also true. If the accused has provided restitution, he may argue that he has already performed under the agreement and should be entitled to its full protection.

²⁴ For example, the restitution provision could be tied to the confinement protection offered in the sentence limitation provision. The provision might read:

2. Confinement. May be approved as adjudged. However, if the accused makes full restitution to Cpl Johnson, in the amount of \$2000, within sixty (60) days of being sentenced by the military judge, then all confinement in excess of ninety (90) days will be suspended for a period of twelve (12) months, at which time, unless sooner vacated, it will be remitted without further action.

entered into by the accused, and holding the accused accountable.²⁵ Regardless of whether or not restitution is added as an authorized punishment, the wise trial counsel will always ensure that the interests of victims are protected through restitution provisions in the pre-trial agreement.²⁶

Problems remain, however, even with a properly drafted pre-trial agreement that includes a restitution provision. What can the government do if the accused decides not to pay restitution after his trial is over? The only legal option is to order a vacation hearing²⁷ to decide if suspended confinement is appropriate. But unless the case is particularly noteworthy, a convening authority may decide that he has little interest in resurrecting an old case to conduct this time-consuming hearing. This may be especially true when the accused has complied for some time with restitution and then stopped, just short of the required restitution amount.²⁸

If the suspension period in the pre-trial agreement passes before all of the restitution has been made to the victim, this may result in another unforeseen situation.²⁹ There is no enforcement mechanism in place to enforce the payment of restitution, if this occurs, even though the process started with a pre-trial agreement.³⁰ Additionally, the accused may be out of confinement and on appellate leave, pending separation from military service, before the victim has been made whole.³¹ One would hope that the government has a better grasp of its cases than these situations describe, but experience may

²⁵ See, e.g., *United States v. Mitchell*, 51 M.J. 490 (1999); *United States v. Olson*, 25 M.J. 293 (C.M.A. 1987); *United States v. Foust*, 25 M.J. 647 (A.C.M.R. 1987); *United States v. Brown*, 4 M.J. 654 (A.C.M.R. 1977).

²⁶ Complete restitution does not always occur. For example, the accused may decide he would rather do extra confinement time than pay money to the victim. Or, after the case is over, the government may lose its interest in ensuring that the victim actually gets the restitution. Unlike defense attorneys, who must continue to work with their clients on clemency matters after trial, some trial counsel give no thought to victims post-trial. Additionally, if the accused “beats” the pre-trial agreement, the power of clemency may be the only leverage available to force restitution.

²⁷ MCM, *supra* note 2, R.C.M. 1109.

²⁸ Note that impossibility to pay or indigency of the accused are not per se bars to additional confinement. See *infra* pt. V.A.3; *Mitchell*, 51 M.J. at 492; *United States v. Tuggle*, 34 M.J. 89, 92 (C.M.A. 1992).

²⁹ For example, suppose LCpl Pawn agrees to pay restitution of \$200 per month until the \$2000 debt is paid off. If the pre-trial agreement suspends a portion of the confinement for six months, at which time it is remitted, without further action (a standard provision in a pre-trial agreement), LCpl Pawn would only have paid \$1200 of the restitution at the time the suspension period ran. Careful drafting of the pre-trial agreement to extend the normal six-month suspension period would be necessary to avoid this.

³⁰ See, e.g., *United States v. Miley*, 59 M.J. 300 (2004).

³¹ This problem is solved if the proposed restitution by proxy provisions are implemented. See *infra* pt. VI.B.1.

prove otherwise.³² The bottom line is that after the court-martial, the commanding officer and trial counsel may lose interest in the accused's case, and subsequently, the victim's restitution.

2. *A Judge's Recommendation to the Convening Authority*

A judge may make a recommendation to the convening authority to disapprove or suspend some portion of the punishment awarded if the accused makes restitution to the victim within a certain period.³³ This situation will most likely arise when either the accused has plead not guilty and then been found guilty by the judge, or when the accused has plead guilty but the first portion of the pre-trial agreement is silent on the subject of victim restitution. In either situation, the judge is not empowered to award restitution as an authorized punishment. The judge must work the restitution clause of his punishment into a recommendation to the convening authority. For example, from the hypothetical above, the judge might state:

LCpl Rob N. Pawn, it is my duty to sentence you as follows: To be reduced to the grade of E-1, to forfeit \$961.40 per month for five months, and to be confined for a period of one hundred and fifty (150) days. However, I am recommending to the convening authority that he suspend sixty (60) days of that confinement if you make restitution in the amount of \$2,000 to Cpl Johnson within sixty (60) days of today's proceeding.

A sentencing authority's recommendation (whether from a judge or a panel) in support of restitution is nice, but it has no binding legal authority; a recommendation is simply that, a suggestion. It is not an enforceable part of the sentence.

³² This is especially true at large installations that process hundreds of cases every year.

³³ See, e.g., *United States v. Latimer*, 35 M.J. 736 (A.C.M.R. 1992). Most of the cases in this area appear to be unreported opinions from the Navy-Marine Corps Court of Criminal Appeals. See, e.g., *United States v. Resendiz*, No. 200200748, 2002 CCA LEXIS 313 (N-M. Ct. Crim. App. Dec. 30, 2002) (unpublished); *United States v. Vallejo*, No. 9602465, 1998 CCA LEXIS 47 (N-M. Ct. Crim. App. Jan. 22, 1998); *United States v. Davis*, No. 9501581, 1996 CCA LEXIS 459 (N-M. Ct. Crim. App. June 20, 1996); *United States v. Norman*, No. 9400836, 1995 CCA LEXIS 376 (N-M Ct. Crim. App. Feb. 24, 1995); *United States v. Womack*, No. 901998, 1990 CMR LEXIS 1041 (N.M.C.M.R. Oct. 16, 1990); *United States v. Jensen*, No. 900305, 1990 CMR LEXIS 767 (N.M.C.M.R. Aug. 8, 1990); *United States v. Pyne*, No. 842559, 1984 CMR LEXIS 3754 (N.M.C.M.R. Aug. 27, 1984).

The weakness in the above approach is obvious—some victims will not receive restitution from the accused. A collateral consequence of this approach is that if the accused does pay the restitution, he is now in a position to bargain for less confinement time from the convening authority based on the judge's recommendation.³⁴ Of course, the convening authority may always approve the sentence "as adjudged." The military should expect a system that makes victims whole, regardless of other punishments meted out. The military should demand, and victims should expect, a restitution system that is not contingent on judges' recommendations and post-trial maneuverings by the accused.

Allowing restitution as an authorized punishment may even benefit the accused in certain situations. For example, if an accused had not made restitution before his court-martial, and one of the punishments the judge awards is restitution, that punishment might be given in lieu of forfeitures or extra confinement that the judge may otherwise have awarded.³⁵

B. Nonjudicial and Non-Military Attempts at Restitution

Victims also use other judicial and nonjudicial means to seek restitution outside the present system. These means include: informally seeking the commander's help, filing an Article 139 complaint,³⁶ applying for transitional compensation³⁷ and resorting to the civilian legal system for relief.³⁸

³⁴ Of course, the opposite is also true. The accused may pay all of the restitution to the victim, relying on the convening authority to follow the judge's recommendation, but the convening authority may show no mercy. If this happens, the accused has no remedy against that convening authority.

³⁵ Allowing restitution may also have the opposite effect. For instance, in the present system, a judge may award a fine to an accused and add a provision that if the fine is not paid by a certain date that the accused is sentenced to extra confinement. MCM, *supra* note 2, R.C.M. 1003(b)(3). This may become the case with the punishment or restitution also, wherein the judge decrees extra confinement if the restitution is not paid by a certain date. The only remedy the accused has at this point is to demonstrate an inability to pay based on indigency. *Id.* R.C.M. 1113(d)(3).

³⁶ UCMJ art. 139 (2005).

³⁷ 10 U.S.C. § 1059 (2000).

³⁸ A victim may seek recourse in a state civil court. But more than likely, a victim will seek restitution through going to small-claims court where a lawyer is not required. For example, in California, an aggrieved party may sue for up to \$5000 in small-claims court. CAL. CIV. PROC. CODE § 116.220 (Deering 2005). Not all states have such a high limit. In Virginia, for example, the monetary limit for small-claims suits is only \$2000. VA. CODE ANN. § 16.1-122.3 (2002).

1. Informally Seeking the Commander's Help

Victims are left seeking assistance from the commander, or convening authority, when there is not a properly drafted pre-trial agreement and no court ordered restitution.³⁹ The victim goes to the commanding officer in this situation, hoping the commander can somehow force or convince the accused to pay restitution. This puts the convening authority in the uncomfortable position of considering leniency for an accused that should have been required to make restitution anyway. If the commander decides not to offer the accused any clemency in exchange for restitution, the victim is left unprotected by the sovereign. There really is no way to force the accused to pay restitution, even if the commanding officer wants to help the victim get restitution. The only option the commander has is to appoint an investigating officer to conduct an investigation under Article 139, UCMJ.⁴⁰

Some might argue that this process gives the accused too many opportunities to negotiate with the convening authority regarding restitution because he can do so pre-trial, and post-trial, when submitting clemency matters.⁴¹ This argument is without merit, however, as this is exactly what happens with other types of punishment in any court proceeding. Regardless, the government should not have to negotiate for what the federal district courts already mandate—victim restitution. Neither the government nor the victim should have to worry about whether or not restitution will be ordered post-trial. The government's focus should be on enforcement of court ordered restitution, not its obtainment. Under the current system, criminals have more protection than they deserve and victims less.

2. Filing an Article 139, UCMJ, Complaint

Filing an Article 139, UCMJ, (Article 139) complaint appears, at first glance, to be another workable solution to the victim restitution problem. Article 139 provides, in pertinent part:

- (a) Whenever complaint is made to any commanding officer that willful damage has been done to the property of any person or that his property has been wrongfully taken by members of the armed forces, he may . . . convene a board to investigate the complaint. The board shall

³⁹ Although most all victims petition the convening authority for something, victims seeking restitution are particularly apt to do so given the inadequacies of the present punishment system.

⁴⁰ UCMJ art. 139 (2005); *see infra* pt. II.B.2.

⁴¹ MCM, *supra* note 2, R.C.M. 1105.

consist of from one to three commissioned officers. . . . The assessment of damages made by the board is subject to the approval of the commanding officer, and in the amount approved by him shall be charged against the pay of the offenders. The order of the commanding officer directing charges herein authorized is conclusive on any disbursing officer for the payment by him to the injured parties of the damages as assessed and approved.⁴²

Both this section and section (b)⁴³ of Article 139 appear to contemplate a claim by civilians against the military wrongdoer. The Act, however, is not limited to civilians; military personnel may also make a claim to the wrongdoer's commanding officer for the wrongful destruction or taking of property. The basis for an Article 139 complaint may occur anywhere. One common situation is when a foreign national makes a claim against a servicemember for damages done while the service member is in the host country.⁴⁴

An Article 139 complaint is an appropriate mechanism for victim restitution if it is properly used. It provides a claim process for victims of willful property damage or theft of property.⁴⁵ It also has a fairly efficient investigative process of appointing a single investigating officer (IO) within four working days of receipt of the claim.⁴⁶ The finding of liability by the IO is based on a preponderance of the evidence⁴⁷ and there are procedural safeguards for the accused servicemember.⁴⁸ Most significantly, monies are generally available to pay the claimant because the servicemember is still being fully paid throughout the investigative process (unlike an accused who is

⁴² UCMJ art. 139 (2005).

⁴³ Article 139(b) is the only other provision under the article. It provides that if the offenders cannot be ascertained, but the organization is known, the amount of damages may be divided up among the members of that unit who were at the scene. *Id.*

⁴⁴ For example, a servicemember goes out on liberty on a port visit, gets drunk, and does damage to a bar in town. The owner of the bar files an Article 139 Complaint (or claim) against the servicemember and delivers it to the commanding officer of that servicemember. The commanding officer appoints an investigating officer to investigate the claim. If the commanding officer determines that the servicemember is at fault, he may, after a legal review, order the accounting or disbursing office to withhold the amount of money equal to the damages and pay it to the claimant. See U.S. DEP'T OF ARMY, REG. 27-20, CLAIMS (1 Jul. 2003) [hereinafter AR 27-20]; and U.S. DEP'T OF ARMY, PAM. 27-162, CLAIMS PROCEDURES (1 Apr. 1998) [hereinafter DA PAM. 27-162].

⁴⁵ AR 27-20, *supra* note 44, pt. 9-4.

⁴⁶ *Id.* pt. 9-7(d)(1).

⁴⁷ *Id.* pt. 9-7(g)(1)(b).

⁴⁸ *Id.* pt. 9-7, 9-8. These procedural safeguards include notification to the servicemember, legal review of the claim and the right to petition the approval authority for reconsideration.

confined post-trial and may be receiving only 1/3 of his base pay).⁴⁹ The commanding officer orders the finance office to take the money out of the servicemember's paychecks and directly pay the claimant, if he determines that the claim is just.⁵⁰ Article 139 complaints may also be filed post-trial.

But there are pitfalls to using Article 139 complaints for victim restitution. First, Article 139 contemplates only willful property damage or theft of tangible property, nothing more. There are several categories of losses specifically excluded by the Article: negligent acts; personal injury, death and theft of services; claims involving contractual disputes; and claims for consequential damages.⁵¹ Second, Article 139 mandates that the claim be submitted within ninety days of the incident that gave rise to it.⁵² Many crime victims may miss this window of opportunity. Third, many servicemember victims may simply not file an Article 139 complaint because of their ignorance of its existence.⁵³

Fourth, pursuant to Article 58b, UCMJ,⁵⁴ fourteen days after the accused is sent to confinement, he receives no money if tried by a general court-martial. If tried by a special court-martial, the accused receives only one-third his base pay and allowances. This may make it difficult for the victim to get restitution, as Article 139 contemplates being in accord with these regulations.⁵⁵ Fifth, Article 139 has monetary limits that are less than what can be awarded under the restitution proposal. The approval limits are \$5,000 and \$10,000 for a special court-martial convening authority and general court-martial authority respectively.⁵⁶ Under the restitution provisions outlined later in the text, there would be no monetary limit for restitution at general courts-martial and a limit of two-thirds of the accused's base pay times twelve months.⁵⁷ Sixth, there is no remedy for the claimant if the wrongdoer is in a "no pay" status, because Article 139 claim money is taken from the paycheck

⁴⁹ UCMJ art. 58b (2005).

⁵⁰ AR 27-20, *supra* note 44, pt. 9-7(i).

⁵¹ *Id.* pt. 9-5.

⁵² *Id.* pt. 9-7(a). The special court-martial convening authority may, however, grant an extension to file if he determines that there is good cause for the delay. *Id.* There is no mention in the regulation of how long an extension is appropriate.

⁵³ Trial counsel and victims' advocates have the responsibility to ensure victims know of this right. The problem is that these individuals may not find out about the victim's loss until after the time to file has passed.

⁵⁴ UCMJ art. 58b (2005).

⁵⁵ For example, Army Regulation 27-20 states that any assessment against the servicemember must be "[s]ubject to any limitations set forth in appropriate [such as pay or MCM] regulations." AR 27-20, *supra* note 44, pt. 9-7(i).

⁵⁶ *Id.* pt. 9-6.

⁵⁷ This mirrors the current limitations regarding fines. *See infra* pt. V.A.

of the wrongdoer as it is earned. This “no-pay” status may arise if the wrongdoer is on excess leave, appellate leave, or in an unauthorized absence status.

Seventh, although Article 139 does not require a conviction for the convening authority to order the payment of money to the claimant, it does mandate that the convening authority appoint an investigating officer to investigate the claim.⁵⁸ This can be an administrative burden, especially in high operation tempo organizations. A command does not need this added burden, especially if it contemplates the responsibility of taking the accused to a court-martial. Eighth, a wise commander may not favor using Article 139 complaints for servicemember on servicemember type crimes. A commander may be reluctant to get between conflicts with servicemembers regarding money. Additionally, commanders may not want to open up Article 139 complaints for all restitution purposes because they may feel it makes them too involved in the judicial process. For example, if the convening authority becomes too intimately involved in the Article 139 complaint process, he may unwittingly become too personally involved with the case or the accused, resulting in a potential “accuser” problem.⁵⁹

Lastly, and perhaps most significant, restitution as an authorized punishment may contain the powerful enforcement mechanism of contingent confinement if the restitution is not paid.⁶⁰ This court ordered restitution, as a binding judgment, might follow the accused, even in his civilian life, until the amount is repaid.⁶¹ The Article 139 complaint process does not incorporate either of these two enforcement concepts.

3. Applying for Transitional Assistance

There is a select group of people who may receive money if they are victims of domestic abuse. This much-needed program is commonly called the “Transitional Compensation Act” (TCA).⁶² It is designed to offer financial assistance (particularly to civilian spouses) if their servicemember spouse is separated from the military, either punitively or administratively, due to

⁵⁸ AR 27-20, *supra* note 44, pt. 9-7(d)(1).

⁵⁹ UCMJ art. 1(9) (2005). If the commander’s involvement in the Article 139 complaint process leads to him becoming personally vested in the accused’s case, he may be disqualified from referring the case to a court-martial or acting as the convening authority in the case for post-trial action. MCM, *supra* note 2, R.C.M. 504(c)(1), 601(c).

⁶⁰ *See infra* pt. V.A.

⁶¹ *See infra* pt. VI.B.

⁶² 10 U.S.C. § 1059 (2000).

domestic abuse.⁶³ This program is very limited and applies to only a few select individuals in certain situations. For example, it does not apply to non-familial victims and it does not cover non-domestic abuse crimes, such as larceny or property damage.⁶⁴

Most importantly, the program is not a restitution⁶⁵ scheme at all; it is merely government interim financial support for victims of domestic abuse. The payment of these monies is not in any way a punishment for the accused since he does not have to pay any money out of his pocket. The program does not compensate victims for monies lost, nor is it tied to economic loss. Under this program, if the accused abuses his family, the government pays the abused victim, with no reimbursement ever from the accused. The addition of this program to the prosecutor's arsenal undoubtedly makes it easier for him to convince reluctant spouses to testify against their abusers. It does nothing, however, to alleviate the economic impact felt by the majority of victims harmed by military members' criminal behavior.

4. *Resorting to the Civilian Legal System*

If compensation is unavailable through military channels, judicial or otherwise, the victim's last resort is to turn outside the military for help. Filing a suit in the local small-claims court is a common method of doing this. Although this is a relatively inexpensive way to seek compensation from the accused, small claims suits have limited application and have their own enforcement problems.

⁶³ The Transitional Compensation Act is a congressionally authorized program that provides twelve to thirty-six months (depending on the amount of time left on the servicemember's enlistment contract) of support payments to family members of servicemembers who are separated from active duty (punitively or administratively) because of domestic violence. These support payments are designed to assist family members in establishing a life apart from the abusive service member. Support payments are paid via direct deposit and are supposed to be used for such things as relocation, food, education, counseling and medical treatment. Monthly payments are based on current dependency and indemnity compensation rates. The rates increase slightly each December. The monthly amounts for 2005 are \$993.00 for the spouse, \$247.00 for each dependent child and \$421.00 for a dependent child only. Commissary and exchange privileges and health care benefits are also available during the "transitional" time. There are other qualifications and disqualifications in the program. *Id.*

⁶⁴ *Id.*

⁶⁵ Restitution is defined as: "Reparation made by giving an equivalent or compensation for loss, damage, or injury caused; indemnification." RANDOM HOUSE WEBSTER'S UNABRIDGED DICTIONARY 1641 (2d ed. 1998).

First, the victim must pay to sue, is inconvenienced, and must comply with the procedural requirements of the local court.⁶⁶ Second, the small-claims court monetary limit is usually quite small.⁶⁷ Third, the small-claims court, by definition, is not set up for litigation of complicated claims. It makes much more sense to have the issue of restitution adjudicated at the sentencing phase of an accused's court-martial, where the sentencing authority is already intimately familiar with the details of the case.⁶⁸ Finally, it may prove difficult, if not impossible, to enforce a small-claims court judgment against a servicemember who constantly moves from state to state (or overseas) and whose assets may be beyond the reach of the court.

III. Optional Restitution In Federal District Courts And The Military's Victim and Witness Assistance Program

A. The Victim and Witness Protection Act of 1982

The Victim and Witness Protection Act of 1982 (VWPA)⁶⁹ was the first comprehensive body of law that Congress passed regarding victim and witness protection.⁷⁰ The focus of the legislation, as its name implies, was protection of victims and witnesses throughout the criminal justice process. The VWPA was momentous in its breadth of applicability⁷¹ and in the protection it offered victims of crimes.⁷² The Congress's declared purpose in passing the VWPA was as follows:

(1) [T]o enhance and protect the necessary role of crime victims and witnesses in the criminal justice process; (2) to

⁶⁶ Most states charge around \$25 to file a suit and then anywhere from \$12 to \$25 for service of process. Virginia, for example, charges \$22 to file a small claim suit and a mandatory \$12 service of process fee. VIRGINIA SMALL-CLAIMS COURT PROCEDURES INFORMATION (2001). The sheriff in Virginia must do service of process. There is also the issue of obtaining jurisdiction in the local court, which may be difficult if the wrongdoer is from out of state or on deployment. *Id.*

⁶⁷ For example, in Virginia the limit is only \$2000. VA. CODE ANN. § 16.1-122.3 (2002). Other states have higher limits. For example, California's limit is \$5000. CAL. CIV. PROC. CODE § 116.220 (Deering 2005).

⁶⁸ This is how it is currently done in the federal district court system. *See infra* pt. IV.B. Please bear in mind, however, that even in district courts, the restitution is for provable compensatory loss. The victim must still go to civil court if the victim desires punitive or consequential damages.

⁶⁹ Do not confuse VWPA with VWAP (the military's Victim and Witness Assistance Program).

⁷⁰ 18 U.S.C. §§ 1512, 3579, 3663 (2000).

⁷¹ The VWPA even applies extraterritorially for certain offenses. 18 U.S.C. § 1512(h) (2000).

⁷² Section 1512, of title 18, is entitled "Tampering with a Witness, Victim, or an Informant." 18 U.S.C. § 1512 (2000). It is an extensive section, detailing many crimes against victims and witnesses that can be categorized into general law crimes such as obstruction of justice, witness tampering, or impeding an investigation. *Id.*

ensure that the Federal Government does all that is possible within limits of available resources to assist victims and witnesses of crime without infringing on the constitutional rights of the defendant; and (3) to provide a model for legislation for State and local governments.⁷³

Perhaps most importantly, the VWPA included the right of victim restitution.⁷⁴ The Act authorized, but did not require, district court judges to order a criminal to pay restitution to the victim of his crime. This was a momentous breakthrough; for the first time in American federal jurisprudence, a judge was allowed to order a defendant to economically compensate his victim for the pecuniary losses he caused. The victim, as well as society, could now get meaningful retribution and be compensated at the same time.

Since 1982, the main thrust of the VWPA has remained relatively unchanged, despite several minor amendments.⁷⁵ The two main provisions that remained unchanged were: section 3663, the order of restitution; and section 3664, the procedure for issuance and enforcement of the order of restitution.⁷⁶ These two sections of the VWPA were the backbone of meaningful restitution under the Act. They also proved essential for two significant pieces of legislation that led to making mandatory victim restitution into law: the Crime Victim's Bill of Rights⁷⁷ and the Mandatory Victim's Restitution Act of 1996.⁷⁸

B. The Crime Victims' Bill of Rights

In 1990, approximately eight years after the passage of the VWPA, Congress decided to further delineate victim's rights. This led to the passage of the Crime Victim's Bill of Rights.⁷⁹ In this Bill of Rights, Congress unambiguously stated that those persons engaged in criminal detection, investigation, or prosecution of crime in the federal workforce should "make

⁷³ 97 P.L. 291; 96 Stat. 1248-49 (1982).

⁷⁴ 18 U.S.C. § 3663 (2000).

⁷⁵ The Act was amended in 1984, 1986, 1987, 1988, 1990, 1994, 1996, 2000 and 2002. 18 U.S.C. §§ 1512, 3663 (2000).

⁷⁶ All of the particulars of the VWPA are not spelled out here. The important provisions dealing with restitution are almost identical to those contained in the new law, the MVRA that is discussed in *infra* pt. IV.

⁷⁷ 42 U.S.C. § 10606 (2000), *repealed* by Justice for All Act of 2004, Pub. L. No. 108-45, 118 Stat. 2260, 2264.

⁷⁸ 18 U.S.C. § 3663A (2000).

⁷⁹ 42 U.S.C. § 10606 (2000).

their best efforts” to accord victims of crimes certain rights.⁸⁰ The Act noted seven essential rights, restitution being number six.⁸¹

The VWPA had given federal judges the *option* of awarding restitution back in 1982. But with the Crime Victims’ Bill of Rights, Congress now declared that victim restitution was a right to which each victim was entitled. The right to restitution now had greater meaning, even if federal workers only had to use their best efforts to accord [those] rights.⁸² Victims of crime could now argue that not only was restitution allowed in the federal system, it was a right with a corresponding entitlement (the actual act of complete restitution). It is little wonder that after this congressional statement, people began pushing even harder for constitutional amendments for crime victims’ rights at both the federal and state level.⁸³

C. The Victim and Witness Assistance Program

In 1994, as a result of the passage of both the VWPA of 1982 and the Crime Victims’ Bill of Rights of 1990, the Department of Defense instituted

⁸⁰ *Id.* § 10606

⁸¹ Congress stated that a crime victim has the following rights:

- (1) The right to be treated with fairness and with respect for the victim's dignity and privacy.
- (2) The right to be reasonably protected from the accused offender.
- (3) The right to be notified of court proceedings.
- (4) The right to be present at all public court proceedings related to the offense, unless the court determines that testimony by the victim would be materially affected if the victim heard other testimony at trial.
- (5) The right to confer with attorney for the Government in the case.
- (6) The right to restitution.
- (7) The right to information about the conviction, sentencing, imprisonment, and release of the offender.

Id. § 10606(b)

⁸² *Id.* § 10606(a).

⁸³ See, generally, Rachel King, *Why a Victims’ Rights Constitutional Amendment is a Bad Idea: Practical Experiences From Crime Victims*, 68 U. CIN. L. REV. 357 (2000); Jennifer J. Stearman, *An Amendment to the Constitution of the United States to Protect the Rights of Crime Victims: Exploring the Effectiveness of State Efforts*, 30 U. BALT. L.F. 43 (1999); William T. Pizzi, *Victims’ Rights: Rethinking Our “Adversary System,”* 1999 UTAH L. REV. 349 (1999); Robert P. Mosteller, *Victim’s Rights and the Constitution: Moving From Guaranteeing Participatory Rights to Benefiting the Prosecution*, 29 ST. MARY’S L.J. 1053 (1998); Walker A. Matthews, III, Note, *Proposed Victims’ Rights Amendment: Ethical Considerations for the Prudent Prosecutor*, 11 GEO. J. LEGAL ETHICS 735 (1998); Jennie L. Caissie, Note, 24 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 647 (1998).

the Victim and Witness Assistance Program (VWAP).⁸⁴ This program sought to implement, in the military judicial system, the rights afforded a victim under the Crime Victims' Bill of Rights. The VWAP lists the rights of victims almost verbatim from the Crime Victims' Bill of Rights, with one notable exception. The sixth right declared by Congress, the "right to restitution,"⁸⁵ was modified in both the Department of Defense Directive (DODD) and Instruction (DODI) as the right to "receive available restitution."⁸⁶

But what is "available restitution" under the VWAP? Neither the DODD nor the DODI answer this important question. The only guidance given is that "[c]ourt-martial convening authorities and clemency and parole boards shall consider making restitution to the victim a condition of granting pretrial agreements, sentence reduction, clemency, and parole."⁸⁷ This provision did nothing more than encourage what already existed—the use of pre-trial agreements and post-trial negotiation to achieve victim restitution. Unlike the federal system, which authorized restitution as part of a sentence in 1982,⁸⁸ the military, twenty-one years later, continues to hope that pre and post-trial negotiations will result in restitution to crime victims.

Despite its faults, the VWAP was a good place to start; it brought victim and witness rights out in the open and ensured trial participants considered them.⁸⁹ The VWAP requires that, throughout the trial process, each witness and victim be informed of his or her rights to respect, dignity and information.⁹⁰ This often includes being assigned a Victim/Witness Advocate from the Family Advocacy Department.⁹¹ Prosecutors are required to consider

⁸⁴ U.S. DEP'T OF DEFENSE, DIR 1030.1, VICTIM AND WITNESS ASSISTANCE (23 Nov. 1994) (*cancelled and reissued* 23 Apr. 2004) [hereinafter DOD DIR. 1030.1]. See also U.S. DEP'T OF DEFENSE INSTR. 1030.2, VICTIM AND WITNESS ASSISTANCE PROCEDURES (23 Dec. 1994)(*cancelled and reissued* 4 Jun 2004) [hereinafter DOD INSTR. 1030.2]. Curiously, the Directive actually references the later-in-time implementing instruction. DOD DIR. 1030.1, *supra*. Both documents, however, reference the VWPA and the Crime Victims' Bill of Rights. DOD DIR. 1030.1, *supra*; DOD INSTR. 1030.2 *supra*.

⁸⁵ 42 U.S.C. § 10606(b)(6) (2000).

⁸⁶ DOD DIR. 1030.1, *supra* note 84, pt. 4.4.6; DOD INSTR. 1030.2, *supra* note 84, pt. 4.4.6.

⁸⁷ DOD DIR. 1030.1, *supra* note 84, pt. 4.5.

⁸⁸ See *supra* note 4 and accompanying text.

⁸⁹ Shortly after the VWAP was passed, it generated a huge amount of work for the government because it had to search old files and find victims and witnesses to ensure their rights had been, and were being, met.

⁹⁰ See DOD DIR. 1030.1, *supra* note 84; DOD INSTR. 1030.2, *supra* note 84.

⁹¹ This is how the United States Marine Corps handles it. Each service may implement the VWAP differently, however, the forms given to victims and witnesses are the same. Department of Defense Forms 2701-06 contain information for victims and witnesses about their rights in the military criminal justice system. U.S. Dep't of Defense, DD Form 2701, Initial Information for Victims and Witnesses of Crime (May 2004); U.S. Dep't of Defense, DD Form 2702, Court-

victim impact in the cases that they try, and encouraged to make the victim feel vindicated instead of vilified or ignored.⁹² Information about the trial process and the accused's sentence and release date is now shared with victims and witnesses.⁹³

The VWAP was a great start, but the military should now do more. The system should give victims a chance to be made economically whole through judicially authorized restitution. The military justice system is unique and distinct for various reasons,⁹⁴ and we cannot hope to satisfy all of the critics who wish it to be identical to the civilian justice system.⁹⁵ However, having said that, certain civilian judicial processes are well suited for the military. Court ordered restitution is one process that, if adopted, will enhance the military justice system.

IV. Mandatory Restitution In Federal District Courts

The federal legal system had in effect both the VWPA and the Crime Victims' Bill of Rights from 1992 to 1996, which authorized, but did not mandate restitution to victims. All of that changed in 1996 with passage of the Mandatory Victims' Restitution Act (MVRA).⁹⁶

A. The MVRA

Martial Information for Victims and Witnesses of Crime (May 2004); U.S. Dep't of Defense, DD Form 2703, Post-Trial Information for Victims and Witnesses of Crime (May 2004); U.S. Dep't of Defense, DD Form 2704, Victim/Witness Certification and Election Concerning Inmate Status (Mar. 1999); U.S. Dep't of Defense, DD Form 2705, Victim/Witness Notification of Inmate Status (Dec. 1994); U.S. Dep't of Defense, DD Form 2706, Annual Report on Victim and Witness Assistance (Dec. 1994) [hereinafter DD Forms 2701-06].

⁹² See DOD DIR. 1030.1, *supra* note 84; DOD INST. 1030.2, *supra* note 84.

⁹³ *Id.* This is done verbally and in writing through DD Forms 2701-06. DD Forms 2701-06, *supra* note 91.

⁹⁴ "The purpose of military law is to promote justice, to assist in maintaining good order and discipline in the armed forces, to promote efficiency and effectiveness in the military establishment, and thereby to strengthen the national security of the United States." MCM, *supra* note 2, pt. I, ¶ 3. It has also been said that the mission of the military is to win the nation's wars. This involves much more than merely protecting society from evildoers.

⁹⁵ For an example of a poorly researched and biased article, see Edward T. Pound et al., *Unequal Justice*, U.S. NEWS & WORLD REPORT, Dec. 16, 2002, at 19.

⁹⁶ 18 U.S.C. §§ 3663A, 3664 (2000). Note that the MVRA refers to both section 3663A, "Order of Restitution" and section 3664, "Procedure for Issuance and Enforcement of Order of Restitution." *Id.*

The MVRA⁹⁷ is the landmark Congressional legislation that mandated

⁹⁷ The text of section 3663A, title 18, of the MVRA is as follows:

§ 3663A. Mandatory restitution to victims of certain crimes

(a) (1) Notwithstanding any other provision of law, when sentencing a defendant convicted of an offense described in subsection (c), the court shall order, in addition to, or in the case of a misdemeanor, in addition to or in lieu of, any other penalty authorized by law, that the defendant make restitution to the victim of the offense or, if the victim is deceased, to the victim's estate.

(2) For purposes of this section, the term "victim" means a person directly and proximately harmed as a result of the commission of an offense for which restitution may be ordered including, in the case of an offense that involves as an element a scheme, conspiracy, or pattern of criminal activity, any person directly harmed by the defendant's criminal conduct in the course of the scheme, conspiracy, or pattern. In the case of a victim who is under 18 years of age, incompetent, incapacitated, or deceased, the legal guardian of the victim or representative of the victim's estate, another family member, or any other person appointed as suitable by the court, may assume the victim's rights under this section, but in no event shall the defendant be named as such representative or guardian.

(3) The court shall also order, if agreed to by the parties in a plea agreement, restitution to persons other than the victim of the offense.

(b) The order of restitution shall require that such defendant--

(1) in the case of an offense resulting in damage to or loss or destruction of property of a victim of the offense--

(A) return the property to the owner of the property or someone designated by the owner; or

(B) if return of the property under subparagraph (A) is impossible, impracticable, or inadequate, pay an amount equal to--

(i) the greater of--

(I) the value of the property on the date of the damage, loss or destruction; or

(II) the value of the property on the date of sentencing, less

(ii) the value (as of the date the property is returned) of any part of the property that is returned;

(2) in the case of an offense resulting in bodily injury to a victim--

(A) pay an amount equal to the cost of necessary medical and related professional services and devices relating to physical, psychiatric, and psychological care, including nonmedical care and treatment rendered in accordance with a method of healing recognized by the law of the place of treatment;

(B) pay an amount equal to the cost of necessary physical and occupational therapy and rehabilitation; and

(C) reimburse the victim for income lost by such victim as a result of such offense;

restitution for victims of certain crimes. What was originally authorized but not required, is now required.⁹⁸ Under the MVRA, ordering restitution is no longer merely an option under federal law. The MVRA is a sweeping piece of legislation that seeks to cover every possible scenario in which a victim of a crime may suffer economic loss. In contrast to military courts, which do not even provide restitution as an option, district courts are not only entitled to award restitution to victims of crimes, they must award it. The MVRA states, “the court shall order . . . the defendant [to] make restitution to the victim of

(3) in the case of an offense resulting in bodily injury that results in the death of the victim, pay an amount equal to the cost of necessary funeral and related services; and

(4) in any case, reimburse the victim for lost income and necessary childcare, transportation, and other expenses incurred during participation in the investigation or prosecution of the offense or attendance at proceedings related to the offense.

(c) (1) This section shall apply in all sentencing proceedings for convictions of, or plea agreements relating to charges for, any offense—

(A) that is--

(i) a crime of violence, as defined in section 16;

(ii) an offense against property under this title, or under section 416(a) of

the Controlled Substances Act (21 U.S.C. 856(a)), including any offense committed by fraud or deceit; or

(iii) an offense described in section 1365 (relating to tampering with consumer products); and

(B) in which an identifiable victim or victims has suffered a physical injury or pecuniary loss.

(2) In the case of a plea agreement that does not result in a conviction for an offense described in paragraph (1), this section shall apply only if the plea specifically states that an offense listed under such paragraph gave rise to the plea agreement.

(3) This section shall not apply in the case of an offense described in paragraph (1)(A)(ii) if the court finds, from facts on the record, that—

(A) the number of identifiable victims is so large as to make restitution impracticable; or

(B) determining complex issues of fact related to the cause or amount of the victim’s losses would complicate or prolong the sentencing process to a degree that the need to provide restitution to any victim is outweighed by the burden on the sentencing process.

(d) An order of restitution under this section shall be issued and enforced in accordance with section 3664.

18 U.S.C. § 3663A (2000).

⁹⁸ This is the restitution piece of the VWPA, which is now required under the MVRA. *Id.* Section 3664, title 18, is the actual order of restitution that carries out what the MVRA mandates. 18 U.S.C. § 3664 (2000).

the offense.”⁹⁹ In addition, the Act allows for the punishment of restitution to be combined with “any other penalty authorized by law,”¹⁰⁰ which by necessary implication includes a fine.¹⁰¹ There are several other notable provisions that are essential to understanding the implication of restitution in the military.

First, the MVRA’s definition of who is a “victim” is very broad—“a person directly and proximately harmed as a result of the commission of an offense for which restitution may be ordered.”¹⁰² Effective litigation of this provision could turn many people into victims. Additionally, the Act allows for restitution to persons who are not victims of the offense if the parties agree to this pursuant to a plea agreement.¹⁰³

Second, the Act does a very good job of laying out the requirements of what the restitution order should seek to remedy by outlining how restitution is to be accomplished. The Act divides offenses into three distinct categories and also provides a fourth catchall provision.¹⁰⁴ The three categories concern offenses which result in: damage to or loss of property; bodily injury; and death of the victim.¹⁰⁵ For the first category, restitution consists of either returning the property or compensating the victim for the loss of the property. The second category, bodily injury, has much broader restitution requirements. It entails the offender paying for: all medical and professional services and devices, physical and occupational therapy and rehabilitation, and reimbursement of the victim for all lost income due to the offense.¹⁰⁶ For an offense which falls into the third category, death of the victim, the Act limits restitution to funeral and related expenses.¹⁰⁷

The catchall provision (part (b)(4)) allows that in any case, victims may be reimbursed for “necessary childcare, transportation, and other expenses incurred during participation in the investigation or prosecution of the

⁹⁹ 18 U.S.C. § 3663A(a)(1) (2000).

¹⁰⁰ *Id.*

¹⁰¹ Any proposed amendment to RCM 1003(b) would need to modify this provision for special-courts martial, where combined monetary punishments cannot exceed the jurisdictional limit of the court (no more than two-thirds base pay per month for six months). MCM, *supra* note 2, R.C.M. 1003(b).

¹⁰² 18 U.S.C. § 3663A(a)(1) (2000).

¹⁰³ *Id.*

¹⁰⁴ *Id.* § 3663A(b)(1)-(3).

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* § 3663A(b)(2).

¹⁰⁷ To do otherwise would necessitate value judgments and proceedings far beyond the reach of district courts. Perhaps restitution for a taken life is better left to civil courts and a civil action for wrongful death.

offense or attendance at proceedings related to the offense.”¹⁰⁸ While the rationale behind this provision is understandable (put the victim in the same financial situation he or she would have been in “but for” the offender’s conduct), it might be too encompassing for the military’s system. Military courts typically move directly from the adjudication phase of the court-martial to the sentencing phase, unlike the civilian sector, which has a substantial time delay between adjudication of guilt and sentencing proceedings. In the military, provision (b)(4)¹⁰⁹ could lead to delays in the proceedings due to proof problems and lengthy hearings wherein the court tries to determine all lost income of the victim, no matter how insignificant that loss may be.

Third, the MVRA effectively lays out the parameters of when the Act will apply to district court proceedings. In essence, one must be the victim of a crime of violence or of an offense against one’s property and suffer a physical injury or pecuniary loss.¹¹⁰ Perhaps just as significant, the MVRA declares itself inapplicable in two scenarios: if there are so many victims as to render restitution impracticable, or if, in seeking to calculate a victim’s losses, it becomes too burdensome on the sentencing process.¹¹¹ The latter provision appears to be of particular benefit in weeding out what may seem to be frivolous expenses by the victim, which might otherwise seem viable under section (b)(4).

Fourth, subsection (f)(1)(A) of section 3664 of the MVRA (the enforcement mechanism of the Act) states that “the court shall order restitution to each victim in the full amount of each victim’s losses as determined by the court and without consideration of the economic circumstances of the defendant.”¹¹² This immensely powerful section directly overruled the VWPA’s previous direction that the district court,¹¹³ in deciding whether to order restitution, should consider “the financial resources of the defendant, the financial needs and earning ability of the defendant and the defendant’s dependents, and other such factors.”¹¹⁴

¹⁰⁸ 18 U.S.C. § 3663A(b)(4) (2000).

¹⁰⁹ *Id.*

¹¹⁰ *Id.* § 3663A(c).

¹¹¹ *Id.* § 3663A(c)(3).

¹¹² 18 U.S.C. § 3664(f)(1)(a) (2000).

¹¹³ Although the text of most of the MVRA states simply that the “court” shall do this or that, the Act is referring only to the federal district courts. Neither state courts nor military courts-martial fall under these regulations. The MVRA specifically states that the mandatory restitution only applies for offenses falling under titles 18 and 21 of the U.S. Code, whereas military courts-martial fall under title 10 of the U.S. Code. 18 U.S.C. § 3663A(c) (2000).

¹¹⁴ 18 U.S.C. § 3663(a)(1)(B).

Lastly, and perhaps most significantly, the MVRA provides for an enforcement mechanism to ensure compliance with the court's restitution order. Section (d) states, "[a]n order of restitution under this section shall be issued and enforced in accordance with section 3664."¹¹⁵

B. Issuance and Enforcement of the Order of Restitution

A judicial order of restitution means little without an enforcement mechanism. Section 3664 of Title 18, sets up the procedures for the issuance of the restitution order and provides the enforcement devices to ensure that victims are compensated.¹¹⁶ Although it is not necessary to discuss all of the particulars of the process, it will be helpful to look at some of the basics of how the process works in district courts.

The probation officer provides the court with a thorough pre-sentence report before restitution is ordered.¹¹⁷ This report details all victim losses and the defendant's economic information. A copy of the report is provided to the defendant and the government. In addition to the pre-sentence report, the court may order any additional testimony or documentation it believes necessary to decide any issue and the amount of restitution to order. Disputes concerning amount are resolved by a preponderance of the evidence.¹¹⁸ The government bears the burden of proving victim losses and the defendant bears the burden of proving his financial situation and that of his dependents.¹¹⁹ Interestingly, this has no bearing on the mandated restitution provision or on the amount of restitution ordered. Instead, the court uses it only in determining an appropriate payment schedule. The payment may be in the form of a single lump sum or partial payments spanning years.¹²⁰ The payment of monies to victims is mandated regardless of the financial situation of the victim, whether the victim has insurance to cover the loss, or any other consideration. Therefore, there is little room for maneuvering in the statute. Once the court determines the amount of restitution a defendant must pay, the court fashions a payment plan of in-kind payments (returning or replacing the property), monetary restitution or, if the victim is amenable, even personal

¹¹⁵ 18 U.S.C. § 3663A(d) (2000).

¹¹⁶ 18 U.S.C. § 3664 (2000). The title of the statute is "Procedure for Issuance and Enforcement of Order of Restitution." *Id.*

¹¹⁷ *Id.* § 3664(a). The probation officer, as part of his report, must provide notice to all victims and allow them to submit an affidavit detailing any economic loss, which resulted from the defendant's crimes. The probation officer also informs victims of the particulars of the sentencing hearing and even the availability of a lien against the defendant's assets. *Id.*

¹¹⁸ *Id.* § 3664(d), (e).

¹¹⁹ *Id.* § 3664(e).

¹²⁰ *Id.* § 3664 (f)(3).

services rendered. Then the court signs the restitution order. The restitution order may then be enforced by the government against the defendant, wherever he goes, to the same extent as a civil judgment. The Act goes so far as to allow the victim to request from the clerk of the court an abstract of judgment that has the force of law and can be used in the state as a judgment lien against the defendant's property. This judgment is enforceable in the state "in the same manner and to the same extent and under the same conditions as a judgment of a court of general jurisdiction in that [s]tate."¹²¹ Finally, section 3664 provides that the restitution order, which accompanies the sentence, is a final judgment regardless of the fact that the sentence may be appealed, modified, corrected or adjusted.¹²²

Sections 3613 and 3614, of Title 18, help implement the MVRA by providing various remedies in the event of a defendant's nonpayment of restitution. These remedies include both civil penalties (such as putting a lien on the defendant's property)¹²³ and criminal penalties (such as re-sentencing the defendant to any sentence which might have originally been imposed).¹²⁴ The appellate courts have held that although indigency is a consideration, it is not a bar to restitution because the restitution can be structured over a significant number of years and the defendant's ability to pay is taken into consideration by the court.¹²⁵

It is plain to see that the enforcement provisions of the MVRA, section 3664 of Title 18, are powerful; they provide restitution to victims regardless of the defendant's or the victim's financial situation and do so with the force of a federal court judgment.¹²⁶ It might seem that Congress has given the federal criminal courts a power traditionally held by civil courts, the power to award a monetary remedy. This, however, is not the case. The federal criminal court has been given the power and mandate to place the victim in the situation the victim was in before the crime was committed. This power, however, is not without limits. The court cannot order consequential and punitive damages; damages routinely available in civil courts.

¹²¹ *Id.* § 3664(m)(1)(B).

¹²² *Id.* § 3664(o). The section also applies even if the defendant is re-sentenced. *Id.*

¹²³ 18 U.S.C. § 3613 (2000).

¹²⁴ 18 U.S.C. § 3614 (2000).

¹²⁵ *See, e.g.*, *United States v. Purther*, 823 F.2d 965 (6th Cir. 1987); *United States v. Mounts*, 793 F.2d 125 (6th Cir. 1986); *United States v. Keith*, 754 F.2d 1388 (9th Cir. 1985) (explaining that it is proper for a court to take into consideration the defendant's future earning capacity).

¹²⁶ 18 U.S.C. § 3664(a), (f)(1)(A).

C. Constitutionality of the MVRA

It is no surprise that the MVRA has been attacked on various constitutional fronts, given its expansive power. These attacks have included alleged violations of the Seventh and Eighth Amendments¹²⁷ as well as the Due Process Clause of the 5th Amendment.¹²⁸ None of these attacks, however, have been successful and the MVRA continues to be valid law.

The attacks alleging a violation of the Ex Post Facto Clause¹²⁹ of the Constitution¹³⁰ are of particular note. Congress, however, opened the door for ex post facto claims when it made the mandatory restitution measures under the MVRA effective for any conviction after enactment of the Act (24 April 1996).¹³¹ This brought up the unfortunate situation of people becoming financially liable for restitution retroactively. This could have easily been avoided by making the Act's restitution provisions applicable for any case in which the misconduct occurred after passage of the Act. This is the suggested method for the proposed restitution measures under RCM 1003(b), as will be shown later.¹³²

V. Optional Restitution In Military Courts

Optional, judicially ordered restitution can work in the military system. Before concerning ourselves with the important question of how it would be enforced, let us first discuss what changes the new system would require. The task of amending any section of the Manual for Courts-Martial is daunting. Adding only one small provision to allow for restitution as an

¹²⁷ The Eighth Circuit, in *United States v. Williams*, 128 F.3d 1239, 1242 (8th Cir. 1997) ruled that the MVRA does not violate the Eighth Amendment because district courts can still consider indigency of the defendant while looking at a payment schedule that considers potential and projected earnings. The Ninth Circuit, in *United States v. Dubose*, 146 F.3d 1141, 1146-48 (9th Cir. 1998) stated that not only does the MVRA not violate the Eighth Amendment's provisions against cruel and unusual punishment or due process concerns, but also the provisions that enforce criminal restitution orders into civil judgments do not violate the Seventh Amendment's guarantee of a trial by jury. The Seventh Circuit went even further in protecting the legality of restitution. In *United States v. Behrman*, 235 F.3d 1049, 1054 (7th Cir. 2000), the Court ruled that restitution does not even constitute a penalty for a crime. In another case, *United States v. Szarwark*, 168 F.3d 993, 998 (7th Cir. 1999), the Court stated that restitution does not constitute criminal punishment at all.

¹²⁸ *Dubose*, 146 F.3d at 1147.

¹²⁹ U.S. CONST. art. I, § 9, cl. 3.

¹³⁰ See, e.g., *United States v. Schulte*, 264 F.3d 656 (6th Cir. 2001); *United States v. Kubick*, 205 F.3d 1117 (9th Cir. 1999); *United States v. Siegel*, 153 F.3d 1256 (11th Cir. 1998); *United States v. Newman*, 144 F.3d 531 (7th Cir. 1998).

¹³¹ 18 U.S.C. § 3663A (2000).

¹³² See *infra* pt. VI.C.

authorized punishment under RCM 1003(b) necessitates making changes to many other places in the Manual that reference this section or correspond with it. The following portion of the article suggests amendments to RCM 1003(b), 1107(d)(5), 1113(d)(3), as well as proposed military judge's Benchbook instructions and a pre-trial agreement sentencing limitation provision. There are other sections of the Manual for Courts-Martial that would need minor amending that this article does not discuss.¹³³

A. Amending RCM 1003(b)

1. RCM 1003(b)(3)

The natural starting point to begin modifying the existing system to allow for restitution as an authorized punishment is the fine provision of RCM 1003(b)(3). It states:

(3) *Fine.* Any court-martial may adjudge a fine in lieu of or in addition to forfeitures. Special and summary courts-martial may not adjudge any fine or combination of fine and forfeitures in excess of the total amount of forfeitures that may be adjudged in that case. In order to enforce collection, a fine may be accompanied by a provision in the sentence that, in the event the fine is not paid, the person fined shall, in addition to any period of confinement adjudged, be further confined until a fixed period considered an equivalent punishment to the fine has expired. The total period of confinement so adjudged shall not exceed the jurisdictional limitations of the court-martial.¹³⁴

There are two important aspects to the fine provision. First, the provision allows a fine to be adjudged in addition to forfeitures, even at special courts-martial. The only limit is that the fine by itself, or in combination with adjudged forfeitures, cannot exceed the jurisdictional maximum allowed by that type of court-martial.¹³⁵ For instance, at a special court-martial, the fine, combined with the forfeitures cannot exceed the total of two-thirds pay per

¹³³ For example, minor changes would need to be made to Articles 19 and 20, UCMJ, concerning the sentence limitations on special and summary courts-martial. UCMJ arts. 19, 20 (2005). Likewise, minor changes would need to be made to RCM 201(f)(2)(B)(i) to incorporate the possibility of restitution. MCM, *supra* note 2, R.C.M. 201(f)(2)(B)(i).

¹³⁴ MCM, *supra* note 2, R.C.M. 1003(b)(3).

¹³⁵ United States v. Tualla, 52 M.J. 228, 230 (2000) (citing United States v. Harris, 19 M.J. 331, 332 (CMA 1985)).

month for twelve months.¹³⁶ Using our hypothetical character, LCpl Pawn could receive a fine and forfeitures at his special court-martial, but if his base pay were \$1,547.70,¹³⁷ the maximum amount of money he could lose would be \$1,032.00 per month times twelve months,¹³⁸ or \$12,384.00. This total amount can be in the form of a fine, forfeitures alone, or a combination of the two.¹³⁹

Second, the provision provides an enforcement mechanism. It states that an appropriate amount of confinement may be added if the fine is not paid. The amount of confinement, however, cannot exceed the jurisdictional limit of the court. At a general court-martial, LCpl Pawn could receive up to five years confinement for his larceny because he stole non-military property of a value in excess of \$500.¹⁴⁰ However, if his case is being adjudicated at a special court-martial, his maximum confinement exposure, including any fine enforcement mechanism, cannot exceed one year.¹⁴¹ If LCpl Pawn had stolen from the government, and was at a special court-martial, a possible punishment, including the fine enforcement provision might read as follows: reduction to E-1, confinement for six months, forfeitures of two-thirds his base pay per month for six months¹⁴² and a fine of \$2,000, with an additional three months confinement to be added to the sentence if the fine is not paid within three months from the date of trial. Bear in mind that these limitations apply only at special courts-martial. General courts-martial are not limited in the amount of a fine which may be adjudged.¹⁴³

To make RCM 1003(b)(3) compatible with the proposed RCM 1003(b)(3)(a), the language of the present rule needs to be changed slightly. The following is the proposed amendment to the rule, with changes underscored:

(3) *Fine.* Any court-martial may adjudge a fine in lieu of or in addition to restitution and in addition to or in lieu of forfeitures. Special and summary courts-martial may not

¹³⁶ MCM, *supra* note 2, R.C.M. 1003(b)(3).

¹³⁷ This is the base pay figure for calendar year 2005, for a LCpl with over 2 years service. Forfeitures are rounded off to the nearest whole dollar amount.

¹³⁸ Twelve months is the maximum number of months LCpl Pawn could be sentenced at a special court-martial. *See supra* note 7 and accompanying text.

¹³⁹ *Tualla*, 52 M.J. at 230.

¹⁴⁰ UCMJ art. 121 (2005).

¹⁴¹ MCM, *supra* note 2, R.C.M. 201(f)(2)(B)(i), 1003(b)(3).

¹⁴² Note that forfeitures are calculated at the reduced rank of the servicemember, regardless of whether the reduction in rank is suspended. *Id.* R.C.M. 1003(b)(2).

¹⁴³ *Id.* R.C.M. 1107(d)(5).

adjudge any fine or combination of fine, forfeitures, and restitution, in excess of the total amount of forfeitures that may be adjudged in that case. In order to enforce collection, a fine may be accompanied by a provision in the sentence that, in the event the fine is not paid, the person fined shall, in addition to any period of confinement adjudged, be further confined until a fixed period considered an equivalent punishment to the fine has expired. The total period of confinement so adjudged shall not exceed the jurisdictional limitations of the court-martial.

In essence, the proposed provision permits an accused to receive all three financial punishments at a court-martial—a fine, restitution and forfeiture of pay.

2. *RCM 1003(b)(3)(a)*

The proposed RCM 1003(b)(3)(a) restitution provision should incorporate both of the important provisions of RCM 1003(b)(3), by allowing restitution to be adjudged in addition to or in lieu of forfeitures and a fine, and by carrying a potent enforcement mechanism. The proposed provision would read:

(3)(a) *Restitution*. Any court-martial may adjudge restitution in addition to forfeitures and a fine. Special and summary courts-martial may not adjudge any combination of a fine, forfeitures and restitution in excess of the total amount of forfeitures that may be adjudged in that case. In order to enforce restitution, a restitution order may be accompanied by a provision in the sentence that, in the event the restitution is not paid, the person ordered to pay the restitution shall, in addition to any period of confinement adjudged, be further confined until a fixed period considered an equivalent punishment to the amount of restitution has expired. The total period of confinement so adjudged shall not exceed the jurisdictional limitations of the court-martial. Any restitution order must state the name(s) of the person(s) or entity(ies) to whom restitution is to be made.¹⁴⁴ The Government has the burden to prove, by preponderance of the evidence, the pecuniary loss of the victim, while the accused has the

¹⁴⁴ The sentencing authority will be at liberty to set up a payment schedule for restitution, whether that authority is a judge or a panel. See *infra* pt. V.D.2.

burden to prove his financial situation and that of his dependents by the same standard.¹⁴⁵

There are several important provisions of the proposed rule. First, the rule allows for the possibility of a contingent confinement provision, in the event the restitution is not paid. Second, the rule sets up a preponderance of the evidence standard as the burden of proof applicable in proving damages and financial resources. This is the same standard used in the MVRA¹⁴⁶ and allows for efficient adjudication of both the defendant's financial resources and the victim's damages. Third, the rule requires that the restitution order specifically name the person or persons to whom payment is to be made.¹⁴⁷ Lastly, the rule allows an accused to receive a fine, forfeiture of pay and restitution at any court-martial.¹⁴⁸

3. *RCM 1003(b)(3) Discussion*

The non-binding discussion accompanying RCM 1003(b)(3) provides useful guidance in describing when a fine is due, what type of crime warrants a fine, what happens if an accused fails to pay a fine, and the limitation on the convening authority in approving that fine.¹⁴⁹ First, the most important

¹⁴⁵ As this paper was originally being drafted, in 2003, unbeknownst to the author, the Working Group of the Joint Services Committee was also drafting proposed amendments to RCM 1003(b) to incorporate restitution as an authorized punishment. Major Chris Carlson, U.S. Marine Corps, a member of the Working Group, shared the Navy-Marine Corps' proposed changes, including a proposed Discussion to RCM 1003(b)(3)(a), Analysis of the Rule and a proposed amendment to RCM 1113(d). The author wishes to credit and thank Major Carlson and the Working Group for allowing the use of their proposed amendments and compare them with his own. Despite any efforts of the Working Group, there has still been no change to the Manual for Courts-Martial.

¹⁴⁶ 18 U.S.C. § 3664(e) (2000).

¹⁴⁷ Unlike district courts, there is no payment schedule set up in the military by the sentencing authority, whether that sentencing authority is a judge or a panel. The general court-martial convening authority, however, may set a deadline for the payment of a fine. *Townsend v. United States*, No. 98-03, 1999 CCA LEXIS 26 (A.F. Ct. Crim. App. Feb. 5, 1999). The convening authority could also set a deadline for payment of restitution.

¹⁴⁸ For some cases, imposing a fine, forfeiture of pay and restitution will be appropriate. For example, a case in which an accused has stolen from both the government and another servicemember. The wise prosecutor will look ahead and ensure that cases such as these, which involve substantial monetary amounts, are referred to a general court-martial vice a special court-martial that has a monetary limit.

¹⁴⁹ The complete Discussion section of RCM 1003(b)(3) is as follows:

A fine is in the nature of a judgment and, when ordered executed, makes the accused immediately liable to the United States for the entire amount of money specified in the sentence. A fine normally should not be adjudged against a member of the armed forces unless the accused was unjustly

guidance in the discussion is that a “fine is in the nature of a judgment and, when ordered executed, makes the accused immediately liable to the United States” for the amount.¹⁵⁰ This provision makes the enforcement of the fine possible because once the fine is ordered executed, the individual becomes indebted to the government. This indebtedness is enforceable by the United States through the withholding of income tax returns.¹⁵¹

Second, the section states that a fine should not normally be awarded unless the defendant was unjustly enriched.¹⁵² By using the word “normally,” the drafters gave even more room for interpretation than normally seen in the non-binding discussions. Despite this guidance, courts have ruled that a fine may be adjudged against an accused even when there was no unjust enrichment, and regardless of the crime committed.¹⁵³ There can be no such ambiguity about the appropriateness of ordering restitution in the new provision.

Third, the discussion cross-references RCM 1113(d)(3),¹⁵⁴ which addresses the procedural prerequisite for imposition of additional confinement for nonpayment of a fine. If the accused is unable to pay the fine, despite making good faith efforts (e.g., he is indigent) the commander may only

enriched as a result of the offense of which convicted. Ordinarily, a fine, rather than a forfeiture, is the proper monetary penalty to be adjudged against a civilian subject to military law.

See R.C.M. 1113(d)(3) concerning imposition of confinement when the accused fails to pay a fine.

Where the sentence adjudged at a special court-martial includes a fine, see R.C.M. 1107(d)(5) for limitations on convening authority action on sentence.

MCM, *supra* note 2, R.C.M. 1003(b)(3) discussion.

¹⁵⁰ *Id.*

¹⁵¹ *See, e.g.,* United States v. Martinsmith, 41 M.J. 343 (1995).

¹⁵² MCM, *supra* note 2, R.C.M. 1003(b)(3).

¹⁵³ *See, e.g.,* United States v. Price, No. S30012, 2002 CCA LEXIS 265 (A.F. Ct. Crim. App. Oct. 4, 2002); United States v. Robertson, 27 M.J. 741 (A.C.M.R. 1988).

¹⁵⁴ Rule for Court-Martial 1113(d)(3) states:

(3) *Confinement in lieu of fine.* Confinement may not be executed for failure to pay a fine if the accused demonstrates that the accused has made good faith efforts to pay but cannot because of indigency, unless the authority considering imposition of confinement determines, after giving the accused notice and opportunity to be heard, that there is no other punishment adequate to meet the Government’s interest in appropriate punishment.

MCM, *supra* note 2, R.C.M. 1113(d)(3).

impose additional confinement upon determining that there is no other punishment adequate to meet the government's interest in appropriate punishment.¹⁵⁵ There is always the possibility that the contingent confinement may be imposed, but the government must satisfy another procedural prerequisite to do so.

Fourth, the discussion reminds us of RCM 1107(d)(5).¹⁵⁶ This rule states that if the "cumulative impact of the fine and forfeitures . . . would exceed the jurisdictional maximum dollar amount of forfeitures that may be adjudged" at a special court-martial, the convening authority may not approve it.¹⁵⁷ This is self-explanatory and makes sense. This rule would also need to be modified if we add restitution as an authorized punishment.

4. RCM 1003(b)(3)(a) Discussion

The discussion section of the proposed RCM 1003(b)(3)(a) restitution provision should follow the format set out for the discussion section of RCM 1003(b)(3)¹⁵⁸ with regards to the important points mentioned in the previous section. Having said that, it must do more; it also needs to explain what restitution is and what its parameters are.¹⁵⁹ The proposed discussion section therefore, by necessity, is quite extensive. The following is the proposed discussion section, which follows RCM 1003(b)(3)¹⁶⁰ and incorporates many of the provisions of the MVRA:

Restitution is a punishment that is appropriate when the victim of the accused's crime is a person, or an entity that is not the United States government. Any restitution order must state the name(s) of the person(s) or entity(ies) to whom restitution is to be made. The goal of restitution is to compensate the victim for the victim's loss; to put the victim back in the same financial position the victim would have been in but for the criminal conduct of the accused. Therefore, restitution does not cover consequential or punitive damages. An imposed punishment of restitution is in the nature of a judgment and, when ordered executed,

¹⁵⁵ *Id.* See also, *United States v. Tuggle*, 34 M.J. 89, 92 (C.M.A. 1992).

¹⁵⁶ MCM, *supra* note 2, R.C.M. 1107(d)(5).

¹⁵⁷ *Id.*

¹⁵⁸ *Id.* R.C.M. 1003(b)(3).

¹⁵⁹ The *Manual for Courts-Martial* states that the drafters of the legislation intended that the "Discussion" sections be considered as treatises, helpful, but without the force of law. *Id.* app. 21, introduction.

¹⁶⁰ *Id.* R.C.M. 1003(b)(3).

makes the accused immediately liable to the victim for the entire amount of money specified in the sentence. Restitution payments to the victim should begin immediately after imposition of punishment.¹⁶¹ It is not the purview of the sentencing authority to set up a payment schedule for restitution.

Orders of restitution should take into account the pecuniary loss to each victim that is the direct or proximate consequence of any offense for which the accused has been found guilty, as well as all information relating to the financial situation of the accused. Pecuniary loss to the victim is a broad term which encompasses not only direct loss from real and personal property offenses, based on the value of property at the time it was lost, damaged or destroyed, but also the cost of necessary medical care and related professional services and devices relating to physical and mental health care, including any necessary physical, speech, or occupational therapy for any offense that directly results in bodily harm to the victim. A victim's economic losses may also include, but are not limited to, lost income, to the extent that it can be readily determined, and unreimbursed travel-related expenses incurred by the victim to attend and participate in proceedings related to the case.¹⁶² In the case of an offense that involves bodily injury resulting in death, the restitution order may include an amount equal to the cost of necessary funeral and related services.¹⁶³

In the case of a victim who is under 18 years of age, incompetent, incapacitated, or deceased, the legal guardian of the victim, the representative of the victim's estate, or another family member may assume the victim's rights of

¹⁶¹ This language of requiring payments to "begin immediately" is taken from an article entitled "*The Perplexing Problem with Criminal Penalties in Federal Courts*," (19 REV. LITIG. 167 (2000)) written by the Honorable W. Royal Furgeson, Jr., Catharine M. Goodwin and Stephanie Lynn Zucker. In the article, Judge Furgeson argues that rather than use the words "due immediately," judges should order restitution payments to "begin immediately." *Id.* at 188. This, he argues, makes it easier to avoid the fiction that the accused can make immediate and full restitution. *Id.*

¹⁶² Credit for a few of these concepts belongs to the Joint Services Committee Working Group. *See supra* note 145.

¹⁶³ This part was taken substantially from the MVRA. *See supra* note 5.

restitution under this section, but in no event shall the accused be named as such representative or guardian.¹⁶⁴

Where more than one accused is responsible for the loss to a victim, the accused being sentenced may be ordered to pay either the entire amount of restitution due or an apportioned amount. It may not be appropriate to order restitution for an offense where the number of identifiable victims is so large as to make restitution impracticable, or if determining complex issues of fact related to the cause or amount of the victim's losses would complicate or prolong the sentencing process to such a degree that the need to provide restitution to any victim is outweighed by the burden on the sentencing process.

See RCM 1113(d) concerning imposition of confinement when the accused fails to pay restitution. Where the sentence adjudged at a special court-martial includes restitution, *see* RCM 1107(d)(5) for limitations on convening authority action on sentence.

5. *RCM 1003(b)(3)(a) Analysis*

In referring to the Analysis section of the Manual for Courts-Martial, the manual states that the “. . . Analysis sets forth the nonbinding views of the drafters as to the basis for each rule or paragraph, as well as the intent of the drafters, particularly with respect to the purpose of substantial changes in present law. The Analysis is intended to be a guide in interpretation.”¹⁶⁵ What follows is a proposed addition to Appendix 21, Analysis of Rules for Courts-Martial:

Subsection (3)(a) is based on Title 18 U.S.C. Sections 3663A and 3664 (Mandatory Restitution to Victims of Certain Crimes (1996) and Procedure for Issuance and Enforcement of Order of Restitution (1982)); 42 U.S.C. Section 10606 (Victims' Rights (1990)); and DoD Dir. 1030.1 (Victim and Witness Assistance (1994)). This new punishment option authorizes courts-martial to award victim restitution as part of the sentence. It is designed to give courts-martial power similar to that of United States district courts to order an

¹⁶⁴ *Id.*

¹⁶⁵ MCM, *supra* note 2, *Id.* app. 21, introduction.

accused to pay direct compensation to any person or entity that has suffered direct pecuniary harm as a result of the accused's crimes.¹⁶⁶

The proposed Analysis section provides the rationale for the proposed new punishment. It lists all of the major legislation and the Department of Defense Directive upon which restitution in the military system is based.

B. Amending RCM 1107(d)(5)

Rule for Court-Martial 1107¹⁶⁷ gives lengthy instructions for convening authority action on the sentence adjudicated at trial. If restitution is added as an authorized punishment, RCM 1107(d)(5)¹⁶⁸ must be amended because of the third sentence in the proposed restitution provision: "Special and summary courts-martial may not adjudge any combination of a fine and forfeitures or restitution and forfeitures in excess of the total amount of forfeitures that may be adjudged in that case." Rule for Court-Martial 1107(d)(5) is specifically mentioned in the Discussion section of both RCM 1003(b)(3)¹⁶⁹ and the proposed RCM 1003(b)(3)(a).

This section does not need to be rewritten, and no original language need be stricken. It just needs to be changed slightly to incorporate the punishment of restitution into the language. The proposed changes are underscored:

(5) Limitations on sentence of a special court-martial where a fine or restitution has been adjudged. A convening authority may not approve in its entirety a sentence adjudged at a special court-martial when, if approved, the cumulative impact of the fine, restitution, and forfeitures (whether the forfeitures are adjudged or by operation of Article 58b), would exceed the jurisdictional maximum dollar amount of forfeitures that may be adjudged at that court-martial.¹⁷⁰

This change comports with the proposed restitution clause. It keeps intact the rule that at a special court-martial, an accused can never pay (for a fine or

¹⁶⁶ See *supra* note 145.

¹⁶⁷ MCM, *supra* note 2, R.C.M. 1107.

¹⁶⁸ *Id.* R.C.M. 1107(d)(5).

¹⁶⁹ *Id.* R.C.M. 1003(b)(3).

¹⁷⁰ Note that the parentheses and the language "the forfeitures are" within the parentheses are added to clarify that the follow-on language applies to forfeitures only.

restitution) or lose (for forfeitures) more money than the combined total of two-thirds of his base pay times twelve months.¹⁷¹ Of course, no such rule is necessary for general courts-martial cases as there is no set jurisdictional limit on fines or restitution.¹⁷²

C. Amending RCM 1113(d)(3)

Rule for Court-Martial 1113(d)(3)¹⁷³ is also specifically mentioned in the discussion following RCM 1003(b)(3) and the proposed RCM 1003(b)(3)(a). This is commonly referred to as the indigency provision. Once again, drastic change is not needed to amend the rule to comport with adding restitution as a punishment option. The proposed changes to the original rule are underscored:

(3) *Confinement in lieu of fine or restitution.* Confinement may not be executed for failure to pay a fine or restitution if the accused demonstrates that the accused has made good faith efforts to pay but cannot because of indigency, unless the authority considering imposition of confinement determines, after giving the accused notice and opportunity to be heard, that there is no other punishment adequate to meet the Government's interest in appropriate punishment.¹⁷⁴

Indigency hearings are uncommon. The fine is usually paid, but if it is not, the fine follows the accused, even if he leaves the military. The government, eventually, recoups the fine by withholding the amount of the fine through garnishment of the individual's tax returns.¹⁷⁵

D. Proposed Military Judge's Benchbook Instructions

The Military Judge's Benchbook (Benchbook)¹⁷⁶ also needs to be modified to incorporate the new restitution punishment. The Benchbook states that although it is not required, it is recommended that the military judge read the definitions of each kind of punishment the accused is facing.¹⁷⁷ There are

¹⁷¹ MCM, *supra* note 2, R.C.M. 201(f)(2)(B)(i), 1003(b)(3).

¹⁷² *Id.* R.C.M. 201(f)(1)(A)(ii).

¹⁷³ *Id.* R.C.M. 1113(d)(3).

¹⁷⁴ *See supra* note 145.

¹⁷⁵ *See, e.g.*, United States v. Martinsmith, 41 M.J. 343 (1995).

¹⁷⁶ U.S. DEP'T OF ARMY, PAM. 27-9, LEGAL SERVICES: MILITARY JUDGES' BENCHBOOK (16 Sep. 2002) [hereinafter BENCHBOOK].

¹⁷⁷ *Id.* ¶ 2-5-22. The Benchbook states that the only sentencing instructions concerning punishments that are required under paragraph 2-5-22 are those of Article 58a and 58b, the nature

two sentencing instructions with regard to fines, one for a general court-martial and one for a special court-martial. We would need to modify both of these existing fine instructions if restitution were authorized. Additionally, it would be necessary to incorporate two new restitution instructions.

1. Amending the General and Special Court-Martial Fine Instructions

Both fine instructions need slight modifications to incorporate restitution language. Language must be added to allow members to sentence the accused to a fine, restitution and forfeitures at both types of courts-martial. The following is the original general court-martial fine instruction with the proposed changes underscored:

(FINE—GENERAL COURT-MARTIAL:) MJ: This court may adjudge a fine either in lieu of, or in addition to, forfeitures, and/or restitution. A fine is a punishment that is appropriate when the victim of the accused's crime is the United States government. A fine, when ordered executed, makes the accused immediately liable to the United States for the entire amount of money specified in the sentence. (In your discretion, you may adjudge a period of confinement to be served in the event the fine is not paid. Such confinement to enforce payment of the fine would be in addition to any other confinement you might adjudge and the fixed period being an equivalent punishment to the fine. The total of all confinement adjudged, however, may not exceed the maximum confinement for the offense(s) in this case.)¹⁷⁸

The “and/or” language is incorporated to leave open the possibility of a sentence including a fine, payment of restitution and forfeitures at a general court-martial.

The present special court-martial fine provision, once again, need be only slightly modified. The following is the original special court-martial fine instruction with the proposed changes underscored:

of a punitive discharge, and pretrial confinement credit if applicable. *Id.* Note that this section applies for contested cases. Identical fine provisions are included in paragraph 2-6-10 of the same chapter when members are used for sentencing only. *Id.* ¶ 2-6-10. Interestingly, types of punishments listed for capital cases do not include a fine as an authorized punishment. *Id.* ¶ 8-3-22.

¹⁷⁸ *Id.* ¶ 2-5-22.

(FINE—SPECIAL COURT-MARTIAL:) MJ: This court may adjudge a fine either in lieu of, or in addition to, restitution and/or forfeitures. A fine is a punishment that is appropriate when the victim of the accused's crime is the United States government. If you should adjudge a fine, the amount of the fine, along with any forfeitures and/or restitution that you adjudge, may not exceed the total amount of forfeitures which may be adjudged, that is, forfeiture of two-thirds pay per month for (twelve)(____) month(s). A fine, when ordered executed, makes the accused immediately liable to the United States for the entire amount of the fine. (In your discretion, you may adjudge a period of confinement to be served in the event the fine is not paid. Such confinement to enforce payment of the fine would be in addition to any other confinement you might adjudge and the fixed period being an equivalent punishment to the fine. The total of all confinement adjudged, however, may not exceed _____ (month(s))(year).)¹⁷⁹

2. *Proposed General and Special Court-Martial Restitution Instructions*

The proposed restitution instructions will, necessarily, follow the basic structure of the fine provisions. The following is the proposed general court-martial restitution instruction:

(RESTITUTION—GENERAL COURT-MARTIAL:) MJ: This court may adjudge restitution either in lieu of, or in addition to, forfeitures and/or a fine. Restitution is a punishment that is appropriate when the victim of the accused's crime is a person, or an entity that is not the United States government. Any restitution order must state the name(s) of the person(s) or entity(ies) to whom restitution is to be made. The goal of restitution is to compensate the victim for the victim's loss; to put the victim back in the same financial position the victim would have been in but for the criminal conduct of the accused. Therefore, restitution does not cover consequential or punitive damages. Restitution, when ordered executed, makes the accused immediately liable to the victim for the entire amount of

¹⁷⁹ *Id.*

money specified in the sentence. (In your discretion, you may adjudge a period of confinement to be served in the event the restitution is not paid. Such confinement to enforce payment of the restitution would be in addition to any other confinement you might adjudge and the fixed period being an equivalent punishment to the restitution. The total of all confinement adjudged, however, may not exceed the maximum confinement for the offense(s) in this case.)

Like the previous fine instruction, the proposed restitution instruction allows for the accused to be sentenced to all three monetary punishments at a general court-martial—a fine, restitution and forfeitures.¹⁸⁰

The following is the proposed special court-martial restitution instruction:

(RESTITUTION—SPECIAL COURT-MARTIAL:) MJ:
This court may adjudge restitution either in lieu of, or in addition to, forfeitures and/or a fine. Restitution is a punishment that is appropriate when the victim of the accused's crime is a person, or an entity that is not the United States government. Any restitution order must state the name(s) of the person(s) or entity(ies) to whom restitution is to be made. The goal of restitution is to compensate the victim for the victim's loss; to put the victim back in the same financial position the victim would have been in but for the criminal conduct of the accused. Therefore, restitution does not cover consequential or punitive damages. If you should adjudge restitution, the amount of the restitution, along with any forfeitures and/or fine that you adjudge, may not exceed the total amount of forfeitures which may be adjudged, that is, forfeiture of two-thirds pay per month for (twelve)(_____) month(s). Payment of restitution, when ordered executed, makes the accused immediately liable to the victim for the entire amount of money specified in the sentence. (In your discretion, you may adjudge a period of confinement to be served in the event the restitution is not paid. Such confinement to enforce payment of the restitution would be in addition to any other confinement you might

¹⁸⁰ Note also that any general court-martial is entitled to award total forfeiture of all pay and allowances whereas at a special court-martial an accused risks only two-thirds forfeitures of his pay per month. MCM, *supra* note 2, R.C.M. 201(f)(1), (2)(B)(i).

adjudge and the fixed period being an equivalent punishment to the restitution. The total of all confinement adjudged, however, may not exceed _____ (month(s))(year.)

Regardless of which court-martial sentences an accused to make restitution, the sentencing worksheet for the members must also be modified to allow the members to annotate their decision and specify to whom restitution payments should be made.¹⁸¹

E. Proposed Pre-Trial Agreement Sentencing Limitation Provision

In most sentencing limitation portions (Part II, or the Appendix) of pre-trial agreements, there is a subsection, after the punitive discharge, confinement and forfeitures subsections, entitled “Other Lawful Punishment.” What usually follows “Other Lawful Punishment” are the words “May be approved as adjudged.” Rather than having what amounts to a fairly useless sentencing subsection, one option is to put a contingent confinement clause for payment of restitution and fines.¹⁸² For example, the “Other Lawful Punishment” provision might read:

4. Other Lawful Punishment: Any other lawful punishment adjudged, including a fine or restitution, may be approved as adjudged. Contingent confinement imposed as a condition of, or in conjunction with, a fine or restitution, is not affected or limited by any period of confinement limited, suspended or disapproved in paragraph 2, above.

“Paragraph 2,” listed in the above proposed sentencing limitation provision, is usually the confinement limitation provision. Including this added language will ensure that there are no misunderstandings between the government and the accused concerning contingent confinement if restitution payments are not made.

¹⁸¹ Appendix C, of the Benchbook, contains the sample worksheets for all four possible special and general court-martial scenarios in sections C-1 through C-4. BENCHBOOK, *supra* note 176, app. C. Appendix 11, of the *Manual for Courts-Martial*, contains language to be used in announcing the sentence of a court-martial. MCM, *supra* note 2, app. 11. Section (b)(3) of this appendix would also need to be modified to include payment of restitution as an option under the category “Forfeitures, Etc.” *Id.* app. 11, (b)(3).

¹⁸² The genesis for this idea came from Major Jan A. Aldykiewicz, Judge Advocate, United States Army, who was an instructor at the school when this paper was originally drafted in 2003.

VI. Implementing And Enforcing Judicially Awarded Restitution In Military Courts

We have examined how the MVRA is set up and possible changes to the military's jurisprudence to incorporate restitution in courts-martial. The biggest problem, however, still remains—how do we implement and enforce the restitution that is awarded by either a judge or members? As stated previously, ordering restitution is easy, enforcing it is an entirely different matter. First, this section sets out several distinctions between how the federal and military systems might treat restitution. Next, four different possible restitution enforcement mechanisms are discussed. Finally, the section explains how to deal with potential *ex post facto* concerns associated with implementation of restitution in the military.

The principle weakness in the military system for implementation of restitution is that, unlike the federal system, the military does not have access to state probation officers to enforce the court's restitution order.¹⁸³ This is compounded by the fact that, in most cases, the military loses jurisdiction over a servicemember when they deliver a certificate of discharge to the accused. This usually occurs either at the end of the servicemember's active service at the unit, or at the end of confinement and appellate review.¹⁸⁴

Another problem area that arises in implementing restitution in the military is that sentencing proceedings follow almost immediately after the findings are announced.¹⁸⁵ This may seem odd to some,¹⁸⁶ since in the federal

¹⁸³ Whether the military could forge alliances with state probation offices, like the federal civilian system, is a subject beyond the reach of this paper.

¹⁸⁴ In some cases, the military will continue to exercise jurisdiction over the accused even when the discharge certificate is delivered. This is true for cases of extended confinement where the appellate process has run its course, the accused receives his discharge certificate, and still has confinement time to serve. UCMJ art. (2)(a)(7) (2005).

¹⁸⁵ Rule for Court-Martial 1001 states that "[a]fter findings of guilty have been announced, the prosecution and defense may present matter pursuant to this rule to aid the court-martial in determining an appropriate sentence." MCM, *supra* note 2, R.C.M. 1001(a)(1). Although the Rules for Court-Martial do not set a timetable on when the sentencing hearing will take place, it is generally done immediately after the findings are announced. This is probably because, unlike the federal system, where the judge decides the sentence, the same members who decided guilt or innocence decide the punishment to be awarded the accused. It appears to be, therefore, a matter of convenience. Experience has shown that significant general court-martial cases sometimes have a short intervening period between when the findings are announced and the sentencing proceedings. This is usually no more than a few days.

¹⁸⁶ It may seem odd to the accused and his supporters that the military defense counsel must prepare for a sentencing case at the same time he prepares for the contested case on the merits. This is so because the sentencing case almost always immediately follows the case on the merits.

civilian system, sentencing of a defendant can happen weeks or months after the adjudication of guilt. This is significant because it is during this time, in the civilian system, that the probation officer compiles an extensive pre-sentencing report,¹⁸⁷ which includes all possible victim restitution issues. This report is then given to the judge. After delivery of the pre-sentence report, both the government and defense present restitution evidence in court to prove their cases by a preponderance of the evidence to the judge; the government seeks to prove all victim restitution amounts and the defendant seeks to prove his and his dependents' financial situation.¹⁸⁸ Because the military usually has its sentencing hearings immediately following the findings, one could argue that there will not be effective litigation of restitution issues. This, however, is unlikely.

The government already presents to the members or judge, before sentencing, some of the particulars of the accused's financial situation. The members are informed how much time the accused has in the military, what his pay is, how many dependents he has and other data.¹⁸⁹ The only thing left to do is what is currently done in federal civilian courts—the government must prove victim restitution amounts and the accused must prove any financial considerations he has (which is commonly done in military sentencing proceedings already). One other important point to keep in mind is that military members and judges, unlike their federal counterparts, are intimately familiar with the lifestyles, pay scale, housing arrangements, and other financial considerations of military personnel.

One last difference between the federal civilian system and military courts is that in the federal system the judge awards the punishment, whereas

The accused may think, "I thought we were going to win, why do we have to get stuff together for sentencing?"

¹⁸⁷ 18 U.S.C. § 3664(d) (2000).

¹⁸⁸ *Id.* § 3664(e).

¹⁸⁹ Although it is common practice to tell the members of the accused's marriage status and dependents, RCM 1001(b)(1) states the following with regard to what must come to the members' attention:

(1) *Service data from the charge sheet.* Trial counsel shall inform the court-martial of the data on the charge sheet relating to the pay and service of the accused and the duration and nature of any pre-trial restraint. In the discretion of the military judge, this may be done by reading the material from the charge sheet or by giving the court-martial a written statement of such matter. If the defense objects to the data as being materially inaccurate or incomplete, or containing specified objectionable matter, the military judge shall determine the issue.

MCM, *supra* note 2, R.C.M. 1001(b)(1).

in the military system a judge *or* members award punishment. Given the fact that the military has blue ribbon juries, picked for their experience and judgment, it seems shortsighted to claim that our “lay jury” would not be able to establish appropriate restitution awards. It is not difficult to figure out dollar figures for property damage, medical expenses, or other incidentals subject to restitution.¹⁹⁰ And, as in the federal civilian system, the members have the prosecutor to help point them in the right direction as to an appropriate amount of restitution to be awarded.

There are four main ways to enforce restitution payments: garnishing the accused’s pay; having the government pay the restitution by proxy and then recovering the money from the accused; allowing military restitution orders be enforced by the states; and imposing contingent confinement or recalling the accused from appellate leave if restitution is not made.

A. Restitution by Garnishing the Accused’s Pay

One way to get restitution money from the accused and to the victim is to garnish the accused’s pay. Under this scenario, once the court-martial sentencing authority has ordered restitution, that amount could be immediately¹⁹¹ taken out of the accused’s pay by the disbursing or finance office. This is the how Article 139 complaints are processed.¹⁹² Under an Article 139 claim, the convening authority may approve an amount to be taken out of the accused’s pay after an investigating board determines that the servicemember was at fault.¹⁹³ Article 139 states, “[t] he order of the commanding officer directing charges herein authorized is conclusive on any disbursing officer for the payment by him to the injured parties of the damages as assessed and approved.”¹⁹⁴ This is powerful language.

If the convening authority can issue a binding order on the disbursing officer to garnish a servicemember’s pay based on the investigating officer’s recommendation, why can’t he have that same power for the payment of restitution? In other words, after the court awards restitution as a punishment,

¹⁹⁰ The accused is free to present complicated evidence on possible retirement benefits that may be forfeited and the judge is required to instruct on the effect of a punitive discharge on these benefits. *See, e.g.*, United States v. Boyd, 55 M.J. 217 (2001); United States v. Luster, 55 M.J. 67 (2001). If members (and judge advocates, for that matter) are expected to understand complicated actuary tables, with mathematical formulas, surely they can understand simple calculations involving pecuniary loss to victims.

¹⁹¹ Immediately begun, but taken out over increments if the amount is substantial.

¹⁹² *See supra* pt. II.B.2.

¹⁹³ UCMJ art. 139 (2005).

¹⁹⁴ *Id.* art. 139(a).

the commanding officer could immediately order the disbursing officer to pay that amount of money to the victim.¹⁹⁵

Of course, Article 139 specifically gives that power to the commanding officer. Perhaps that same authority could be given to the commanding officer (or convening authority) by modifying the previously proposed restitution provision.¹⁹⁶ The original restitution provision would contain the additional, underscored language:

(3)(a) *Restitution*. Any court-martial may adjudge restitution in addition to forfeitures and a fine. Special and summary courts-martial may not adjudge any combination of a fine, forfeitures and restitution in excess of the total amount of forfeitures that may be adjudged in that case. The restitution ordered may be charged against the pay of the accused upon the approval of the convening authority, which approval is conclusive on any disbursing officer for the payment by him to the victim(s) of the restitution ordered. In order to enforce restitution, a restitution order may be accompanied by a provision in the sentence that, in the event the restitution is not paid, the person ordered to pay the restitution shall, in addition to any period of confinement adjudged, be further confined until a fixed period considered an equivalent punishment to the amount of restitution has expired. The total period of confinement so adjudged shall not exceed the jurisdictional limitations of the court-martial. Any restitution order must state the name(s) of the person(s) or entity(ies) to whom restitution is to be made. The Government has the burden to prove, by preponderance of the evidence, the pecuniary loss of the victim, while the accused has the burden to prove his financial situation and that of his dependents by the same standard.

A few important points need to be mentioned. First, the underlined restitution language contains the verb “may,” as opposed to “shall,” as is contained in the Article 139 language. This is to grant leeway to the convening authority as to whether to garnish the accused’s pay or set up some other payment plan for

¹⁹⁵ The purpose of this article is not to delve into all of the nuances of the military’s pay regulations, but it appears that it does not appear a stretch to assume that the pay regulations could accommodate court-martial judgments of restitution to the same extent they accommodate Article 139 complaints.

¹⁹⁶ See *supra* pt. V.A.2.

restitution. Second, the convening authority's decision to garnish the accused's pay for restitution is final on the disbursing officer. Third, the contingent confinement language is left in to give the sentencing authority as much freedom as possible to construct an appropriate sentence. Finally, the term "convening authority" is used in the proposed punishment, instead of "commanding officer," as is used in the Article 139 complaint.¹⁹⁷ This is to ensure that the same authority that had the power to refer the case to the court-martial is the one who garnishes the accused's pay. Using the term "commanding officer," could be taken to mean someone other than a convening authority, such as a company commander.

The weakness in the above system is that the accused may be in a no-pay status or the convening authority may deem him unable to afford the garnishment of pay. For example, if the accused is sentenced to confinement at a general court-martial, he receives no pay after fourteen days from when the sentence was adjudged.¹⁹⁸ The same is true for a sentence received at a special court-martial, except the accused receives one-third of his pay.¹⁹⁹ At either court-martial, a convening authority may decide not to garnish the accused's pay because of monetary commitments the accused has, such as child support payments.

B. Restitution by Proxy

The most important notion in any restitution scheme is to make the victim whole, by securing for the victim the ordered restitution as soon as practicable. It is possible for the military to have a better system than the probation officer and payment plan system that exists in federal district courts, where restitution is burdensome to secure and may take years to complete.²⁰⁰ The military can also have a system that does more than merely garnish the accused's pay. The government can ensure restitution is paid both quickly and easily by instituting a system of "restitution by proxy." Under this system, the government would pay the victim the restitution ordered, and then the accused reimburses (or becomes indebted to) the government. Unlike district courts, all of the accused who are sentenced in military courts work for the United States government. The government controls their pay.

Restitution by proxy is the best way to ensure timely restitution takes place because this system compensates victims by allowing them to recoup

¹⁹⁷ UCMJ art. 139 (2005).

¹⁹⁸ UCMJ arts. 57, 58b (2005).

¹⁹⁹ *Id.*

²⁰⁰ See 18 U.S.C. §§ 3613, 3664 (2000) (monitoring restitution in the federal system).

adjudicated pecuniary losses directly from the government. The government pays the victim the amount of restitution the court has awarded and then the accused must reimburse the government the full amount. Restitution by proxy has an obvious advantage for the victim that the civilian system does not—the victim is not forced to wait around for years to collect the restitution money.²⁰¹ It also has a very practical advantage. Under restitution by proxy, the victim is not required to have any interaction with the accused in seeking to collect restitution. Victims will not be required to keep track of where the accused is or what his ability to pay is.

Restitution by proxy also avoids the predicament of the victim not receiving complete restitution because the accused is discharged from the military and the military loses jurisdiction over him. As mentioned previously, the military does not have the luxury of state probation officers to track defendants and ensure restitution is paid, like the civilian system does.

The government is reimbursed by the accused just as it is under a fine in the restitution by proxy system; the accused pays the full amount of restitution to the U.S. Department of Treasury. If the accused does not pay, the Defense Finance and Accounting Service (DFAS) is notified that the accused is indebted to the government. Just like with nonpayment of a fine, the federal government is then free to notify the Internal Revenue Service (IRS), who, in turn, can garnish tax returns from the accused until he has fully reimbursed the government. It is irrelevant, at this point, whether the accused is still serving in the military.

It may take the government time to recoup its money under the restitution by proxy system. But, despite the administrative burden, the government would eventually get its money back. Unlike other well-meaning entitlement programs that pay out huge amounts of money with no reimbursement,²⁰² restitution by proxy results in only a temporary loss of

²⁰¹ Under the federal civilian system, the judge orders a payment schedule for the defendant and then relies on the probation officer to ensure monies are collected. 18 U.S.C. § 3664(f)(2) (2000). The restitution could take years to pay off under the payment system if the victim is poor or out of work. *See also* Furgeson, *supra* note 161.

²⁰² The Transitional Compensation Program provides a good example. The monies paid out for fiscal years 2004 through fiscal year 2000 are as follows: FY 04, \$677,000.00; FY 03 \$694,000.00; FY 02, \$659,000.00; FY 01, \$497,000.00; and FY 00, \$448,000.00. E-mail from Tracy C. Perl, Program Analyst, Transitional Compensation Program Manager, Manpower and Reserve Affairs, Headquarters, U.S. Marine Corps, to Lieutenant Colonel Dave M. Jones (Nov. 22, 2005, 7:59 a.m. EST) (on file with author). To illustrate how much money a single family is entitled to, consider the case of a military member who gets court-martialed for domestic abuse. Assume that he has three years left on his enlistment and has a wife and three children. That family would be entitled to approximately \$65,000. None of this money is ever reimbursed. The

funds. More importantly, the victim is immediately made whole and any inconvenience is borne by the accused, not the victims of crimes committed by servicemembers.

1. Creating New Law for Restitution by Proxy

The conspicuous drawback to restitution by proxy is that there must be a law or regulation allowing the government to pay the restitution and then be reimbursed by the accused. The President, by Presidential Executive Order, may make all of the changes and amendments needed in areas relating to punishment.²⁰³ But Congress must authorize the expenditure of funds; the expenditure of public funds is proper only when specifically authorized by Congress.²⁰⁴ It is doubtful that any commanding officer will want to use precious Operation and Maintenance (O&M) funds to pay for restitution by proxy. Besides, paying restitution may not qualify as an O&M need.²⁰⁵

One solution to this dilemma, therefore, is for Congress to pass a statute authorizing the Secretary of Defense to pay restitution to crime victims upfront and seek reimbursement from the accused afterward. There is a practical model of what this might look like, that already exists—the Transitional Compensation Act (TCA).²⁰⁶ Although this Act is an entitlement program, rather than a reimbursement program, the Act still gives us a working model for what a “restitution by proxy” statute might look like.

It is not necessary to propose a draft for the entire statute here. However, using the TCA as a guide,²⁰⁷ the following is how the proposed law (we will call it 10 U.S.C. Section 10XX) might begin:

typical restitution case, on the other hand, would probably run from a few hundred to a few thousand dollars, and would be reimbursed.

²⁰³ MCM, *supra* note 2, pt. I, ¶ 4; *see also* UCMJ art. 56 (2005); 10 U.S.C. §§ 801-946 (2000).

²⁰⁴ *United States v. MacCollom*, 426 U.S. 317 (1976).

²⁰⁵ Operation and maintenance (O&M) money is an appropriated fund type that is set by the Appropriation Act. The Appropriation Act is the statutory authorization to incur obligations and make payments out of the U.S. Treasury for specified purposes. Operation and maintenance money is used for such items as day-to-day expenses of training exercises, deployments, and operating and maintaining installations. The Purpose Statute states that appropriations must be applied only to the objects for which the appropriations were made. 31 U.S.C. § 1301 (2000). To use O&M money for purposes for which it is not intended may result in an Antideficiency Act (ADA) violation. 31 U.S.C. § 1341 (2000). The ADA mandates administrative and criminal sanctions for unlawful use of appropriated funds. *Id.* Therefore, any money for this kind of program would have to be earmarked in the Appropriation Act for that year.

²⁰⁶ 10 U.S.C. § 1059 (2000).

²⁰⁷ *Id.*

§ 10XX. Court ordered restitution to victims: payment to victims, reimbursement from accused.

a. Authority to pay restitution. The Secretary of Defense, with respect to the armed forces (other than the Coast Guard when it is not operating as a service in the Navy), and the Secretary of Homeland Security, with respect to the Coast Guard when it is not operating as a service in the Navy, may each establish a program to pay court-martial ordered restitution to victims, in accordance with this section. Upon establishment of such a program, the program shall apply in the case of each such victim described in section (b) for which the court-martial case was under the jurisdiction of the Secretary establishing the program.

b. Victim for which restitution is authorized. This section applies to any person, persons, or entity named in a court-martial sentencing proceeding, as being entitled to restitution from the accused in a court-martial.

c. Payment and reimbursement of restitution. In the case of any individual described in section (b), the Secretary shall pay the full amount of the court ordered restitution. Thereafter, the accused becomes immediately liable to the United States Government for the entire restitution amount. Any sentence that imposes an order of restitution shall be final, notwithstanding any appeal.

This statute allows the Secretary of Defense (or Secretary of Homeland Security with respect to the Coast Guard) to set up a program for restitution, just as previously done for the TCA. Section (b) stresses the importance of the sentencing authority specifically naming the recipient of restitution. Section (c) contains two important provisions: the word “shall,” which requires the Secretary to pay restitution; and language making the accused immediately liable to the United States for the entire restitution amount.

2. Amending Article 58b, UCMJ

There is a second way to set up restitution by proxy if the possibility of a new statute is unfeasible. If the government cannot pay the victim directly and then get reimbursed by the accused, why not modify Article 58b, UCMJ

(Article 58b),²⁰⁸ to allow the government to take money it would have paid to the accused and pay restitution to the victim instead? Of course, if the accused is not sentenced to confinement, garnishing the accused's pay²⁰⁹ might be the easiest course of action. However, if the accused is sentenced to more than six months confinement, or less than six months confinement and a punitive discharge, he forfeits pay and/or allowances to the jurisdictional limit of the court.²¹⁰ These financial penalties are effective fourteen days after announcement of the sentence.²¹¹ This makes it extremely difficult, if not impossible, to garnish the accused's pay to make restitution payments.

Amending Article 58b is only restitution by proxy in the loosest sense, because what the government is really doing when they do this, is paying the accused while he is confined so that he can pay restitution to the victim. In fact, one could argue that this is not restitution from the accused at all because the government is actually paying the victim with money the accused would never have received while confined. For this reason, amending Article 58b is not nearly as good an alternative as making a law that allows the government to pay the victim restitution and then recoup all of that money from the accused.²¹²

The biggest obstacle to implementing this proposal is that it appears to be in direct contravention to why Article 58b was passed in the first place—Congress did not want the government to pay confined criminals. However, Article 58b(b) provides that the convening authority “may waive any or all of the forfeitures of pay and allowances...for a period not to exceed six months” if that money is given to the dependents of the accused.²¹³ Thus, Congress already contemplated providing money for the dependents of the accused when it originally passed Article 58b.²¹⁴ It is not a stretch to argue that a waiver for restitution should also be allowed, given that the intent of Congress was to avoid paying the confined criminal, but still provide for dependents. Under either scenario, the accused is not getting paid while confined.²¹⁵ Another drawback to this proposal, however, is that, like restitution by proxy,

²⁰⁸ UCMJ art. 58b (2005).

²⁰⁹ *See supra* pt. VI.A.

²¹⁰ UCMJ art. 58b (2005).

²¹¹ *Id.*

²¹² This actually looks more like the entitlement philosophy of the Transitional Compensation Act.

²¹³ UCMJ art. 58b(b) (2005).

²¹⁴ Article 58b, UCMJ, was passed on 10 February 1996. 10 U.S.C. § 858b (2000).

²¹⁵ In fact, paying the dependents of the accused while he is confined may actually result in the accused eventually receiving that money. Paying restitution would not render the same result, assuming the victim is not a family member.

amending Article 58b requires congressional action vice merely an executive order.

Article 58b(b) can be amended to allow the convening authority to waive forfeitures of pay and allowances for the payment of restitution awarded by the court. If an accused did not have dependents, there would be no competing interests between victims and dependents. If the accused did have dependents, Article 58b(b) could be modified so that the convening authority could waive forfeitures of pay and allowances for six months for both payment of restitution and for the benefit of the accused's dependents.

In the alternative, modifying Article 58b(b) would allow the convening authority to waive six months of forfeitures for the accused's dependents and six months of forfeitures for the payment of restitution. This provision seems to accord with congressional intent,²¹⁶ considering Article 58b was passed before the jurisdiction of special courts-martial was extended to a year for both confinement and forfeitures.²¹⁷ Article 58b(b) reads as follows:

(b) In a case involving an accused who has dependents, the convening authority or other person acting under section 860 of this title (article 60) may waive any or all of the forfeitures of pay and allowances required by subsection (a) for a period not to exceed six months. Any amount of pay or allowances that, except for a waiver under this subsection, would be forfeited shall be paid, as the convening authority or other person taking action directs, to the dependents of the accused.

A proposed amendment to Article 58b(b) is Article 58b(b)(1). This amendment copies much of the language of Article 58b(b), but allows for the waiver of forfeitures for the benefit of victims:

(b)(1) In a case involving an accused that has been ordered to pay restitution pursuant to a court-martial, the convening authority or other person acting under section 860 of this title (article 60) may waive any or all of the forfeitures of pay and allowances required by subsection (a) for a period not to exceed six months. Any amount of pay or allowances that,

²¹⁶ Although the jurisdictional limit for special courts-martial was extended for confinement time and forfeitures (as well as fines), the waiver provision of six months was never changed. *See supra* note 7 and accompanying text.

²¹⁷ *Id.*

except for a waiver under this subsection, would be forfeited shall be paid, as the convening authority or other person taking action directs, to the victim(s) of the accused for restitution.

These two provisions could actually work together if the accused was sentenced for more than six months at either a special or a general court-martial; the convening authority could waive six months of forfeitures for the family and waive six months of forfeitures for the victim. In addition, to ensure that the government is paid back any monies paid out for victim restitution, the following language should be added at the end of proposed Article 58b(b)(1): “The accused is financially liable to the government for any monies paid under this section for victim restitution.” The drawback to these provisions is that they remove any incentive the accused might have to pay restitution, and instead, put the financial onus on the government.

C. Restitution by State Enforcement

Another possible enforcement mechanism for restitution is to mandate that, by law, the restitution order resulting from a court-martial is binding in all states. This would allow either the government or the victim to enforce the restitution order in state court. The particulars of this were addressed in the MVRA section,²¹⁸ however, they will be briefly discussed again. In essence, the restitution order needs to be binding in state court, like a civil judgment, so that both the victim and the government have recourse against the accused.

The MVRA goes as far as to allow the victim to request from the clerk of the court an abstract of judgment that has the force of law and can be used in the state as a judgment lien against the defendant’s property.²¹⁹ This judgment is enforceable in the state “in the same manner and to the same extent and under the same conditions as a judgment of a court of general jurisdiction in that [s]tate.”²²⁰ Finally, section 3664 provides that the restitution order, which accompanies the sentence, is a final judgment regardless of the fact that the sentence may be appealed, modified, corrected or adjusted.²²¹

²¹⁸ See *supra* pt. IV.B.

²¹⁹ 18 U.S.C. § 3664(m)(1)(A) (2000).

²²⁰ *Id.* § 3664(m)(1)(B).

²²¹ *Id.* § 3664(o). The section also applies even if the defendant is re-sentenced. *Id.*

Ensuring that states recognize what the military does is not a novel concept.²²² A conviction from a military court-martial already carries with it the force and effect of a conviction in the state systems.²²³ The same should hold true for restitution orders. The president is allowed to prescribe the maximum punishments for offenses under the UCMJ,²²⁴ but that does not mean that an order of restitution will be recognized in state court. Perhaps relying on the Supremacy Clause of the U.S. Constitution²²⁵ is not enough. To ensure enforcement of military court-martial ordered restitution, title 10 should be amended to incorporate the language similar to the enforcement language of sections 3664(m) and (o), of title 18. Proposed language for an amendment to title 10 would read:

Court-martial order of restitution; enforcement and finality. A victim may enforce an order of restitution from a military court-martial in any state. At the request of a victim named in the restitution order, a military judge may issue an abstract of judgment certifying that a judgment has been entered in favor of such victim in the amount specified in the restitution order. Upon registering, recording, docketing, or indexing such abstract in accordance with the rules and requirements relating to judgments in any state court, the abstract of

²²² For example, consider how the military reacted when states stopped accepting military powers of attorney. The military began to put the following provision as the preamble of every power of attorney it drafted:

This is a military power of attorney prepared pursuant to Title 10, United States Code, Section 1044b and executed by a person authorized to receive legal assistance from the military services. Federal law exempts this power of attorney from any requirement of form, substance, formality or recording that is prescribed for powers of attorney under the laws of a state, the District of Columbia, or a territory, commonwealth, or possession of the United States. *Federal law specifies that this power of attorney shall be given the same legal effect as a power of attorney prepared and executed in accordance with the laws of the jurisdiction where it is presented.*

J.A. 272, LEGAL ASSISTANCE DEPLOYMENT GUIDE (1994) (emphasis added).

²²³ Each state treats convictions a little differently, however. For example, what is considered a “felony” conviction from a military court varies from state to state. Some states, like Alabama, consider the accused to have a felony conviction if the crime he committed falls under a list of certain “felony” crimes (ALA. CODE § 13A-5-3 (2002)); other states, like California, consider the accused to have a felony conviction if he spent time in the equivalent of a state prison vice a city or county jail (CAL. PENAL CODE § 17 (Deering 2002)); and some states, like Montana, consider the accused to have a felony conviction based on the maximum confinement time he was facing from the charges (MONT. CODE ANN. § 45-1-201 (2002)).

²²⁴ MCM, *supra* note 2, pt. I, ¶ 4. *See also* UCMJ art. 56 (2005); 10 U.S.C. §§ 801-946 (2000).

²²⁵ The Supremacy Clause states that the Constitution and federal law is the supreme law of the land, notwithstanding state laws. U.S. CONST. art. VI, cl. 2.

judgment shall be a lien on the property of the defendant located in such state in the same manner and to the same extent and under the same conditions as a judgment of a court of general jurisdiction in that state. Any state may consider the abstract of judgment a final judgment.

This language allows victims to enforce the restitution order at the state level without having to go through procedural prerequisites, like getting the order recognized in the state. It provides a powerful enforcement mechanism by allowing the victim to put a lien on the accused's property if restitution is not paid.

D. Restitution by Threat of Contingent Confinement or Recall From Appellate Leave

There are two other related ways to enforce restitution, neither of which is as powerful as those already discussed. The first way to enforce it is by allowing contingent confinement for nonpayment of restitution, which was briefly addressed above.²²⁶ This sounds like a great way to get the victim paid. It has problems, however. For example, if the accused claims indigency, a hearing must be held to decide if confinement is the only way the government can meet its interest in appropriate punishment.²²⁷ Regardless of the result of the indigency hearing, however, the victim still gets no restitution.

The threat of additional confinement might be enough to convince the accused to either start, or to keep, making restitution payments.²²⁸ However, if the accused would rather serve confinement than pay restitution, nothing can be done, and the victim still does not receive restitution. In addition, an accused who is not confined could arrive at the end of his enlistment contract, at which time the military would lose jurisdiction. At this point, the government loses the ability to collect restitution from the accused absent reporting the issue to DFAS and then to the IRS.

One consistent theme of military justice for commanders is that they do not want the evildoer, who has received a punitive discharge, in their unit any longer than is absolutely necessary. They see him as a threat to good

²²⁶ See *supra* pt. V.A.2.

²²⁷ MCM, *supra* note 2, R.C.M. 1113(d)(3).

²²⁸ One issue that has not been addressed is how an accused would pay a victim absent restitution by proxy. One option might be for the accused to give it to his defense attorney, who would then give it to the victim. Another option might be for the Service Secretaries to designate someone to act as an intermediary for the money; for example, the VWAP Coordinator, someone from Family Advocacy, or someone from disbursing.

order and discipline. He takes a “boat space” available for a productive servicemember. The commanders want these people gone and on appellate leave (home awaiting their discharge) at the earliest possible opportunity. So, what happens if the accused has not made restitution and the convening authority wants to place him on appellate leave? The convening authority can send the accused home with threats that restitution has to be made or he will be called back off of appellate leave, but this may be a hollow threat that neither party wants to be carried out. In particular, the commander may not want the accused at the unit, either before or after his confinement, because this may hurt the morale and discipline of the unit. In this type of case, contingent confinement may hold little threat for the accused on appellate leave.

Although bringing an accused off appellate leave and back to active duty is an option, practically speaking, it probably will not be utilized. After the accused is gone, the commanding officer has little incentive to bring him back on active duty to make certain he pays restitution. This is due to the cost and time commitment involved in tracking down the accused and getting him to come back. The accused may also disappear, which may result in the government forgetting the issue all together. Restitution delayed may become restitution denied.

E. Eliminating Ex Post Facto Issues

One of the prime concerns in implementing any new legislation is to avoid violating the ex post facto clause of article I, section 9 of the U.S. Constitution. Any proposed amendment to RCM 1003(b) should be forward-looking in its application, thus avoiding any ex post facto concerns.²²⁹ One of the seminal military cases in this area is *United States v. Gorski*,²³⁰ a 1997 Court of Appeals for the Armed Forces case. This case dealt with whether Article 58b, UCMJ, the 1996 amendment regarding automatic forfeiture of pay and allowances for persons confined, violated the ex post facto clause of the U.S. Constitution. Gorski argued that the newly enacted Article 58b, UCMJ, should not apply to him because he committed his offense before enactment of the new law.²³¹ The government disagreed, arguing that because the minimum punishment had never been increased for Gorski, article I, section 9 had not been violated.²³²

²²⁹ Even the drafting of the MVRA gave rise to ex post facto concerns. *See, e.g.*, Irene J. Chase, *Making the Criminal Pay in Cash: The Ex Post Facto Implications of the Mandatory Victims Restitution Act of 1996*, 68 U. CHI. L. REV. 463.

²³⁰ *United States v. Gorski*, 47 M.J. 370 (1997).

²³¹ *Id.* at 372.

²³² *Id.* at 374.

The Court ruled that Gorski was correct; the provisions concerning automatic forfeitures, under Article 58b, UCMJ, could not be applied to him if the law was enacted subsequent to his offense.²³³ Most importantly for the present analysis on restitution, the Court of Appeals laid out the law on the prohibition of ex post facto laws for the military. The Court went all the way back to 1798, to cite Justice Chase, U.S. Supreme Court, who gave the following test for determining whether a law violates the ex post facto clause of the U.S. Constitution:

1st. Every law that makes an action done before the passing of the law, and which was innocent when done, criminal; and punishes such action. 2d. Every law that aggravates a crime, or makes it greater than it was, when committed. 3d. Every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed. 4th. Every law that alters the legal rules of evidence, and receives less, or different, testimony, than the law required at the time of the commission of the offence, in order to convict the offender.²³⁴

In implementing restitution, the focus should be on not violating the third prong of Justice Chase's analysis—inflicting a greater punishment than the law affixed to the crime when committed. This is not hard to do. Ex post facto concerns can be avoided by carefully drafting the Executive Order to add restitution as an authorized punishment under RCM 1003(b) for only those offenses committed after the signing of the Executive Order. The Order must not use preferral of charges, arraignment, or adjudication of the sentence as benchmarks of when restitution is applicable.

In our hypothetical case of LCpl Pawn, assume LCpl Pawn committed his larceny on 15 June 2002 and the president signed the Executive Order allowing restitution as an authorized punishment on 16 June 2002. Further assume that charges were preferred against LCpl Pawn on 15 August 2002 and he went to trial from 15 to 17 September 2002. LCpl Pawn would not be subject to the new restitution provision because his criminal conduct took place one day before the Executive Order went into effect. This seems a simple

²³³ *Id.*

²³⁴ *Id.* at 373 (quoting *Calder v. Bull*, 3 U.S. 386, 390 (1798)). See also, *Taylor v. Garaffa*, 54 M.J. 645 (2002).

concept to grasp, yet is not always applied in practice.²³⁵ The new law should not only list the date of enactment, but should state clearly that it applies only to offenses committed after the date of enactment. To do otherwise runs the risk of violating the ex post facto clause of the U.S. Constitution.

VII. Comparing the MVRA and Optional Restitution under RCM 1003(b)

This paper has discussed how restitution is set up in the federal civilian system and how it might work in the military system. Table 1 shows how the two systems compare to one another.

Table 1.

	The Mandatory Victims' Restitution Act of 1996	Optional Restitution Under R.C.M. 1003(b)(3)
Predecessor to Current Law	VWPA, Crime Victims' Bill of Rights.	VWAP, Crime Victims' Bill of Rights.
Restitution Mandated by Law?	Yes. For everything listed below.	No.

²³⁵ See *Gorski*, 47 M.J. at 374. Another, more recent, example of the confusion that can arise from not knowing when to apply new law occurred when the President amended section 819, Article 10 (Article 19, UCMJ), in the National Defense Authorization Act for FY 2000, Pub. L. No. 106-65, 113 Stat. 512 (1999). See *supra* note 7. This amendment increased the jurisdictional maximum punishment of special courts-martial for confinement and forfeitures from six months to one year. This change became effective in military courts on 15 May 2002 but was silent on when commission of the offenses had to be to qualify under the new law. This led to a controversy on how to apply the new law. Some argued that if the accused committed his crime before 15 May 2002 he should face a one-year special court-martial. Others argued it should be based on prefferal of charges, arraignment, or at adjudication of the sentence. To avoid the prospect of being overruled by the appellate courts, and having to re-try cases, some took the position that the new law would apply only for those cases in which the criminal conduct occurred after 15 May 2002. Subsequently, on 24 May 2002, the Navy finally came out with its position, endorsing the conservative approach—any offense that was committed before 15 May 2002 would be adjudicated under the old system. E-mail from Deputy Assistant Judge Advocate General of the Navy (Criminal Law), to all Navy and Marine Corps Judge Advocates (24 May 2002) (on file with author).

Who Imposes Restitution and When?	Judge, weeks or months after adjudication of guilt.	Judge or Members, immediately or shortly after adjudication of guilt.
Restitution to Whom?	Victim, others.	Victim.
Restitution for Property Damage, Loss or Destruction?	Yes. For real and personal property. Includes return of taken property.	Yes. For real and personal property.
Restitution for Bodily Injury?	Yes. For necessary medical and related professional services and devices relating to physical, psychiatric, and psychological care, including nonmedical care and treatment rendered in accordance with a method of healing recognized by law. Also for necessary physical and occupational therapy and rehabilitation. Also, reimburse victim for income lost as a result of offense.	Yes. May include cost of necessary medical care and related professional services and devices relating to physical and mental health care, including any necessary physical, speech, or occupational therapy for any offense that directly results in bodily harm to the victim.
Restitution for Death?	Yes. For necessary funeral and related services.	Yes. For necessary funeral and related services.

<p>Restitution for Other Costs?</p>	<p>Yes. For lost income and necessary childcare, transportation, and other expenses incurred during participation in the investigation or prosecution of the offense or attendance at proceedings related to the offense.</p>	<p>Yes. Included, but not limited to, lost income to the extent that it can be readily determined, and un-reimbursed travel-related expenses incurred by the victim to attend and participate in proceedings related to the case.</p>
<p>Joint and Several Liability?</p>	<p>Yes.</p>	<p>Yes.</p>
<p>Burden of Proof</p>	<p>Preponderance of the Evidence.</p>	<p>Preponderance of the Evidence.</p>
<p>When is Restitution Due?</p>	<p>Whenever schedule that judge sets up states.</p>	<p>Due immediately upon sentence. Possibility of garnishment if no restitution by proxy.</p>
<p>Possibility of Restitution by Proxy?</p>	<p>No.</p>	<p>Yes.</p>

<p>Possible Enforcement Mechanisms?</p>	<ol style="list-style-type: none"> 1. Enforced like civil judgment, follows defendant. 2. Victim can get judgment lien against defendant's property in state court. 3. Judge can revoke probation, hold defendant in contempt, order sale of defendant's property or re-sentence defendant to more punishment than he could have originally received. 	<ol style="list-style-type: none"> 1. Enforced like civil judgment, follows accused. 2. Victim can get judgment lien against defendant's property in state court. 3. Pay by proxy, take immediately from accused's salary to pay victim. 4. Contingent confinement. 5. Nonpayment reported to DFAS, IRS. 6. Convening authority waives automatic forfeitures to pay to victim. 7. Recall from appellate leave to active duty.
<p>Is Indigency of Defendant or Accused Relevant?</p>	<p>No. Since payments can be stretched out over years.</p>	<p>Yes, but only as it pertains to contingent confinement.</p>

VIII. Conclusion

Under the present military system, crime victims have a difficult time getting restitution from those who do them harm. Military judges and panels should have the option of ordering an accused to pay restitution. Several changes can be made to incorporate restitution as an authorized punishment under RCM 1003(b) and there are also several ways to enforce restitution. The best way to do this is by creating a law allowing the government to pay restitution by proxy and then seeking reimbursement from the accused later. Setting up a viable restitution enforcement system will not be easy, but it will be worth it.

Let us revisit LCpl Pawn at his court-martial, to illustrate how court ordered restitution, with a potent enforcement mechanism, works. After the members' questions about ordering restitution, the military judge instructs the members that restitution is an authorized punishment under RCM 1003(b) and that they can order restitution. The members then return and order LCpl Pawn to pay restitution. After the court-martial, the military pays Cpl Johnson \$2,000 to reimburse him for the crime committed by his fellow Marine. Now, LCpl Pawn is indebted to the U.S. government for that amount, which he must pay.

It may not be easy to incorporate restitution in the military system, but it should be done. It is time for the military to make the accused fully pay for his crime by including restitution as an authorized punishment under RCM 1003(b)(3).

THE UNITED STATES NATIONAL SECURITY STRATEGY: YESTERDAY, TODAY, AND TOMORROW

Jane Gilliland Dalton *

On 17 September 2002, approximately one year after the horrific attacks of 11 September 2001, President Bush promulgated his first *National Security Strategy*.¹ It was a bold and aggressive strategy that reflected the astonishment of the nation in the immediate post-9/11 world. Woven throughout the *Security Strategy* are four major themes with significant international law implications:

A Nation at War: The United States has been thrust into a struggle against global terrorism and those who harbor or support global terrorists;

Preemption: The United States will be proactive in identifying and defeating emerging threats before they are fully formed;

American Internationalism: Multilateral institutions and the support of coalition partners are valuable, but the United States will not hesitate to act alone to protect its national interests; and

Transformation: The U.S. national security institutions will be transformed to meet the challenges of the twenty-first century.²

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¹ THE WHITE HOUSE, THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA (2002), available at <http://www.whitehouse.gov/nsc/nss.pdf> [hereinafter SECURITY STRATEGY].

² *Id.* Two additional themes found in the *Security Strategy*—the need for global economic growth through free markets and free trade and the need to build democratic infrastructures and open societies—are beyond the scope of this article. *Id.*

Now, three years after the *Security Strategy* was promulgated, and four years after 9/11, this article will reflect on some of the major legal issues embedded in the *Security Strategy*. It will also prescribe improvements for any future national security strategy. These comments are based on a review of the *Security Strategy* and a number of implementing documents, specifically the Secretary of Defense's *National Defense Strategy*³ promulgated in March 2005, the Chairman of the Joint Chiefs of Staff's *National Military Strategy*⁴ dated 2004 but complementary to the 2005 *National Defense Strategy*, and the *National Strategy for Maritime Security*⁵ promulgated in September 2005. Reference will also be made to the Chairman of the Joint Chiefs of Staff General Peter Pace's October 2005 *Guidance to the Joint Staff*⁶ and the Chief of Naval Operations Admiral Michael Mullen's *Guidance to the Navy for 2006*.⁷ Viewed together these documents provide a comprehensive vision of post-9/11 national security that reflects where the national security establishment has been and may shed light on where it will move over the next few years.

Before embarking on this project, however, it is useful to consider for a moment the "battlespace," that is, the security environment, in which the United States is operating. This brief detour is important, because the national leadership's perception of the battlespace affects their perception of the nation's ability to identify, deter, and defeat threats in that battlespace. The

³ DEPARTMENT OF DEFENSE, THE NATIONAL DEFENSE STRATEGY OF THE UNITED STATES OF AMERICA (2005), available at <http://www.defenselink.mil/news/Mar2005/d20050318nds1.pdf> [hereinafter DEFENSE STRATEGY].

⁴ CHAIRMAN OF THE JOINT CHIEFS OF STAFF, THE NATIONAL MILITARY STRATEGY OF THE UNITED STATES OF AMERICA—A STRATEGY FOR TODAY; A VISION FOR TOMORROW (2004), available at <http://www.defenselink.mil/news/Mar2005/d20050318nms.pdf> [hereinafter MILITARY STRATEGY].

⁵ THE NATIONAL STRATEGY FOR MARITIME SECURITY (2005), available at <http://www.whitehouse.gov/homeland/4844-nsms.pdf> [hereinafter MARITIME STRATEGY; the DEFENSE STRATEGY, the MILITARY STRATEGY, the MARITIME STRATEGY, and the SECURITY STRATEGY are collectively referred to as the STRATEGIES]. The *Maritime Strategy* and its eight proposed supporting plans represent the first-ever, comprehensive national strategy for maritime security. The proposed supporting plans consist of the *National Plan to Achieve Domain Awareness*, the *Global Maritime Intelligence Integration Plan*, the *Interim Maritime Operational Threat Response Plan*, the *International Outreach and Coordination Strategy*, the *Maritime Infrastructure Recovery Plan*, the *Maritime Transportation System Security Plan*, the *Maritime Commerce Security Plan*, and the *Domestic Outreach Plan*.

⁶ GENERAL PETER PACE, CHAIRMAN OF THE JOINT CHIEFS OF STAFF, THE 16TH CHAIRMAN'S GUIDANCE TO THE JOINT STAFF—SHAPING THE FUTURE (2005), available at <http://www.jcs.mil/PaceGuidance02Oct05.pdf> [hereinafter CHAIRMAN'S GUIDANCE].

⁷ ADMIRAL M.G. MULLEN, CNO GUIDANCE FOR 2006—MEETING THE CHALLENGE OF A NEW ERA (2005), available at <http://www.navy.mil/features/2006CNOG.pdf> [hereinafter CNO'S GUIDANCE].

three hallmarks of the battlespace in which the nation found itself in September 2002, and finds itself today, are complexity, distribution, and ambiguity.

The battlespace is complex, because it extends “from critical regions overseas to the homeland and span[s] the global commons of international airspace, waters, space and cyberspace.”⁸ An “arc of instability” stretching from the Western Hemisphere, through Africa and the Middle East, and extending to Asia serves as a “breeding ground” for threats to U.S. interests. Within that arc, rogue states, ungoverned spaces, and under-governed territories provide sanctuary and opportunity for terrorists, criminals, and ideological extremists to plan, train for, and launch attacks against the United States and its allies.

The battlespace is distributed, because the United States will be required to conduct operations in widely diverse locations—from “densely populated urban areas” to “remote, inhospitable and austere” locations. United States forces must be prepared to operate against pockets of resistance located in the midst of large numbers of noncombatants and in an environment where precision strikes may destroy a discrete target but leave large elements of an adversary’s forces untouched. Thus, the battlespace is not located in an identified or identifiable geographic area, but rather is loosely scattered throughout an area or areas that are populated largely by noncombatants.

Finally, the battlespace is ambiguous, because the same global commons that give life, food, resources, and means of communication also provide conduits for threats to national security and offer vast expanses conducive to anonymity and surreptitious activity. The two most ambiguous domains in the global commons are the oceans and cyberspace. The oceans provide an immense maritime domain of enormous importance to the security and prosperity of all nations and all peoples, but they also provide a “vast, ready, and largely unsecured medium for an array of threats by nations, terrorists, and criminals.”⁹ “Cyberspace is a new theater of operations. . . . Increased dependence on information networks creates new vulnerabilities that adversaries may seek to exploit.”¹⁰ Accordingly, the ability to operate in, through, and from the global commons is a critical requirement. Access to these domains—in other words, a “secure battlespace”—is necessary to protect

⁸ MILITARY STRATEGY, *supra* note 4, at 5 (describing the features of the battlespace, including its complexity and distribution).

⁹ MARITIME STRATEGY, *supra* note 5, at 2.

¹⁰ DEFENSE STRATEGY, *supra* note 3, at 13.

U.S. global interests, to defend the nation, and to guard the safety of U.S. forces in the field.¹¹

This vision of the security environment as complex, distributed, and ambiguous forms the backdrop against which the national leadership developed the *Strategies*. Keeping this vision in mind will assist the reader in understanding the impetus for some of the major themes found in the *Strategies*.

Theme I: A Nation at War

*“America is now threatened less by conquering states than we are by failed ones. We are menaced less by fleets and armies than by catastrophic technologies in the hands of the embittered few.”*¹²

The President’s introduction to the *Security Strategy* begins by reflecting on the decisive victory in the twentieth century of the forces of freedom over those of totalitarianism and of the United States’ unparalleled military, economic, and political strength as the twenty-first century gets underway—a strength that will be used to foster human freedom and to defend and extend the peace. Because the United States is so strong, however, no nation or organization can hope to develop the great armies or industrial capability that would be necessary to threaten the United States militarily. Accordingly, today’s adversaries adopt asymmetric capabilities and methods that have the potential to “bring great chaos and suffering to our shores for less than it costs to purchase a single tank.”¹³ The President’s message then states, as a matter of fact and without fanfare, as if the concept were so basic it needed no explanation or discussion, that the nation is engaged in a “war against terrorists of global reach[,] . . . a global enterprise of uncertain duration.”¹⁴

Whether the United States is legally “at war” with terrorism has been the topic of extensive debate within the academic community, particularly since 9/11.¹⁵ The subject recently engendered a lively panel discussion at the annual International Law Weekend of the American Branch of the International

¹¹ MILITARY STRATEGY, *supra* note 4, at 18.

¹² SECURITY STRATEGY, *supra* note 1, at 1.

¹³ *Id.* at iv.

¹⁴ *Id.*

¹⁵ See, e.g., Nathaniel Berman, *Privileging Combat? Contemporary Conflict and the Legal Construction of War*, 43 COLUM. J. TRANSNAT’L L. 1 (2004); Mary Ellen O’Connell, *What is War?*, JURIST, Mar. 17, 2004, <http://jurist.law.pitt.edu/forum/oconnell1.php>.

Law Association.¹⁶ While there may be those in the academic community who doubt that the nation is “at war” with terrorism, there is no doubt in the minds of the national political and military leadership. The *Security Strategy* makes it clear: “The struggle against global terrorism is different from any other war in our history. It will be fought on many fronts against a particularly elusive enemy over an extended period of time.”¹⁷ Every one of the subordinate strategy and guidance documents begins by unequivocally recognizing that the nation is waging a global war on terrorism. The *Defense Strategy* states: “America is a nation at war.”¹⁸ The *Military Strategy* states: “The ‘National Military Strategy’ conveys . . . strategic direction [to] the Armed Forces . . . in this time of war.”¹⁹ The *Maritime Strategy* states: “[T]he Federal government has reviewed and strengthened all of its strategies to combat the evolving threat in the War on Terrorism.”²⁰ The *Chairman’s Guidance* states: “We are at war against an enemy whose publicly reiterated intent is to destroy our way of life.”²¹ The *CNO’s Guidance* states: “We are a nation and a Navy at war.”²²

Importantly, it is clear from the context of these statements and the body of the documents as a whole, that the national leadership does not use the phrase “war on terrorism” as a figure of speech, as were the cases of the “war on poverty” and the “war on drugs” of previous administrations. Rather, these statements reflect a conviction that the nation was the victim of an armed attack and that the United States may appropriately and lawfully respond, under Article 51 of the United Nations Charter²³ and the inherent right of self-defense under customary international law, with that amount of force necessary to decisively defeat the enemy.²⁴

¹⁶ Panel Discussion, What is War? at the American Branch of the International Law Association International Law Weekend 2005: International Norms in the 21st Century—Development and Compliance Revisited (Oct. 21, 2005).

¹⁷ SECURITY STRATEGY, *supra* note 1, at 5.

¹⁸ DEFENSE STRATEGY, *supra* note 3, at iv, 1.

¹⁹ MILITARY STRATEGY, *supra* note 4, at iv; *see also id.* at viii (“Our challenge for the coming year and beyond is to stay the course in the War on Terrorism . . .”).

²⁰ MARITIME STRATEGY, *supra* note 5, at ii.

²¹ CHAIRMAN’S GUIDANCE, *supra* note 6, at 1.

²² CNO’S GUIDANCE, *supra* note 7, at 1.

²³ U.N. CHARTER art. 51 (“Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations . . .”).

²⁴ It is beyond the scope of this article to analyze the legal complexities concerning the resort to force in self-defense and whether the United States is legally “at war” with terrorism or terrorists. Suffice it to say for the purposes of this article that the North Atlantic Treaty Organization (NATO) invoked Article 5 of the Washington Treaty and the Organization of American States (OAS) invoked the equivalent provision of the Rio Treaty, Article 3(1), which provide that an

This approach—that the nation is “at war” with terrorism or, in the post-United Nations Charter context, is involved in an armed conflict with terrorism—has legal implications. It arguably means one can strike and kill terrorists wherever they are located, whenever they are found. The Predator strike in Yemen is the classic demonstration of the exercise of that authority.²⁵ It definitely means the combatants in the war may be detained for the duration of hostilities to prevent them returning to the fight and killing more Americans.²⁶ It means the nation has tools at its disposal under the laws of armed conflict, in addition to traditional law enforcement authorities.

This approach does not mean, however, that the nation’s military forces are without constraints. Even when dealing with unlawful combatants like terrorists, the customary principles of the law of armed conflict, such as necessity, distinction, and proportionality, still apply.²⁷ And even though it may be legal under the law of armed conflict to strike and kill terrorists wherever they are located, political considerations and principles of sovereignty dictate that the United States work cooperatively with other

armed attack against one or more of the parties shall be considered an attack against them all. North Atlantic Treaty art. 5, Apr. 4, 1949, 63 Stat. 2241, 34 U.N.T.S. 243; Inter-American Treaty of Reciprocal Assistance art. 3(1), *adopted* Sept. 2, 1947, 62 Stat. 1681, U.N.T.S. 77; *Invocation of Article 5 Confirmed*, NATO UPDATE, Oct. 2, 2001, <http://www.nato.int/docu/update/2001/1001/e1002a.htm>; see OEA/Ser G, CP/Res. 797 (1293/01) (Sept. 19, 2001); OEA/Ser. G, CP/Res. 796 (1293/01) (Sept. 19, 2001). Likewise, United Nations Security Council Resolution 1368 invoked the inherent right of self defense in response to the attacks of 9/11. S.C. Res. 1368, U.N. Doc. S/RES/1368 (Sept. 12, 2001).

²⁵ On Sunday, 3 November 2002, a Hellfire missile attack launched from a CIA-controlled Predator unmanned aerial vehicle struck a vehicle in Yemen’s Marib province, killing a key al-Qaeda leader and five other al-Qaeda members. See, e.g., Dana Priest, *CIA Killed U.S. Citizen in Yemen Missile Strike*, WASH. POST, Nov. 8, 2002, at A1; *Sources: U.S. Kills Cole Suspect*, CNN.COM, Nov. 5, 2002, <http://archives.cnn.com/2002/WORLD/meast/11/04/yemen.blast/index.html>.

²⁶ The International Military Tribunal at Nuremberg made clear that since the eighteenth century captivity during time of war “‘is neither revenge nor punishment, but solely protective custody, the only purpose of which is to prevent the prisoners of war from further participation in the war.’” 2 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL 474 (1947) (quoting with approval the statement of German Admiral Wilhelm Canaris made in opposition to the rules regarding the treatment of prisoners issued by German General Hermann Reinecke).

²⁷ See, e.g., YORAM DINSTEIN, WAR, AGGRESSION AND SELF-DEFENCE 183–85 (2001), *citing Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. Rep. 14 (June 27); *citing Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 I.C.J. Rep. 226 (July 8).

governments to the maximum extent possible to eliminate the terrorist sanctuaries within their borders.²⁸

After an unsuccessful attempt to capture a number of suspected al-Qaeda operatives resulted in the deaths of at least thirteen soldiers, the Yemeni government permitted the United States to take direct action and assisted in the effort.²⁹ But one of the most difficult issues dealt with in the *Security Strategy* is what to do about states that are unable or unwilling to counter terrorism within their borders. The *Defense Strategy* asserts that states:

[M]ust exercise their sovereignty responsibly, in conformity with the customary principles of international law, as well as with any additional obligations that they have freely accepted. It is unacceptable for regimes to use the principle of sovereignty as a shield behind which they . . . engage in activities that pose enormous threats to their citizens, neighbors, or the rest of the international community. . . . [In] the 21st century . . . great dangers may arise in and emanate from relatively weak states and ungoverned areas.”³⁰

Though the above *Defense Strategy* assertion is compelling, it begs the questions: What should the United States do about states that do not exercise their sovereignty “responsibly”? How exactly does one deal with the ungoverned areas, with weak states that cannot control their territory, and with rogue states that choose to permit coalitions of criminals and ideological extremists to operate from their land and airspace? What role does the United States have to play if a “high-value target” is located in a country, such as Italy,³¹ with a functioning government and judicial system? The answers, though perhaps disappointing to those who are seeking a robust answer to robust questions, should allay the concerns of those who fear the global war on

²⁸ Such cooperation was displayed when the United States worked with Yemen to launch a missile strike on terrorists. See *supra* note 25 and accompanying text; *infra* notes 29–30 and accompanying text.

²⁹ See, e.g., Walter Pincus, *Missile Strike Carried Out with Yemeni Cooperation—Official Says Operation Authorized Under Bush Finding*, WASH. POST, Nov. 6, 2002, at A10; *Yemen Attacks ‘Al-Qaeda Hideout,’* BBC NEWS, Dec. 18, 2001, http://news.bbc.co.uk/1/hi/world/middle_east/1717461.stm.

³⁰ DEFENSE STRATEGY, *supra* note 3, at 1.

³¹ In June 2005, an Italian judge issued arrest warrants for thirteen CIA agents who allegedly captured an Egyptian cleric in Italy and secretly flew him to Egypt for interrogation—an action known as an “extraordinary rendition.” See, e.g. *Italy Seeks ‘CIA Kidnap Agents,’* BBC NEWS, June 24, 2005, <http://news.bbc.co.uk/2/hi/europe/4619377.stm>; Tracy Wilkinson, *Italy Orders Arrest of 13 CIA Operatives*, L.A. TIMES, June 25, 2005, at A1.

terrorism will serve to provide a *carte blanche* for indiscriminate, military, direct action anytime, anywhere.

As gleaned from the *Strategies*, one of the major lines of attack to address these complex issues is interagency and multinational cooperation. The twin themes of improved cooperation among the executive national security agencies of the U.S. Government and of enhanced interaction with multinational partners pervade all four documents. The *Military Strategy* quite succinctly sums up the requirement for “more detailed coordination and synchronization of activities” both at home and abroad: “The United States must adopt an ‘active defense-in-depth’ that merges joint force, interagency, international non-governmental organizations, and multinational capabilities in a synergistic manner.”³²

The *Defense Strategy* notes: “One of our military’s most effective tools in prosecuting the Global War on Terrorism is to help train indigenous forces.”³³ The *Defense Strategy* then details how the Department of Defense seeks effective partnerships with domestic agencies to improve homeland defense and is cooperating with the newly-created Office of the Coordinator for Reconstruction and Stabilization at the State Department to “bolster the capabilities of US civilian agencies and improve coordination with international partners to contribute to the resolution of complex crises overseas.”³⁴ The Department focuses its efforts “on those tasks most directly associated with establishing favorable long-term security conditions.”³⁵

To be sure, an effective defense-in-depth includes the capability to “strike swiftly at any target around the globe.”³⁶ The military has not been more active in attacking terrorists world-wide largely due to the absence of actionable intelligence and the lack of a cadre of agile, mobile forces to carry out clandestine operations, rather than a self-imposed deference to other agencies or multinational partners.³⁷ Further, the *Security Strategy* establishes an aggressive tone by the use of bellicose language and repeated variations on the refrain that the United States will seek to work with and through the international community but “will not hesitate to act alone, if necessary.”³⁸ Nevertheless, taking the *Strategies* as a whole, and particularly when tracing the progression of the *Strategies* it is fair to say that interagency cooperation

³² MILITARY STRATEGY, *supra* note 4, at 6.

³³ DEFENSE STRATEGY, *supra* note 3, at 15.

³⁴ *Id.*

³⁵ *Id.* at 16.

³⁶ MILITARY STRATEGY, *supra* note 4, at 6.

³⁷ See *infra* notes 132–37 & 151–55 and accompanying text.

³⁸ SECURITY STRATEGY, *supra* note 1, at 6.

and multinational interaction form one of, if not the, major courses of action in the global war on terrorism.³⁹

Theme II: Preemption

*“We will disrupt and destroy terrorist organizations by: . . . identifying and destroying the threat before it reaches our borders.”*⁴⁰

The doctrine of preemption, introduced as official U.S. Government policy in the *National Security Strategy*, is the most provocative and controversial concept therein. It is also the most confusing legally and the least well-defined. Though the idea first appears in President Bush’s introduction,⁴¹ the word itself is not used until Part III.⁴²

The *Security Strategy* articulates a three-part rationale to explain why the United States can no longer rely on a “reactive posture.”⁴³ First, unlike the generally risk-averse adversaries of the past, deterrence is ineffective against adversaries whose tactics involve wanton destruction and the targeting of civilians, for whom martyrdom is the goal, and whose most potent protection is statelessness. Second, the technologies capable of detecting an imminent threat posed by conventional armies crossing defined state borders are ineffective in detecting and identifying terrorists concealing small amounts of hugely destructive materials through porous borders. When such weapons can be easily concealed, covertly delivered, and used without warning, the point at which an imminent threat is identified is the point at which it is too late to react. Third, the greater the threat, the greater the risk of inaction—with today’s destructive technologies, the United States cannot sit idly by waiting for clearer threat indicators or a manifest demonstration of hostile intent. The consequences of inaction could be catastrophic.

³⁹ Compare DEFENSE STRATEGY, *supra* note 3, and MARITIME STRATEGY, *supra* note 5, and MILITARY STRATEGY, *supra* note 4, with SECURITY STRATEGY, *supra* note 1. For example, the *Maritime Strategy*, the most recent of the four, places very strong emphasis on multinational cooperation vice unilateral action. See MILITARY STRATEGY, *supra* note 5.

⁴⁰ SECURITY STRATEGY, *supra* note 1, at 6.

⁴¹ *Id.* at v (“And, as a matter of common sense and self-defense, America will act against such emerging threats before they are fully formed.”).

⁴² *Id.* at 6 (“Strengthen Alliances to Defeat Global Terrorism [W]e will not hesitate to act alone, if necessary, 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”). In context, the word “such” appears to refer to “terrorist organizations of global reach and any terrorist or state sponsor of terrorism which attempts to gain or use weapons of mass destruction (WMD) or their precursors.” *Id.*

⁴³ *Id.* at 15.

Unfortunately, the articulation of what preemption is, and how and when it will be employed, is less clear than the articulation of why it is believed to be necessary. Further, the preemption doctrine is inconsistent with, and unnecessary for, the global war on terrorism. This article will address these two issues in turn.

First, what exactly is preemption? A loose reading of the *Strategies* could lead to the conclusion that preemption involves actions to be taken against potential threats while the threats are still inchoate: the United States will confront its enemies “early and at a safe distance” and challenges “before they are allowed to mature;”⁴⁴ preventive actions must “deny an opponent the strategic initiative;”⁴⁵ the United States must be prepared to stop terrorists and rogue states “before they can threaten;”⁴⁶ “if terrorists cannot be deterred . . . , then they must be interdicted and defeated, preferably overseas;”⁴⁷ and, the United States must anticipate adversary actions and react “more swiftly than in the past,”⁴⁸ even “if uncertainty remains as to the time and place of the enemy’s attack.”⁴⁹ Such a reading could lead to the conclusion that the United States is prepared to act preemptively even when there is uncertainty as to the nature, or even the existence, of a concrete threat.

A closer reading, however, gives a more restrained view. Embedded within the discussions of preemption are words and phrases that connote the existence of an identifiable and identified threat in only “the most dangerous and compelling circumstances:”⁵⁰ the United States will actively confront those who “directly” threaten it;⁵¹ options include preventive actions to preempt a “devastating attack”⁵² and to defeat “the most dangerous challenges early and at a safe distance,”⁵³ “before they can strike;”⁵⁴ the United States “must be prepared to stop terrorists and rogue states before they can . . . use weapons of mass destruction or engage in other attacks against the United States,”⁵⁵ and must preempt “those adversaries that pose an unmistakable threat of grave

⁴⁴ DEFENSE STRATEGY, *supra* note 3, at 6, 9.

⁴⁵ *Id.* at 8.

⁴⁶ MARITIME STRATEGY, *supra* note 5, at 1.

⁴⁷ *Id.* at 9.

⁴⁸ MILITARY STRATEGY, *supra* note 4, at 11.

⁴⁹ SECURITY STRATEGY, *supra* note 1, at 15.

⁵⁰ DEFENSE STRATEGY, *supra* note 3, at 10.

⁵¹ *Id.* at 6.

⁵² *Id.* at 8.

⁵³ *Id.* at 9.

⁵⁴ *Id.* at 17.

⁵⁵ MARITIME STRATEGY, *supra* note 5, at 1.

harm.”⁵⁶ All these qualifiers appear to contemplate a devastating attack that has been identified and is in the process of being implemented.

Regrettably, the *Military Strategy* somewhat muddies the waters by conflating preemption and anticipatory self-defense and appearing to distinguish defensive actions from actions in self-defense: “Deterring aggression and coercion must be anticipatory in nature to prevent the catastrophic impact of attacks using biological, chemical or nuclear weapons on civilian population centers;”⁵⁷ “[p]reventing conflict and surprise attack is not, however, solely defensive . . . and . . . may necessitate actions in self-defense to preempt adversaries before they can attack;”⁵⁸ “commanders cannot rely solely on reactive measures and a robust defensive posture to accomplish objectives. This strategy requires a posture of anticipatory self-defense, which reflects the need for prepared and proportional responses to imminent aggression. When directed, commanders will preempt in self-defense those adversaries that pose an unmistakable threat of grave harm and which are not otherwise deterrable.”⁵⁹

Despite the schizophrenic way the *Strategies* deal with preemption and the odd notion that anticipatory self-defense in response to imminent aggression is somehow “preemptive” rather than “defensive,” or perhaps because of these factors, this author’s assessment is that the preemption doctrine as articulated in the *Strategies* differs little, if at all, from the doctrine of anticipatory self-defense under customary international law and long-standing U.S. application of that doctrine.

The articulation of the doctrine of anticipatory self-defense has most often been attributed to Secretary of State Daniel Webster, whose statement was made in response to a cross-border incursion by a British military unit during the Mackenzie Rebellion in Canada in 1837. To prevent American sympathizers from using the steamboat *Caroline* to transport men and materiel to the Canadian insurgents, British forces boarded the vessel, set it afire, and sent it over Niagara Falls, killing and injuring several American citizens in the process. When the United States protested the violation of its sovereignty, the British Government invoked the right of self-defense. Secretary Webster, in a series of diplomatic notes between 1841 and 1842, maintained that for the claim of self-defense to be valid Great Britain was required to “show a necessity of self-defence, instant, overwhelming, leaving no choice of means,

⁵⁶ MILITARY STRATEGY, *supra* note 4, at 9.

⁵⁷ *Id.* at 12.

⁵⁸ *Id.* at 2.

⁵⁹ *Id.* at 9.

and no moment for deliberation.”⁶⁰ Secretary Webster’s correspondence has thus come to signify that there existed prior to the United Nations Charter a customary right of anticipatory self-defense. That right was incorporated into the Charter through Article 51’s invocation of the “inherent” right of self-defense in response to an armed attack.⁶¹

The exact definition of anticipatory self-defense as articulated by Secretary Webster has been criticized as too restrictive, particularly given the “nature and lethality of modern weapons systems.”⁶² The *Annotated Supplement to the Commander’s Handbook on the Law of Naval Operations*, a multi-service doctrine publication adopted by the United States Navy, Marine Corps, and Coast Guard, provides that anticipatory self-defense “involves the use of armed force where attack is imminent and no reasonable choice of peaceful means is available.”⁶³ This articulation of anticipatory self-defense retains the concept of “imminent” attack, but provides greater flexibility than the “instant, overwhelming, no moment” standard of the *Caroline* diplomatic notes. This approach is supported by a number of eminent scholars, including Professors Sally and Thomas Mallison, who opined that: “A credible threat may be imminent without being ‘instant’ and more than a ‘moment for deliberation’ is required to make a lawful choice of means.”⁶⁴ It is also supported by Professors McDougal and Feliciano, who noted: “The standard of required necessity has been habitually cast in language so abstractly restrictive as almost, if read literally, to impose paralysis. . . . [T]he requirements of necessity and proportionality . . . can ultimately be subjected

⁶⁰ Dinstein, *supra* note 27, at 218–19, quoting Letter from Daniel Webster, U.S. Sec’y of State, to Mr. Fox (Apr. 24, 1841), reprinted in 29 BRIT. & FOREIGN ST. PAPERS 1129, 1138 (James Ridgway & Sons 1857).

⁶¹ Professor Dinstein disagrees with this author and a number of far more eminent scholars than she that Article 51 contemplates or incorporates a customary right of anticipatory self-defense. *Id.* at 166–68. Dinstein does, however, subscribe to the theory of “interceptive” self-defense, which permits a defending state to use force in response to an incipient armed attack once the other side has irrevocably committed itself to such armed attack. *Id.* at 172–73. This author will leave for another day the parsing of the difference between “anticipatory” and “interceptive” in this context.

⁶² See, e.g., Dinstein, *supra* note 27, at 219 (“Webster’s prose was inclined to overstatement”); OCEANS LAW AND POLICY DEP’T, NAVAL WAR COLLEGE, ANNOTATED SUPPLEMENT TO THE COMMANDER’S HANDBOOK ON THE LAW OF NAVAL OPERATIONS para. 4.3.2.1, at 4–13 to 4–14 n.32 (1997) [hereinafter ANNOTATED SUPPLEMENT] (“The Webster formulation is clearly too restrictive today, particularly given the nature and lethality of modern weapons systems which may be employed with little, if any, warning. Ascertaining when a modern weapons system’s employment may be ‘instant’ or ‘overwhelming’ is at best problematical”).

⁶³ ANNOTATED SUPPLEMENT, *supra* note 62, para. 4.3.2.1, at 4-13.

⁶⁴ Sally V. Mallison & W. Thomas Mallison, *Naval Targeting: Lawful Objects of Attack*, in THE LAW OF NAVAL OPERATION 241, 263 (Horace B. Robertson, Jr. ed., 1991), quoting Webster, *supra* note 60, at 1138.

only to that most comprehensive and fundamental test of all law, reasonableness in particular context.”⁶⁵

The Standing Rules of Engagement for United States Forces authorizes national self-defense in response to a hostile act or “hostile intent,” defined as “the threat of imminent use of force against the United States, US forces or other designated persons or property.” The *Standing Rules* further explain that the determination of whether the use of force against U.S. forces is imminent will be based on an assessment of all facts and circumstances known to them at the time. Further, “[i]mminent does not necessarily mean immediate or instantaneous.”⁶⁶ This interpretation of hostile intent has remained essentially unchanged through several past iterations of the *Standing Rules*. Thus, under long-standing U.S. policy, doctrine and rules of engagement, the authority has existed to intercept and defeat imminent threats before they actually strike the United States or U.S. interests, even, as the *Security Strategy* asserts, when “uncertainty remains as to the [exact] time and place of the enemy’s attack.”⁶⁷

As further evidence that the doctrine of preemption as introduced in the *Security Strategy* is probably not intended to release a massive firestorm of attacks on groups or states merely suspected of undesirable activity, the preemption doctrine should be viewed in the context of a larger strategy of “prevention.” Prevention, in turn, is a critical component of an active, layered “defense-in-depth” which begins at the source of the threats abroad; encompasses the air, land, sea and space approaches to the United States; and includes, as a last resort, military capabilities at home to protect from direct attack and, if required, to integrate with other government and law enforcement agencies for consequence management in response to an attack or a natural disaster.⁶⁸ If prevention succeeds, however, there will be no need to call on the other layers of the defense-in-depth.

Prevention involves a whole host of activities, many of which do not rely, or do not rely solely, on U.S. armed forces—such as strengthening alliances, diffusing regional conflicts, enhancing nonproliferation efforts, and engaging in security cooperation, forward deterrence, humanitarian assistance, and peace operations.⁶⁹ This effort merges joint forces, interagency actors,

⁶⁵ MYRES S. MCDUGAL & FLORENTINO P. FELICIANO, *THE INTERNATIONAL LAW OF WAR: TRANSNATIONAL COERCION AND WORLD PUBLIC ORDER* 217–18 (1994).

⁶⁶ CHAIRMAN OF THE JOINT CHIEFS OF STAFF, INSTR. 3121.01B, *STANDING RULES OF ENGAGEMENT/STANDING RULES FOR THE USE OF FORCE FOR U.S. FORCES* para. 3.g, at A-4 (13 June 2005) [hereinafter CJCSI 3121.01B] (copy on file with author).

⁶⁷ *SECURITY STRATEGY*, *supra* note 1, at 15.

⁶⁸ *DEFENSE STRATEGY*, *supra* note 3, at 9; *MILITARY STRATEGY*, *supra* note 4, at 2, 9–10.

⁶⁹ *DEFENSE STRATEGY*, *supra* note 3, at 9–10.

international non-governmental organizations, and multinational capabilities in a synergistic manner. This concept of synergy among various governmental and non-governmental entities approaches a new concept of “jointness” altogether and is reflected in General Pace’s *Guidance to the Joint Staff*⁷⁰ and in Admiral Mullen’s *Guidance to the Navy*.⁷¹ In the *Maritime Strategy*, “jointness” also involves the private sector. An entire section of the *Maritime Strategy* is devoted to commercial security practices. It identifies private owners and operators as the “first line of defense” for their property and denotes a close partnership between government and the private sector as “essential” to ensuring the security of critical infrastructure and key maritime-related resources.⁷²

Thus, it appears that “preemption” is simply one of many tools available to the President, to be employed cautiously and only in the most extreme and threatening circumstances. The *Security Strategy* closes out its discussion of preemption with the following caveat: “The purpose of our actions will always be to eliminate a specific threat to the United States or our allies and friends. The reasons for our actions will be clear, the force measured, and the cause just.”⁷³

There is one additional point to be made, however, in this discussion of the doctrine of preemption, and that is that the doctrine is completely unnecessary in the context of the war on terrorism. When a nation is brutally attacked, as the United States was on 11 September 2001, it has the right to respond in national self-defense. The North Atlantic Treaty Organization, the Organization of American States, the United Nations Security Council, and the United States Congress all recognized that fact and passed appropriate resolutions to that effect.⁷⁴ It is clear that the attacks of 11 September 2001 were not isolated incidents, but rather were part of an ongoing series of attacks that encompass: the first World Trade Center bombing in 1993; the attacks on the United States embassies in Kenya and Tanzania in 1998; the attempted attack on U.S.S. THE SULLIVANS; the attack on U.S.S. COLE in 2000; and

⁷⁰ CHAIRMAN’S GUIDANCE, *supra* note 6, at 2, 4 (“The key to the staff’s effectiveness, therefore, is to . . . function in a collaborative manner in active partnership with the Office of the Secretary of Defense (OSD), the combatant commanders, the Services, the combat support agencies, the interagency, and Congress. . . . It is our collaborative efforts with our OSD counterparts, the interagency, and our Coalition partners that will ultimately determine our success in this war.”).

⁷¹ CNO’S GUIDANCE, *supra* note 7, at 2 (“Jointness. The future of national and international security lies in interoperability and cooperation among the Services, the interagency, international partners and non-governmental organizations.”).

⁷² MARITIME STRATEGY, *supra* note 5, at 10, 18–20.

⁷³ SECURITY STRATEGY, *supra* note 1, at 16.

⁷⁴ Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001); CP/Res. 797, *supra* note 24; CP/Res. 796, *supra* note 24; S.C. Res. 1368, *supra* note 24.

the attacks on the World Trade Center, the Pentagon, and the failed attempts against the White House and Capitol of 2001.⁷⁵

Further, there is clear evidence that the aims of the terrorists are of strategic scope—seeking nothing less than the murder of “any American, anywhere on earth” and the destruction of free and democratic societies around the world.⁷⁶ It is this author’s opinion that the doctrine of preemption or anticipatory self-defense is irrelevant at this point. The United States has the authority to seek out and destroy those who are plotting its destruction without waiting for another hostile act or demonstration of hostile intent. To conclude otherwise is to permit an armed group to wage “war” unlawfully against a sovereign state while precluding that state from defending itself.⁷⁷ Neither customary international law nor the United Nations Charter mandate that result.

The primary factors limiting the ability of the United States to respond to these ongoing threats are, of course, the absence of intelligence necessary to positively identify the terrorist cells and terrorist actors and the lack of a cadre of mobile, agile forces that can act quickly and decisively on perishable information. Those factors will be discussed in a later section of this article.

If the doctrine of preemption is aimed at defeating terrorism, then, as outlined above, it is not a necessary part of the *Security Strategy*. If the doctrine is aimed at state actors who may pose threats to the U.S. national security—perhaps, Iran, China, or North Korea—then the analysis above comparing the doctrine as explained in the *Strategies* with the customary

⁷⁵ See Stephen Gale, *Terrorism 2005: Overcoming the Failure of Imagination*, FOREIGN POLICY RESEARCH INSTITUTE E-NOTES, Aug. 16, 2005, <http://www.fpri.org/enotes/20050816.americawar.gale.failureofimagination.html>. There is also evidence that al Qaeda may have been involved in or inspired the attacks on the Saudi National Guard facility in Riyadh in 1995 that killed five Americans and in the attack on Khobar Towers in 1996 that killed nineteen Americans and wounded 372. NAT’L COMM’N ON TERRORIST ATTACKS UPON THE U.S., THE 9/11 COMMISSION REPORT 60 (Official Gov’t ed., U.S. Gov’t Prtg. Office 2004) [hereinafter 9/11 REPORT].

⁷⁶ 9/11 Report, *supra* note 75, at 47; Gale, *supra* note 75.

⁷⁷ U.N. Econ. & Soc. Council [ECOSOC], Comm’n on Human Rights, *Civil and Political Rights, Including the Questions of: Disappearances and Summary Executions: Letter Dated 14 April 2003 from the Chief of Section, Political and Specialized Agencies, of the Permanent Mission of the United States of America to the United Nations Office at Geneva Addressed to the Secretariat of the Commission on Human Rights*, Annex, at 4–5, U.N. Doc. E/CN.4/2003/G/80/Annex (April 22, 2003) (prepared by Jeffrey De Laurentis) (“International humanitarian law . . . governs the use of force against legitimate military targets. . . . Under that body of law, enemy combatants may be attacked unless they have surrendered or are otherwise rendered *hors de combat*. Al Qaida terrorists who continue to plot attacks against the United States may be lawful subjects of armed attack in appropriate circumstances.”).

concept of anticipatory self-defense leads to the conclusion that the preemption doctrine really gains the country very little. Somewhere between the “instant, overwhelming . . . no choice . . . no moment” standard of the *Caroline* incident and the roundly-condemned Israeli attack on the Osirak reactor⁷⁸ lies substantial freedom of movement to respond in self-defense to anticipated threats. Each case is judged by its unique facts and circumstances—be it the American air strikes against Libya in 1986⁷⁹ or the air strikes against terrorist training camps in Afghanistan and the al Shifa pharmaceutical facility in Sudan in 1998.⁸⁰ Rather than seeking to introduce and justify a new, unfamiliar concept, it is advisable that future national security strategies rely on the customary principle of anticipatory self-defense, adapted to the facts and circumstances of the current and existing threat.

⁷⁸ On 7 June 1981, Israeli F-15 bombers and F-16 fighters attacked and destroyed a uranium-powered reactor that was nearing completion near Baghdad, Iraq. *On this Day 7 June 1981: Israel Bombs Baghdad Nuclear Reactor*, BBC NEWS, http://newssearch.bbc.co.uk/onthisday/hi/dates/stories/june/7/newsid_3014000/3014623.stm (last visited Dec. 15, 2005). The Israeli Government explained that the bombs the reactor would soon be capable of producing posed a “mortal danger” to Israel. *Id.* The United Nations Security Council unanimously condemned the attack as a “clear violation of the Charter of the United Nations and the norms of international conduct” S.C. Res. 487, U.N. Doc. S/RES/487 (June 19, 1981).

⁷⁹ See Letter to the Speaker of the House and the President Pro Tempore of the Senate, 1986 PUB. PAPERS 499 (Apr. 16, 1986). On 16 April 1986, President Reagan informed Congressional leaders that he had ordered attacks on facilities in Libya that were chosen for their “direct linkage to Libyan support of terrorist activities” in exercise of the right of self-defense under Article 51 of the United Nations Charter. *Id.* Interestingly, the letter also characterized the strikes as “preemptive”—“directed against the Libyan terrorist infrastructure and designed to deter acts of terrorism by Libya, such as the Libyan-ordered bombing of a discotheque in West Berlin on April 5.” *Id.* The letter also notes, however, that the discotheque bombing was “the latest in a long series of terrorist attacks against United States installations, diplomats and citizens carried out or attempted with the support and direction of Muammar Qadhafi.” *Id.* If that is the case, then the strikes were not preemptive at all, but rather were legitimate responses in self-defense to an ongoing series of attacks.

⁸⁰ See Letter to Congressional Leaders Reporting on Military Action Against Terrorist Sites in Afghanistan and Sudan, 1998 PUB. PAPERS 1464 (Aug. 21, 1998). On 21 August 1998, President Clinton informed Congressional leaders that he had ordered attacks on facilities in Afghanistan and Sudan connected with the Usama bin Ladin organization. *Id.* The attacks were launched in exercise of the inherent right of self-defense as a “necessary and proportionate response to the imminent threat of further terrorist attacks against U.S. personnel and facilities,” after receiving “convincing information from a variety of reliable sources” that the bin Ladin organization was responsible for the 7 August 1998 attacks on U. S. embassies in Nairobi, Kenya and Dar es Salaam, Tanzania, that killed over 250 people. *Id.*

Theme III: American Internationalism

*“The U. S. national security strategy will be based on a distinctly American internationalism”*⁸¹

The third major theme of the *Strategies* matures significantly and becomes much more realistic as the documents progress through time. The initial construct of “distinctly American internationalism” in the 2002 *Security Strategy* can be paraphrased along the following lines: The United States wants to work in partnership with states that agree with our goals, our strategy and our methods; we will provide resources to these like-minded partners to increase their capacity to support us. We will redefine our relationships with those who don’t support us and cultivate new relationships with those who do. We will use our influence to persuade or, if necessary, compel, other states to support our world view.

By March and October 2005, when the *Defense Strategy* and the *Maritime Strategy*, respectively, were promulgated, the Administration had suffered several major defeats in the United Nations and with coalition partners world-wide. The tones of the *Defense Strategy* and the *Maritime Strategy* are more conciliatory and reflect a more cooperative, multi-national approach to the international community. A few examples suffice to illustrate this point.

First, though President Bush’s introduction professes that “no nation can build a safer, better world alone,”⁸² the tone in the *Security Strategy* is somewhat “in your face” and portrays the United States as the lead actor, cajoling and encouraging reluctant partners: “While the United States will constantly strive to enlist the support of the international community, we will not hesitate to act alone, if necessary, to exercise our right of self-defense”⁸³ The United States will encourage regional partners to work with us cooperatively; will match the willpower and resources of those governments who find the fight beyond their capabilities;⁸⁴ and “will remain actively engaged in critical regional disputes to avoid explosive escalation and minimize human suffering.”⁸⁵ The *Security Strategy* even goes so far as to announce that the United States will “compel” other states to deny sponsorship, support and sanctuary to terrorists if it is unable to convince them to do so⁸⁶—though

⁸¹ SECURITY STRATEGY, *supra* note 1, at 1.

⁸² *Id.* at vi.

⁸³ *Id.* at 6.

⁸⁴ *Id.* at 7.

⁸⁵ *Id.* at 9.

⁸⁶ *Id.* at 6.

exactly how the *Security Strategy* intends to accomplish that objective is unclear.

The tones of the *Defense Strategy*, the *Military Strategy*, and the *Maritime Strategy* are decidedly different. In the interim, of course, the “distinctly American internationalism” suffered a number of setbacks: the United States failed to obtain the clear and decisive United Nations Security Council resolution it sought for the invasion of Iraq;⁸⁷ long-time NATO ally Turkey refused to permit U.S. forces to cross Turkish territory into Northern

⁸⁷ U.N. Security Council Resolution 1441, unanimously adopted on 8 November 2002, was a masterful piece of ambiguity, open to practically any interpretation a nation wanted to adopt. S.C. Res. 1441, U.N. Doc. S/RES/1441 (Nov. 8, 2002). On the one hand, it recognized that Iraq’s noncompliance with Council resolutions posed a threat to international peace and security and decided that Iraq “has been and remains in material breach of its obligations under relevant resolutions.” *Id.* On the other hand, it afforded Iraq “a final opportunity” to comply with its disarmament obligations. *Id.* On the one hand, it recalled that resolution 678 “authorized Member States to use all necessary means to . . . restore international peace and security in the area,” and that the Council had repeatedly warned Iraq that it would face “serious consequences as a result of its continued violations of its obligations.” *Id.* On the other hand, it decided that if the Council received a report from the United Nations Monitoring, Verification and Inspection Commission (UNMOVIC) or the International Atomic Energy Agency (IAEA) of any further interference or lack of cooperation by Iraq, it would re-convene immediately “to consider the situation and the need for full compliance.” *Id.* Despite Iraq’s continued non-compliance with its obligations under resolution 1441, the United States and Great Britain were unable to secure agreement for a further resolution specifically authorizing military action against Iraq. 401 PARL. DEB., H.C. (6th ser.) (2003) 703–23, available at http://www.hansard-westminster.co.uk/pubs_frames.asp (follow “Bound Volumes” hyperlink under “Hansard Publications”; then follow “Session 2002–03” hyperlink under “Index to the Bound Volume Hansard”; then follow “401” hyperlink under “Index to the Bound Volume Hansard”; then follow “Sq” hyperlink under “Index for Volume 399”; then follow “703–23” hyperlink under “Straw, Rt Hon Jack, Secretary of State for Foreign and Commonwealth Affairs; Chamber Debates; Iraq Conflict, Ministerial statements (17.03.03)”; 399 PARL. DEB., H.C. (6th ser.) (2003) 21–38, available at http://www.hansard-westminster.co.uk/pubs_frames.asp (follow “Bound Volumes” hyperlink under “Hansard Publications”; then follow “Session 2002–03” hyperlink under “Index to the Bound Volume Hansard”; then follow “399” hyperlink under “Index to the Bound Volume Hansard”; then follow “bi” hyperlink under “Index for Volume 399”; then follow “21–38” hyperlink under “Blair, Rt Hon Tony, Prime Minister, First Lord of the Treasury and Minister for the Civil Service; Chamber Debates; Iraq, Ministerial statements (03.02.03)”).

Iraq for Operation Iraqi Freedom;⁸⁸ and Spain withdrew its troops from Iraq in the aftermath of the horrendous Madrid bombings,⁸⁹ to name a few.

The *Defense Strategy* cites international partnerships as a “principle source” of strength and opines: “Shared principles, a common view of threats, and commitment to cooperation provide far greater security than we could achieve on our own.”⁹⁰ It reiterates many of the themes from the *Security Strategy*, such as the desire for a “harmony of views,” the intention to cultivate “new relationships” with “like-minded states,” and the leading role of the United States in the global war on terrorism.⁹¹ But it also views the world through a different prism. It frankly acknowledges that the leading position of the United States in world affairs will breed “unease, a degree of resentment, and resistance”⁹² and asserts that: “A secure international system requires collective action.”⁹³ The *Military Strategy* also looks at how others perceive the United States, seeking to ensure the United States is viewed as an “indispensable partner,” rather than the other way around.⁹⁴

But the greatest change in tone is found in the *Maritime Strategy*, which places strong emphasis on international cooperation in the maritime domain: “Defeating this array of threats to maritime security . . . requires a

⁸⁸ See, e.g., Ilene R. Prusher & Seth Stern, *US, Turkey Wrangle over Last Pieces of War Plan*, CHRISTIAN SCI. MONITOR, Mar. 20, 2003, at 1 (discussing U.S. efforts to obtain permission from Turkish Government for U.S. forces to fly over Turkey and to obtain Turkish Government’s agreement not to unilaterally invade Northern Iraq); Robin Wright, *Turkey Calls for U.S. Help On Rebels*, WASH. POST, June 8, 2005, at A15 (recounting that on 1 March 2003, Turkey’s Parliament voted not to permit the 4th Infantry Division to deploy to Iraq through Turkish territory, thus forcing a change in U.S. campaign plans, which initially had called for a northern front into Iraq, and souring U.S.-Turkish relations for the next two years).

⁸⁹ On 11 March 2004, four explosions in Madrid killed 191 and injured scores more. Three days later, the ruling conservative Popular Party lost to the Socialist Party and Jose Luis Rodriguez Zapatero was elected Prime Minister. Shortly thereafter, Prime Minister Rodriguez Zapatero announced that he would withdraw the 1,300 Spanish troops that were stationed in Iraq. See, e.g., Katya Adler, *Spaniards Celebrate Iraq Pull-out*, BBC NEWS, Apr. 19, 2004, <http://news.bbc.co.uk/2/hi/europe/3640077.stm> (describing public support for removal of Spanish troops from Iraq and stating that the Spanish Prime Minister denies allegations that he is bowing to the wishes of terrorists after the attacks in Madrid); Jose Luis Rodriguez Zapatero, Prime Minister, Kingdom of Spain, *Addressing the Withdrawal of Spanish Troops from Iraq on Spanish Canal 24 Horas* (Apr. 18 2004), available at <http://news.bbc.co.uk/2/hi/europe/3637741.stm> (announcing his decision to withdraw Spanish troops from Iraq based on a pre-election promise to the people of Spain).

⁹⁰ DEFENSE STRATEGY, *supra* note 3, at 4.

⁹¹ *Id.* at 6–8.

⁹² *Id.* at 5.

⁹³ *Id.* at 7.

⁹⁴ MILITARY STRATEGY, *supra* note 4, at v.

common understanding and a joint effort for action on a global scale.”⁹⁵ There is still an element of mandating that other nations cooperate,⁹⁶ but the list of specific new and on-going international initiatives is truly impressive and reflects a mature, multilateral, cooperative approach that is missing from the *Security Strategy*.⁹⁷

Second, the *Security Strategy* takes an aggressive approach to an issue that has long vexed those concerned about the transportation of terrorists and weapons of mass destruction, particularly by sea.⁹⁸ The problem is that ships on the high seas, as well as civil aircraft in international airspace, generally are subject only to the jurisdiction of the state in which they are registered.⁹⁹ Some states, known as “flags of convenience,” register thousands of vessels for the income that is derived, but exercise little positive authority or control over them.¹⁰⁰ Yet if those vessels are suspected of transporting terrorists, or the components or precursors of weapons of mass destruction, the primary recourse is for concerned states to approach the flag state or port states at which the vessels call to seek to have the vessels inspected and, if appropriate, detained. This process is cumbersome, slow, and generally unsatisfactory for the concerned states.

The *Security Strategy* identifies the major exception to the rule set out above and seeks to take advantage of it on an international scale. Piracy and the slave trade are universally accepted as so abhorrent that all states may assert jurisdiction over vessels engaged in those activities.¹⁰¹ The *Security*

⁹⁵ MARITIME STRATEGY, *supra* note 5, at 2.

⁹⁶ *Id.* (“Since all nations benefit from this collective security, all nations must share in the responsibility for maintaining maritime security by countering the threats in this domain.”).

⁹⁷ *Id.* at 14–15 (listing some of the new and ongoing initiatives as follows: the Container Security Initiative, the Proliferation Security Initiative, the Customs-Trade Partnership Against Terrorism, the nonproliferation amendments to the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation and the International Code for the Security of Ships and Port Facilities, and the proposed Long-Range Information and Tracking system that would facilitate coastal state monitoring of maritime traffic out to 2000 nautical miles).

⁹⁸ See, e.g., Andrew C. Winner, *The Proliferation Security Initiative: The New Face of Interdiction*, 28 WASH. Q., Spring 2005, at 129, 130 (detailing a failed interdiction attempt during the Clinton administration of the Chinese ship *Yinhe*).

⁹⁹ The *S.S. Lotus* (France v. Turkey) 1927 P.C.I.J. (ser. A) No. 10, at 25 (Sept. 7) (“[V]essels on the high seas are subject to no authority except that of the state whose flag they fly.”). This customary rule is now codified in Article 92 of the United Nations Convention on the Law of the Sea, although the United States is not a party. United Nations Convention on the Law of the Sea art. 92, Dec. 10, 1982, 1833 U.N.T.S. 397 [hereinafter UNCLOS] (“Ships shall sail under the flag of one State only and, save in exceptional cases expressly provided for in international treaties or in this Convention, shall be subject to its exclusive jurisdiction on the high seas.”).

¹⁰⁰ This practice is not as common for aircraft.

¹⁰¹ This customary rule is now codified in Article 110 of UNCLOS. UNCLOS, *supra* note 99, art. 110 (“[A] warship which encounters on the high seas a foreign ship . . . is not justified in

Strategy announces its intention to use “the full influence of the United States, and working closely with allies and friends, to make clear that all acts of terrorism are illegitimate so that terrorism will be viewed in the same light as slavery, piracy, or genocide: behavior that no respectable government can condone or support and all must oppose.”¹⁰² Closely related to this issue is the intention in the *Security Strategy* to strengthen nonproliferation efforts to prevent rogue states and terrorists from acquiring the materials, technologies, and expertise necessary to develop or employ weapons of mass destruction. Though the emphasis is on existing regimes, such as arms control, multilateral export controls, and threat reduction assistance, the *Security Strategy* also asserts that, when necessary, interdiction of enabling technologies and materials will be conducted.¹⁰³

Unfortunately, despite all its best efforts, the United States has been unsuccessful in obtaining a United Nations Security Council Resolution authorizing “all necessary means” to interdict terrorists or weapons of mass destruction on the high seas or in international airspace.¹⁰⁴ And there is considerable opposition by many nations to the notion of interdicting vessels or aircraft—even those engaged in transporting terrorists or weapons of mass destruction—without the imprimatur of a Security Council Resolution. The

boarding it unless there is reasonable ground for suspecting that: (a) the ship is engaged in piracy; (b) the ship is engaged in the slave trade . . .”).

¹⁰² SECURITY STRATEGY, *supra* note 1, at 6.

¹⁰³ *Id.* at 14.

¹⁰⁴ United Nations Security Council Resolution 1540 identified the proliferation of nuclear, chemical and biological weapons as a threat to international peace and security; expressed the Security Council’s “grave concern” over illicit trafficking in such weapons and the risk that non-State actors could acquire, develop, traffic in or use them; and decided under Chapter VII that all States shall refrain from providing support to non-State actors that attempt to develop or acquire such weapons; but stopped short of authorizing “all necessary means” to interdict suspected shipments of such weapons. S.C. Res. 1540, U.N. Doc. S/RES/1540 (Apr. 28, 2004). The most forward leaning language that could be obtained in the Security Council was the call to all States “to take cooperative action to prevent illicit trafficking in nuclear, chemical or biological weapons, their means of delivery, and related materials.” *Id.* Further, despite efforts by the United States to have the resolution endorse the Proliferation Security Initiative, it was passed in a version that avoided any reference to or explicit support of the Initiative. *Id.*; William Hawkins, *Timely Leadership at U.N.*, WASH. TIMES, Mar. 14, 2005, at A16. Likewise, concerning terrorism, the Security Council passed no less than 18 resolutions between 11 September 2001 and 4 August 2005 condemning terrorism and the threat posed by terrorism to international peace and security—none of which authorized “all necessary means” to defeat, interdict or prevent future terrorist attacks. *See, e.g.*, S.C. Res. 1373, U.N. Doc. S/RES/1373 (Sept. 28, 2001) (calling upon all states to exchange information and otherwise increase cooperation through bilateral and multilateral arrangements); S.C. Res. 1368, U.N. Doc. S/RES/1368 (Sept. 12, 2001) (“Calls also on the international community to redouble their efforts to prevent and suppress terrorist acts including by increased cooperation . . .”).

December 2002 freighter *So San* incident brought that point home with substantial publicity and fanfare.¹⁰⁵

Six months after the *So San* incident, on May 31, 2003, the President announced the *Proliferation Security Initiative*, or PSI, a global effort to create a “dynamic, creative and more proactive approach” to stop trafficking in weapons of mass destruction, their delivery systems, and related materials to and from states and non-state actors of proliferation concern worldwide.¹⁰⁶ It is rooted in the December 2002 *National Strategy to Combat Weapons of Mass Destruction*,¹⁰⁷ which identifies interdiction as an area for greater focus, and is one method for states to engage in the “cooperative action” to prevent trafficking in weapons of mass destruction unanimously endorsed by *United Nations Security Council Resolution 1540*. Although initially criticized for being introduced unilaterally and misunderstood as proposing interdictions contrary to international law,¹⁰⁸ PSI has over sixty cooperating nations, has

¹⁰⁵ In December 2002, United States and Spanish forces seized the freighter *So San*, which U.S. intelligence had tracked from a port in North Korea to the Indian Ocean. See, e.g., Kevin Drew, *Law Allows Search, But Does Not Address Seizure of Cargo*, CNN.COM, Dec. 11, 2002, available at http://www.CNN.com/law_center; Tony Karon, *SCUD Seizure Raises Tricky Questions*, TIME.COM, Dec. 11, 2002, <http://www.time.com/time/world/article/0,8599,398592.00.html>; *US “Satisfied” by Yemeni assurances*, BBC NEWS, Dec. 12, 2002, http://news.bbc.co.uk/2/hi/middle_east/2568223.stm. The legal basis for the boarding was that the vessel was flying no flag and, thus, lacked nationality. Drew *supra*; Karon *supra*; *US Satisfied supra*. Fifteen Scud missiles were concealed beneath thousands of sacks of cement. Drew *supra*; Karon *supra*; *US Satisfied supra*. The missiles did not appear on the ship’s cargo manifest. Karon *supra*. Ultimately it was determined that the missiles had been purchased by the Government of Yemen. See, e.g., Drew *supra*; Karon *supra*; *US Satisfied supra*. United States officials eventually released the vessel and its cargo to Yemen, after receiving assurances that the missiles would not be transferred to a third party. Drew *supra*; Karon *supra*; *US Satisfied supra*. White House spokesman Ari Fleischer announced that while there was authority to stop and search, in this instance there was no clear authority to seize the shipment of Scud missiles from North Korea to Yemen. Drew *supra*. Therefore, the merchant vessel was released. Drew *supra*; Karon *supra*; *US Satisfied supra*. One lesson learned from this incident was that had it not been for the vessel appearing to be stateless, the United States and Spanish forces would have had no legal authority to board it, thus emphasizing the need for a multilateral, cooperative effort to interdict vessels suspected of carrying WMD parts, components, or precursors.

¹⁰⁶ Bureau of Nonproliferation, U.S. Dep’t of State, *The Proliferation Security Initiative (PSI)*, May 26, 2005, <http://www.state.gov/t/np/rls/other/46858.htm>.

¹⁰⁷ THE WHITE HOUSE, *NATIONAL STRATEGY TO COMBAT WEAPONS OF MASS DESTRUCTION* (2002), available at <http://www.whitehouse.gov/news/releases/2002/12/WMDStrategy.pdf> [hereinafter WMD STRATEGY].

¹⁰⁸ See, e.g., Samantha Maiden, *Howard Begins Tour with Warning to North Korea*, THE ADVERTISER (Austl.), July 14, 2003, at 7 (quoting the official North Korean news agency, DPRK, as saying that PSI is “a brigandish naval blockade” and “as dangerous an act as igniting a new war on the Korean peninsula” and quoting unspecified North Korean sources as saying that any U.S.-led blockade would be “terrorism in the sea and a gross violation of international law”); Nikki Todd, *Activists Hit Out at PSI Plans to Stop Weapons Trade*, AAP NEWSFEED, July 9, 2003 (LEXIS, News Library, Wires File) (quoting Just Peace spokeswoman Annette Brownlie as saying

conducted over twenty multi-lateral exercises, and has met with at least one publicly-announced real-world success.¹⁰⁹

Perhaps the administration's generally positive experience with the PSI contributed to the willingness to emphasize international cooperation in the *Maritime Strategy*, and the pride with which the *Defense Strategy* lauds the progress that "the United States and its partners" have made in the war on terrorism through an "unprecedented level of international cooperation" by more than 170 countries.¹¹⁰

Finally, before moving to the final theme, it would be remiss not to address one clear success of the *Security Strategy's* distinctly American internationalism—NATO's development of the military capability and political will to fully embrace out-of-area operations. The *Security Strategy* adopts a slightly scolding tone when it addresses the actions NATO "must" take: NATO "must develop new structures and capabilities to carry out [its collective defense] mission under new circumstances;" NATO "must build a capability to field, at short notice, highly mobile, specially trained forces whenever they are needed to respond to a threat against any member of the alliance;" NATO "must be able to act wherever [its] interests are threatened

U.S. blockades under the PSI would be "vigilante attacks on the high seas"); Rebecca Weiner, *Proliferation Security Initiative to Stem Flow of WMD Matériel*, Center for Nonproliferation Studies, July 16, 2003, <http://www.cns.miis.edu/pubs/week/index.htm> (follows "Proliferation Security Initiative to Stem Flow of WMD Matériel—July 16" hyperlink under "Story Archives—2003"). Even the State Department acknowledged that "some critics have questioned PSI's legitimacy." Bureau of Int'l Info. Programs, U.S. Dep't of State, *Bolton Confident Proliferation Security Initiative Is Legitimate*, USINFO.STATE.GOV, Nov. 13, 2003, <http://usinfo.state.gov/xarchives/display.html?p=washfile-english&y=2003&m=November&x=20031113180557yakcm0.8482935&t=usinfo/wf-latest.html>; see also Colin Robinson, *The Proliferation Security Initiative: Naval Interception Bush-Style*, CTR. FOR DEF. INFO., Aug. 25, 2003, <http://www.cdi.org/friendlyversion/printversion.cfm?documentID=%201667> ("[M]ost states believe at the moment that only a UN resolution can authorize interception and search on the high seas, outside nations' territorial waters, which would otherwise be piracy. Given the wide dismay with many recent U.S. international initiatives, which have been viewed as unilateral and perhaps unwise, the PSI is unlikely to gain such legal backing in the foreseeable future.").

¹⁰⁹ On the second anniversary of the announcement of PSI, Secretary Rice lauded the "quiet cooperation" of the PSI partners that resulted in eleven successful efforts, including preventing the transshipment of material and equipment to Iran's missile, nuclear, and other WMD programs. Condoleezza Rice, Secretary, U.S. Dep't of State, Remarks on the Second Anniversary of the Proliferation Security Initiative (May 31, 2005) (transcript available at <http://www.state.gov/secretary/rm/2005/46951.htm>).

¹¹⁰ DEFENSE STRATEGY, *supra* note 3, at 1–2.

creating coalitions under NATO's own mandate, as well as contributing to mission-based coalitions."¹¹¹

Much of this directive language reflects the skepticism with which the Bush Administration viewed NATO's ability to engage in effective military operations, based on observance of NATO's cumbersome and convoluted procedures during the Kosovo operation several years earlier. That skepticism further explains why, despite welcoming NATO's invocation of Article 5 of the Washington Treaty, the Administration did not invite or encourage NATO to send forces to Afghanistan in support of Operation Enduring Freedom.¹¹² Instead, NATO sent Airborne Warning and Control System (AWACS) aircraft to the United States to participate with Canadian and United States forces from the North American Air Defense Command (NORAD) in patrolling the skies over North America. In this way, NATO was able to contribute to the defense of the United States without sending its forces out of the traditional NATO area of responsibility.¹¹³

Two years later, however, the United States welcomed the decision by the North Atlantic Council to send forces to Afghanistan to lead the International Security Assistance Force (ISAF). This decision reflected a major change in NATO's operational outlook and was a clear testament to the leadership of the United States in convincing NATO allies that the future security of the North Atlantic nations was dependent on developing the operational capability to effectively contribute to secure conditions in areas outside the immediate territory of the NATO countries.¹¹⁴

¹¹¹ SECURITY STRATEGY, *supra* note 1, at 25.

¹¹² Daniel S. Hamilton & Timothy Garden, *Debate: Should NATO's New Function Be Counter-Terrorism?*, NATO REVIEW, Summer 2002, at 16, 18 (Garden states: "The United States, burned by the experience of Kosovo, chose to call on allies on a bilateral basis where they had something useful to offer."), available at http://www.nato.int/docu/review/pdf/i2_en_review.pdf.

¹¹³ OFFICE OF THE ASSISTANT SEC'Y FOR PUB. AFFAIRS, U.S. DEP'T DEF., FACING THE FUTURE: MEETING THE THREATS AND CHALLENGES OF THE 21ST CENTURY 43 (2005), available at http://www.defenselink.mil/pubs/facing_the_future/facing_the_future_cOL.pdf [hereinafter FACING THE FUTURE] (stating that after invoking Article 5 of the Washington Treaty, NATO initiated Operation Eagle Assist, "flying NATO AWACS planes to defend American skies against further terrorist attack"); Donald H. Rumsfeld, Secretary, U.S. Dep't of Def., Remarks at the NATO Air Base, Geilenkirchen, Germany (June 7, 2002) (transcript available at <http://www.defenselink.mil/speeches/2002/s20020607-secdef.html>) (stating that NATO AWACS aircraft logged over 4,300 hours in 367 operational sorties).

¹¹⁴ FACING THE FUTURE, *supra* note 113, at 41, 44 ("Realizing that the threats to its member states are global rather than regional, NATO moved outside its traditional Treaty area and Europe for the first time, taking responsibility for the International Security Assistance Force in Afghanistan . . .").

Theme IV: Transform America's National Security Institutions

*"The major institutions of American national security were designed in a different era to meet different requirements. All of them must be transformed."*¹¹⁵

The fourth and final theme of the *Security Strategy* is that America's national security institutions must undergo a major transformation to meet the challenges of the post-9/11 world. That transformation is to be based in the new Department of Homeland Security, the new U.S. Northern Command, the first combatant command to include the continental United States in its area of responsibility,¹¹⁶ and a "fundamental reordering" of the Federal Bureau of Investigation.¹¹⁷ Transformation—the "buzzword" for anyone seeking to justify organizational changes, to procure new weapons systems, or to realign functions and operations—has received much publicity. Exactly what transformation entails, however, is not completely clear. Perhaps the Chairman of the Joint Chiefs of Staff says it best: "Transformation is a continual process, not an end state. . . . It is as much a mindset and a culture as it is a technology or a platform and at its heart is a willingness on the part of the individual and the organization to embrace innovation and accept analyzed risk."¹¹⁸

A review of the *Strategies* reveals six major components of transformation, each of which must be successful if the nation is to be more secure: seamless homeland defense/homeland security; improved intelligence; aggressive strategic communications; in-stride joint transformation; enhanced decision superiority; and operations in the global commons. Each will be discussed briefly in turn.

1. Seamless Homeland Defense/Homeland Security

The *Security Strategy* predicts that its comprehensive plan to secure the homeland, which encompasses every level of government as well as public/private sector cooperation, will result in emergency management

¹¹⁵ SECURITY STRATEGY, *supra* note 1, at 29.

¹¹⁶ Donald H. Rumsfeld, Secretary, U.S. Dep't of Def., et al., Special Briefing on the Unified Command Plan (Apr. 17, 2002) (transcript available at http://www.defenselink.mil/transcripts/2002/t04172002_t0417sd.html) (describing the 2002 Unified Command Plan, which contains some historic firsts, including the establishment of the Northern Command, which assigns the continental United States to a combatant commander for the first time).

¹¹⁷ SECURITY STRATEGY, *supra* note 1, at 6.

¹¹⁸ CHAIRMAN'S GUIDANCE, *supra* note 6, at 4.

systems better able to cope, not just with terrorism, but with all hazards.¹¹⁹ Unfortunately, recent events, in particular the aftermath of the disaster response efforts to Hurricanes Katrina and Rita, have revealed in no uncertain terms the extent of the gaps and seams between the Department of Defense and the Department of Homeland Security that are latent within the *Strategies*—gaps and seams which must be eliminated if the nation is to successfully counter terrorist threats to the homeland in the future.

The problem is, as the *Security Strategy* recognizes, that the distinction between domestic and foreign affairs is diminishing—events beyond America’s borders may have a great impact inside them.¹²⁰ Thus, the traditional distinction between military operations in support of national security outside the United States and law enforcement activities to counter threats inside the United States has become blurred. The pressing question is: Who is in charge of preventing and responding to catastrophic events, whether terrorist attacks or natural disasters, within the United States?

The *Defense Strategy* and the *Military Strategy* envision a direct, in addition to a supporting, role for the armed forces. The *Defense Strategy* states: “At the direction of the President, the Department will undertake military missions at home to defend the United States, its population, and its critical infrastructure from external attack.”¹²¹ The *Military Strategy* states: “At home, the Armed Forces must defend the United States against air and missile attacks, terrorism and other direct attacks. As necessary, the Armed Forces will protect critical infrastructure that supports our ability to project military power.”¹²²

The *Defense Strategy* and the *Military Strategy* also envision a supporting role for civil agencies and appear to view them as the first responders of choice—reserving the military capabilities only for those situations that overwhelm the capacity of civilian agencies.¹²³ In fact, the *Defense Strategy* commits to increasing the capabilities of local, state, and

¹¹⁹ SECURITY STRATEGY, *supra* note 1, at 6.

¹²⁰ *Id.* at 31.

¹²¹ DEFENSE STRATEGY, *supra* note 3, at 10.

¹²² MILITARY STRATEGY, *supra* note 4, at 10.

¹²³ DEFENSE STRATEGY, *supra* note 3, at 10 (“In emergencies, we will act quickly to provide unique capabilities to other Federal agencies when the need surpasses the capacities of civilian responders and we are directed to do so by the President or the Secretary.”); MILITARY STRATEGY, *supra* note 4, at 10 (“When directed, the Armed Forces will temporarily employ military capabilities to support law enforcement agencies during special events. During emergencies the Armed Forces may provide military support to civil authorities in mitigating the consequence of an attack or other catastrophic event when civilian responders are overwhelmed.”).

federal “domestic partners” to improve homeland defense. The Department seeks effective partnerships with domestic agencies charged with security and consequence management in the event of significant attacks against the homeland and, in doing so, seeks to improve their ability to respond effectively.¹²⁴

The *Maritime Strategy*, however, offers a different vision, one that transcends mere “cooperation” among agencies and foresees the integration of the various layers of maritime security—the Armed Forces and federal, regional, state, and local levels of law enforcement—to address national security threats.¹²⁵ The *Maritime Strategy* proposes “maritime security forces” from both the Armed Forces and law enforcement agencies operating in “mutually supporting and complementary roles.”¹²⁶ These forces would have a “high degree of interoperability, reinforced by joint, interagency, international training and exercises to ensure a high rate of readiness, and supported by compatible communications and, where appropriate, common doctrine and equipment.”¹²⁷ Agencies would be co-located wherever feasible and operationally effective, and the resources from multiple agencies—surveillance and reconnaissance assets, aircraft, ships, boats, land units, and shore support facilities—would all be linked by an operational information network and would operate jointly.¹²⁸ Under this construct, it is possible that not only would the Department of Defense operate in support of the Department of Homeland Security and civilian law enforcement agencies, but that the civilian side would also work in support of the military. This approach is truly transformational and could significantly change interagency relationships in the future.¹²⁹

¹²⁴ DEFENSE STRATEGY, *supra* note 3, at 15.

¹²⁵ MARITIME STRATEGY, *supra* note 5, at 22.

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ There could also be potential issues concerning the Posse Comitatus Act. The Posse Comitatus Act, 18 U.S.C. 1385 (2000), was passed in 1878 in the context of the Civil War Reconstruction period. It prohibited use of the military to “execute the laws.” *See also*, 10 U.S.C. 375 (2000). Beginning with 9/11, there has been considerable interest in whether the act needs to be changed to provide the President greater authority to use the armed forces in domestic situations. That discussion resurfaced in the aftermath of the Katrina and Rita relief efforts. The issue is still unsettled—both as a legal matter (whether a change to the law is necessary to provide the President greater authority) and as a policy matter (whether it would be desirable to change the law). *See, e.g.* Stewart M. Powell, *Bush Considers Changes to Posse Comitatus Act*, HOUS. CHRON., Oct. 2, 2005, at A18; Skelton: *Rumsfeld Confirms DOD Has No Plans To Alter Posse Comitatus*, INSIDE THE PENTAGON, Oct. 13, 2005 (LEXIS, News Library); John Yoo, Editorial, *Trigger Power*, L.A. TIMES, Oct. 2, 2005, at M5 (positing that a better defined and executed emergency plan and stronger leadership at all levels of government is needed, not new laws).

It is apparent from recent reporting, however, both before and after the Katrina and Rita Hurricane relief efforts, that the roles of the various departments are not clearly defined or agreed-upon, and it is unlikely the Secretary of Homeland Security would warmly embrace the *Maritime Strategy* proposal. For example, in early August 2005, it was reported that the U.S. Northern Command had developed the “first-ever war plans for guarding against and responding to terrorist attacks in the United States.”¹³⁰ Although defense officials continued to stress that the Department of Defense would largely play a supporting role, the plans nevertheless were described as “a historic shift” for the Pentagon, because they contemplated that in some situations the military would have to take charge if civilian resources became overwhelmed.¹³¹ The very next day, Secretary of Homeland Security Michael Chertoff countered that: “The Department of Homeland Security has the responsibility under the President’s directives to coordinate the entirety of the response to a terrorist act here in the United States.”¹³²

Scarcely two months later, the debate began again as President Bush called for increased authority for the military to respond to natural disasters in extraordinary circumstances. In a little-noticed remark, however, the President noted that the military “clearly” would become the lead agency in case of a terrorist attack.¹³³ Assistant Secretary of Defense for Homeland Defense Paul McHale stressed a few days later that the Department of Defense would not become the “first responders” except in the most catastrophic events, but government officials have not decided what scope of disaster would trigger a military response or what role exactly the military would play—lead agency or a supporting role. Referring to terrorist threats such as chemical and biological attacks on U.S. cities, Secretary McHale called for Congress and federal agencies to develop clear guidelines for the military’s role.¹³⁴ These issues must be addressed and clarified soon if the “transformation” of the country’s national security agencies is to have the positive effect contemplated in the *Security Strategy*. Unclear lines of authority or

¹³⁰ Bradley Graham, *War Plans Drafted To Counter Terror Attacks in U.S.*, WASH. POST, Aug. 8, 2005, at A1.

¹³¹ *Id.*

¹³² Nicole Gaouette, *Chertoff Differs With The Military*, L.A. TIMES, Aug. 9, 2005, at A10.

¹³³ Ken Herman, *Let GIs Run Storm Relief?* ATLANTA J.-CONST., Sept. 26, 2005, at 1A; Bill Sammon, *Bush Offers Pentagon As ‘Lead Agency’ In Disasters*, WASH. TIMES, Sept. 26, 2005, at A1. These proposals also raise issues concerning the *Posse Comitatus* Act, as discussed *supra* note 129.

¹³⁴ Mark Mazzetti, *Military Sees Limits To Role In U.S. Disasters*, L.A. TIMES, Oct. 13, 2005, at A11; Ann Scott Tyson, *Pentagon Plans To Beef Up Domestic Rapid-Response Forces*, WASH. POST, Oct. 13, 2005, at A4.

uncertainty as to which agency is in charge would lead to disaster in the event of another catastrophic attack.

2. *Improved Intelligence*

The *Security Strategy* denotes intelligence—and how it is used—as the “first line of defense against terrorists and the threat posed by hostile states.”¹³⁵ The *Security Strategy* calls for the transformation of existing intelligence capabilities and the creation of new ones to keep pace with the nature of current threats. Intelligence must be appropriately integrated with defense and law enforcement systems and coordinated with allies and friends. The *Security Strategy* announces several initiatives to strengthen intelligence warning and analysis, to include strengthening the authority of the Director of Central Intelligence, establishing a new framework for intelligence warning, and developing new methods of collecting information. The initiatives announced in the *Security Strategy* have now been augmented significantly, and, in some, cases, superseded, by the Intelligence Reform and Terrorism Prevention Act of 2004, which provides the framework for an even more profound transformation of the intelligence agencies.¹³⁶

In the midst of transforming the intelligence community, however, it must be kept in mind that the need is not simply for more intelligence, but for better intelligence—actionable intelligence, as the Department of Defense refers to it.¹³⁷ The *Military Strategy* makes clear that preventing future surprise attacks will place increased demands on intelligence assets—not to simply obtain more information, but to share the information they obtain with other national security agencies in the U.S. Government. Information sharing,

¹³⁵ SECURITY STRATEGY, *supra* note 1, at 30.

¹³⁶ Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108-458, 118 Stat. 3638, *amended by* Pub. L. No. 109-13, 119 Stat. 231, 244, 306, 310, 316 (2005). The legislation in part implements the recommendations of the National Commission on Terrorist Attacks Upon the United States (the “9/11 Commission”) and responds to other recommendations for intelligence reform to protect the United States against future attacks. It reorganizes the United States Intelligence Community by, among other changes, creating an empowered Director of National Intelligence and a National Counterterrorism Center and making a number of changes in government structure, law enforcement, and security arrangements. H.R. Rep. No. 108-796, at 241 (2004), *available at* http://www.gpoaccess.gov/serialset/creports/intel_reform.html.

¹³⁷ The phrase “actionable intelligence” is not defined in the Department of Defense Dictionary of Military and Associated Terms. JOINT CHIEFS OF STAFF, JOINT PUB. 1-02, DEPARTMENT OF DEFENSE DICTIONARY OF MILITARY AND ASSOCIATED TERMS 3, 266 (12 Apr. 2001, amended through 31 Aug. 2005), *available at* <http://www.dtic.mil/doctrine/jel/doddict/> [hereinafter JOINT PUB. 1-02]. The Army, however, has a “Task Force Actionable Intelligence” dedicated to providing commanders and soldiers “a high level of situational understanding, delivered with speed, accuracy and timeliness, in order to conduct successful operations.” Press Release, U.S. Army, Actionable Intelligence relies on every Soldier (Apr. 13, 2004) (LEXIS, News Library).

intelligence fusion, and collaborative planning among governmental agencies will be necessary to effectively identify and prevent future attacks.¹³⁸

As alluded to earlier on, one possible reason there have been so few “preemptive” missions is the paucity of actionable intelligence linked with an agile force and a rapid decision-making process to take advantage of time-sensitive opportunities that arise. The *Defense Strategy* refers to the enabling capability as “horizontal integration”—a fusion of operations and intelligence and breaking down the institutional, technological and cultural barriers that separate the two.¹³⁹ Horizontal integration, combined with better early warning and “exacting” intelligence enhanced by competitive analysis will contribute to an improved capacity to conduct rapid, precise operations. “These missions,” according to the *Military Strategy*, “require exacting analysis and synthesis of intelligence gathered by a combination of capabilities, including human and technical collectors,” and generally involve coordinated efforts with other government agencies and departments.¹⁴⁰

3. Aggressive Strategic Communications

The *Security Strategy* contains a brief reference to the State Department’s lead role in managing bilateral relationships with other governments, and promises to ensure the Department “receives funding sufficient to ensure the success of American diplomacy.”¹⁴¹ American diplomats must be able to interact equally adroitly with non-governmental organizations and international institutions as well as governments, and they must be prepared to help build police forces, court systems, legal codes, local and provincial government institutions, and electoral systems.¹⁴²

More importantly, however, is the recognition that the United States must adopt a different and more comprehensive approach to public information if there is to be any hope at all of winning the global war on terrorism. As the *Security Strategy* offers, the war on terrorism is not a clash of civilizations, but it reveals the clash inside a civilization—a battle for the future of the Muslim world.¹⁴³ This battle is a struggle of ideas, and it is an area where the United States absolutely must improve its record and performance.

¹³⁸ MILITARY STRATEGY, *supra* note 4, at 13.

¹³⁹ DEFENSE STRATEGY, *supra* note 3, at 12.

¹⁴⁰ MILITARY STRATEGY, *supra* note 4, at 13.

¹⁴¹ SECURITY STRATEGY, *supra* note 1, at 30.

¹⁴² *Id.* at 30–31.

¹⁴³ *Id.* at 31.

A successful public information campaign must involve more than merely providing information to the public. It requires a strategic communications plan that is global in scope, in vision, and in execution and that is focused on creating a global antiterrorism environment. The President's 6 October 2005 speech to the National Endowment for Democracy largely reflects this strategic view.¹⁴⁴ Naming Karen Hughes as the Under Secretary of State for Public Diplomacy and Public Affairs should also give added impetus to this effort, though she appears to be fighting an uphill battle based on her initial forays into the public domain.¹⁴⁵ Importantly, however, such an effort should be focused on more than simply repeating the U.S. position on current issues. It must be about creating credibility and trust through honest, fact-based dialogue and a commitment to building long-term relationships.

In the vision of the *Military Strategy*, developing and implementing a strategic communications plan that will contribute to the creation of a global antiterrorism environment is an aggressive effort in which the combatant commanders must take a major role. The *Military Strategy* announces the creation of Counter-Terrorist Joint Interagency Coordination Groups at five regional and two global combatant commands for the purpose of enhancing interagency integration and information sharing. The predecessors of these groups have already served to dramatically increase information sharing across the interagency community. They are additionally designed, however, to take a proactive role in ensuring unity of themes and messages, accurately confirming or refuting external reporting on United States operations, countering adversary disinformation or misinformation, and reinforcing the legitimacy of national goals. The *Military Strategy* exhorts the combatant commanders to be actively involved in the development, execution, and support of this strategic communications campaign.¹⁴⁶

¹⁴⁴ George W. Bush, President, U.S., President Discusses War on Terror at National Endowment for Democracy (Oct. 6, 2005) (transcript available at <http://www.whitehouse.gov/news/releases/2005/10/20051006-3.html>) ("The fifth element of our strategy in the war on terror is to deny the militants future recruits by replacing hatred and resentment with democracy and hope across the broader Middle East.").

¹⁴⁵ News reports from the region were critical of Secretary Hughes' first trip to the Middle East. See, e.g., *Karen Hughes: Selling Bush to the World*, WORLDPRESS.ORG, Oct. 8, 2005, available at <http://www.worldpress.org/Americas/2159.cfm>. Secretary Hughes is also taking over a difficult bureaucracy that "is in disarray." Stephen Johnson, The Heritage Found., Public Diplomacy Needs a Commander, Not a Spokesman: WebMemo No. 869 (Sept. 30, 2005), available at <http://www.heritage.org/Research/NationalSecurity/wm869.cfm>; Stephen Johnson & Helle Dale, The Heritage Found., New Leadership, New Hope for Public Diplomacy: WebMemo No. 688 (Mar. 15, 2005), available at <http://www.heritage.org/Research/GovernmentReform/wm688.cfm>.

¹⁴⁶ MILITARY STRATEGY, *supra* note 4, at 24.

This aggressive strategic communications plan is to be coupled with other deterrence-related activities: supporting national and partner nation efforts to deny state sponsorship, assistance, and sanctuary to terrorists; denying safe haven to terrorists in failed states and ungoverned regions; developing intelligence partnerships to take advantage of foreign expertise and areas of focus; and emphasizing the willingness of the United States to employ force in defense of its interests.¹⁴⁷ Whether the U.S. Government is able to execute a truly global strategic communications effort will depend largely on whether the various national security agencies are committed to a comprehensive, cooperative effort that marries the strengths of each agency with the resources and personnel of the others to implement a single plan. To date, the government has not been particularly successful in this area—time will tell if the commitment reflected in the *Military Strategy* will prevail over the inherently parochial interests of the various agencies.

4. “In-Stride” Joint Transformation

One component of the larger transformation of the national security agencies discussed in the *Security Strategy* is the transformation of the military into a truly joint force. Former Chairman of the Joint Chiefs of Staff, General Richard B. Myers, has long viewed jointness as more than merely cooperation and de-confliction; it is a seamless total force in which service components repose trust and confidence in each other and in which the active, reserve, and civilian components of the force are fully integrated.¹⁴⁸ Strengthened trust and confidence will come by acknowledging the interdependence of the service components and by developing concepts that reduce gaps and seams among the various organizations.¹⁴⁹ General Pace calls for an “interdependent” rather than an “interoperable” force.¹⁵⁰ The goal for the force of the future is “full spectrum dominance”—that is “the ability to control any situation or defeat any adversary across the range of military operations.”¹⁵¹

Further, the transformation of the force to meet future global challenges must continue “in-stride,” while the war on terrorism is prosecuted to its completion.¹⁵² As the *Military Strategy* directs, “The Armed Forces must remain ready to fight even as they transform and transform even as they fight,” which will require innovative concept development, rapid prototyping,

¹⁴⁷ *Id.* at 10–11, 24.

¹⁴⁸ *Id.* at iv. The *Military Strategy* distinguishes enhancing the joint force from transforming the armed forces. This author views the two initiatives as inextricably interrelated.

¹⁴⁹ *Id.* at 23.

¹⁵⁰ CHAIRMAN’S GUIDANCE, *supra* note 6, at 5.

¹⁵¹ MILITARY STRATEGY, *supra* note 4, at 23.

¹⁵² *Id.* at v, 6, 23.

field experimentation, and organizational redesign.¹⁵³ This desire for a rapid turn of technology from concept to prototype to field testing to production complements the Secretary of Defense's view that long-standing business processes within the Department must be transformed if the operational forces are to be successfully transformed.¹⁵⁴

5. *Achieving Decision Superiority*

A fifth component of transformation entails developing the ability to make decisions better and faster than an adversary. General Pace is careful to point out: "Improved speed of decision is not the same thing as making hasty decisions. Quality assessment is a critical element of an efficient decision cycle. We must discriminate between speed and haste."¹⁵⁵ The *Military Strategy* clearly reflects that distinction. For example, dynamic decision-making that would allow commanders to attack time-sensitive and time-critical targets is a complex process that brings together organizations, planning processes, technical systems, and commensurate authorities to support informed decision-making. Networked command and control capabilities and a tailored common operating picture of the battlespace support and contribute to that process. Networking must also provide increased transparency in multinational operations and support the integration of other government agencies and multinational partners into joint operations.¹⁵⁶

Better intelligence, as discussed above, is a vitally important enabler of decision superiority. Human collectors are critical to obtaining better intelligence, because they "provide the ability to discern the intention of adversaries and produce actionable intelligence for plans and orders."¹⁵⁷ Once information is obtained, however, it must be shared with all those who benefit from, and can contribute to, awareness of the battlespace, including other government organizations and allies. Decision superiority also requires highly flexible and adaptive joint command and control processes. These processes not only enable rapid and well-informed decisions, but also support the military commander's ability to "communicate decisions to subordinates, rapidly develop alternative courses of action, generate required effects, assess results and conduct appropriate follow-on operations."¹⁵⁸

¹⁵³ *Id.* at 6; see also CHAIRMAN'S GUIDANCE, *supra* note 6, at 5.

¹⁵⁴ DEFENSE STRATEGY, *supra* note 3, at 10.

¹⁵⁵ CHAIRMAN'S GUIDANCE, *supra* note 6, at 8.

¹⁵⁶ MILITARY STRATEGY, *supra* note 4, at 20.

¹⁵⁷ *Id.* at 19.

¹⁵⁸ *Id.*

The difficulty of attaining this nirvana of interagency collaboration and information sharing, agile and decisive decision-making, and responsive and adaptive military forces is no doubt part of what is driving the Secretary of Defense's frustrations with the absence of concrete operations against terrorism world-wide. Such frustration likely precipitated Secretary Rumsfeld's recent appointment of General Wayne Downing, former Commander of the U.S. Special Operations Command, to review that command's operations. The Secretary seeks to determine if Special Operations Command is adequately equipped for rapid, precise operations to achieve decisive results. The Secretary's frustration and General Downing's appointment have also likely precipitated a call from the current Commander, General Brown, for his staff to develop "more innovative strategies to fight terrorists."¹⁵⁹ Unfortunately, the answer does not lie within Special Operations Command alone. To achieve the results the Secretary seeks will require a far more collaborative, integrated, responsive interagency process than currently exists—a process that is unlikely to develop without decisive direction imposed by the President himself.

6. *Operations in the Global Commons*

As mentioned at the outset of this article, the complex, distributed, ambiguous battlespace in which the national security agencies currently find themselves demands that they operate in, through, and from the global commons, and that they do so effectively.¹⁶⁰ That is, U.S. access to and use of the global commons must be assured, while hostile exploitation of these areas must be denied to adversaries. The *Strategies* address a number of initiatives that will enhance the nation's ability to operate in the global commons.

For one, cyberspace is viewed as a new "theater of operations"—akin to the regional theaters of the combatant commanders in the Pacific, Europe,

¹⁵⁹ Eric Schmitt, *Review Is Set For U.S. Forces In Terror Fight*, N.Y. TIMES, Oct. 19, 2005, at A15; see Bradley Graham, *Shortfalls Of Special Operations Command Are Cited*, WASH. POST, Nov. 17, 2005, at A2.

¹⁶⁰ While it is important that the United States be able to operate freely in, through, and from the global commons, this author is not enamored of the phrase "command of the commons" as a military strategy. Traditionally, the United States has viewed freedom of navigation in the global commons—the high seas, international airspace, and outer space—as essential to national security and economic prosperity. The United States was one of the major proponents of the high seas freedoms reflected in Article 87 of the United Nations Convention on the Law of the Sea. See *supra* note 99 and accompanying text. Nevertheless, the phrase appears to be gaining acceptance, at a minimum, within the Pentagon. "Command of the Commons" was the theme of a large U.S. Air Force display in the Pentagon in May 2004 and the author has seen the phrase used in at least one draft Department of Defense document.

the Middle East, and North and South America. Within this theater, information operations, both offensive and defensive,¹⁶¹ are becoming a core military competency and key to ensuring freedom of action across the battlespace.¹⁶² Second, maritime domain awareness must be maximized to support effective decision-making by establishing an intelligence enterprise and a shared situational awareness capability. This capability will require an integrated and robust maritime command and control system.¹⁶³

Third, the Department of Defense will develop a new overseas military posture, which will rely heavily on sea basing,¹⁶⁴ joint pre-positioned equipment and stocks, expeditionary logistics, and more austere forward-deployed facilities with enhanced reach-back capabilities to provide, for example, intelligence support and battle damage assessments.¹⁶⁵ The global commons are particularly important for this transformational concept, because both sea basing and expeditionary logistics will rely on sealift, airlift, and the ability of military forces to maneuver freely in the oceans and airspace of other nations' contiguous and exclusive economic zones.

Finally, though not primarily directed toward the global commons, the *Strategies* assert that legal arrangements governing overseas posture and activities must support greater flexibility; they must help, not hinder, rapid deployment and employment of U.S. and coalition forces worldwide in a crisis. Both the *Security Strategy* and the *Defense Strategy* emphasize that American personnel must be protected from prosecution by the International Criminal Court.¹⁶⁶ The State Department and the Department of Defense have been embarked over the past several years on an aggressive strategy to negotiate such protections¹⁶⁷ and have successfully concluded at least 100

¹⁶¹ Information Operations consist of "actions taken to affect adversary information and information systems while defending one's own information and information systems." JOINT PUB. 1-02, *supra* note 137, at 259.

¹⁶² DEFENSE STRATEGY, *supra* note 3, at 13; MILITARY STRATEGY, *supra* note 4, at 19.

¹⁶³ MARITIME STRATEGY, *supra* note 5, at 16.

¹⁶⁴ Sea basing is envisioned as a system of systems—a flotilla of ships serving collectively as a staging and sustainment area from which ground forces can launch attacks ashore in a nonpermissive environment. Though no one knows exactly what the sea base will look like in any detail, it will probably consist of a "network of ships providing offshore artillery fire, air support, food, ammunition, and even a place to sleep for ground troops." Dale Eisman, *The Fleet of the Future*, VIRGINIAN-PILOT, Mar. 8, 2005, at A1. The *CNO's Guidance* directs the Navy to further develop the sea basing concept of operations in support of future expeditionary operations. CNO's *Guidance*, *supra* note 7, at 7.

¹⁶⁵ DEFENSE STRATEGY, *supra* note 3, at 19; MILITARY STRATEGY, *supra* note 4, at 17.

¹⁶⁶ DEFENSE STRATEGY, *supra* note 3, at 20; SECURITY STRATEGY, *supra* note 1, at 31.

¹⁶⁷ Known as Article 98 Agreements, from Article 98 of the Rome Statute, which provides: "The Court may not proceed with a request for surrender which would require the requested State to act inconsistently with its obligations under international agreements pursuant to which the consent of

agreements to date. In addition, the *Defense Strategy* supports legal agreements that encourage responsibility-sharing between the United States and its partners and provide legal protections for U.S. personnel deployed overseas through status of forces agreements.¹⁶⁸

The above examples demonstrate only a few of the many initiatives the national security agencies are pursuing to enhance successful operations in, from, and through the global commons.

The Future of the National Security Strategy

President Bush's *National Security Strategy* is now three years old. Judging from his 6 October 2005 speech to the National Endowment for Democracy,¹⁶⁹ his strategy for winning the global war on terrorism has not changed significantly since September 2002. The October speech recalled the horrific attacks of 11 September 2001 and noted a "new terror offensive" unleashed by the recent attacks on London, Sharm el-Sheikh, and Bali. It set forth a five-part strategy: preventing terrorist attacks before they occur; denying weapons of mass destruction to outlaw regimes and their terrorist allies; denying radical groups the support and sanctuary of outlaw regimes; denying to the militants control of any nation which could be used as a home base and launching pad for terror; and denying the militants future recruits by replacing hatred and resentment with democracy and hope across the broader Middle East.

If there is to be an updated national security strategy in the coming months, however, a number of changes as discussed in this article would improve the strategy, enhance its implementation, and clarify some questionable issues for the international audience.

First, the strategy should more clearly define the concept of preemption—what it is, under what circumstances it would be employed, and how it would be implemented. Better yet, the entire concept of preemption should be abandoned in favor of a clear and cogent discussion of the principle of anticipatory self-defense as applied to the realities of today's threats. As the *Security Strategy* recognizes: "The greater the threat, the greater is the risk of

a sending State is required to surrender a person of that State to the Court, unless the Court can first obtain the cooperation of the sending State for the giving of consent for the surrender." Rome Statute of the International Criminal Court, July 17, 1998, art. 98(2), U.N. Doc. A/Conf.183/9*, available at <http://www.un.org/law/icc/statute/romefra.htm>.

¹⁶⁸ DEFENSE STRATEGY, *supra* note 3, at 19.

¹⁶⁹ See Bush, *supra* note 144.

inaction—and the more compelling is the case for taking anticipatory action to defend ourselves”¹⁷⁰ Rather than getting bogged down in a discussion of preemption, the strategy should focus on developing and explaining the requirements for anticipatory self-defense.

Second, the strategy should provide a much clearer, though not necessarily larger, role for the Department of Defense in domestic operations—both in response to terrorist threats and in response to natural disasters. If changes in authority are required, then changes in authority should be sought. The gaps and seams that exist among the various departments and agencies must be identified and addressed. Where responsibilities and authorities are not clearly defined or where there is duplication, ambiguity, or lack of focus, there must be clarity.¹⁷¹

Third, the strategy should sincerely commit to developing a more rapid decision-making cycle with all that entails—including enhanced

¹⁷⁰ SECURITY STRATEGY, *supra* note 1, at 15.

¹⁷¹ The *Chairman’s Guidance* calls on the Joint Staff to undertake a fundamental assessment of its organizational structure and seek improvements similar to those outlined in the text above. CHAIRMAN’S GUIDANCE, *supra* note 6, at 7. General Pace calls this “organizational agility.” *Id.* at 6–7. He also encourages the Joint Staff not to allow disagreements to prevent resolution of problems. *Id.* at 8, 9–10. From this author’s experience, a classic interagency tactic to prevent change is for agencies to insist on obtaining consensus before a proposal is allowed to move forward. The result is that contentious issues never advance beyond the lowest-level functionaries and change is never effected. General Pace also recognizes this tendency and cautions the Joint Staff against it. “If we cannot reach agreement on an issue within a reasonable amount of time then we must be comfortable indicating so to our seniors and move the issue forward. This is as true for the action officer as it is for me. The key is to make sure that all are aware of the disagreement and are prepared to address the issue as it moves forward. We must give primacy to the objective and not the process.” *Id.* at 8. Unless this attitude prevails in the entire interagency process, true change will never be forthcoming.

intelligence, information sharing among domestic agencies and international partners, clearer command and control procedures for all involved agencies, greater interagency integration, and increased multinational cooperation. The key to an agile and adaptive military force is an agile and adaptive decision-making structure.

Finally, the strategy should provide for a more comprehensive strategic communications plan that not only disseminates information but is aggressively engaged in: countering misinformation and disinformation; ensuring consistency in messages and themes; presenting the American viewpoint; and, importantly, promulgating and explaining the legal rationales supporting U.S. operations and activities in the global war on terrorism.

CONFRONTING NOMADIC TERRORISM

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I. INTRODUCTION

Terrorism¹ with an international flavor is not a new concept to international law, but it has taken on a new form. Over the last 40 years or so, extra-legal violence by protagonists in dispersed, small groups, or nodes, to whom national borders are meaningless, and who communicate, coordinate, and conduct their campaigns without a precise central command, has emerged as the dominant terrorist threat.² The actors may be of one nationality, living

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¹ Definitions of terrorism are numerous. The U.N. Secretary General's High-Level Panel on Threats, Challenges and Change has proposed the following: "[T]errorism [is] . . . any action, in addition to actions already specified by the existing conventions on aspects of terrorism, the Geneva Conventions and Security Council resolution 1566 (2004), that is intended to cause death or serious bodily harm to civilians or non-combatants, when the purpose of such an act, by its nature or context, is to intimidate a population, or to compel a Government or an international organization to do or to abstain from doing any act." U.N. High-Level Panel on Threats, Challenges and Change, *A More Secure World: Our Shared Responsibility*, ¶ 164(d), U.N. Doc. A/59/565 (Dec. 2, 2004) [hereinafter Secretary General's Report].

² Michele Zanini & Sean J.A. Edwards, *The Networking of Terror in the Information Age, in NETWORKS AND NETWARS: THE FUTURE OF TERROR, CRIME, AND MILITANCY* 29, 30 (John Arquilla & David Ronfeldt eds, 2001). Examples are numerous. The actors in the Madrid train bombing have been described as radical, locally-based Moroccans funding their activities through petty crime and narcotics dealing. Terrorists may have infiltrated much of Morocco's hashish trade, funding an aborted attack on a U.S. Navy ship in Gibraltar in 2002 and a suicide attack in Casablanca in 2003. Dutch filmmaker Theo van Gogh is believed to have been killed in November, 2004 by a member of a loosely knit Moroccan Muslim group influenced by al Qaeda,

in another state or states, dispersed among various local populations, and attacking targets indiscriminately, sometimes congregating for an action with little commonality of purpose.³

Existing legal norms have proven inadequate for preventing or limiting the spread of this insidious form of violence, which poses an intractable puzzle for nation-states and international authorities dealing with it. This paper examines some of the reasons why both municipal law and international law have failed to provide an acceptable means for resolution. We draw an analogy between transnational terrorism and the history of piracy prior to the 20th century, noting the nature and severity of the risks faced by civilian populations and institutions.⁴ We conclude that transnational terrorists should be treated as common enemies of mankind and extraterritorial jurisdiction should be authorized for their identification, apprehension and disposition. Further, we recommend specific enforcement mechanisms be included in the language of multilateral instruments to ensure that an offended state can obtain personal jurisdiction over a transnational terrorist when other means fail.

II. THE RISE OF NOMADIC TERRORISM

Scholars have observed the global development of flat/horizontal transnational organizations across every kind of interest group,⁵ enabled by the information revolution. Technological and organizational changes have enhanced the power of small groups by allowing them to project ideas and extend influence in seconds, to other like-minded groups, across vast

some of whose members trained in Pakistan or Afghanistan. James Graff, *Morocco: The New Face of Terror?*, TIME, Mar. 21, 2005, at 46. More recently, bombings in London have familiarized the public with young British men, with links to Pakistan and Somalia, bombing the city's transport system.

³ Another prime example is Abu Musab al-Zarkawi, who is Jordanian, operating in Iraq with henchmen who are mostly Iraqi, but many of whom are common criminals and the unemployed. Zarkawi was originally independent, but is now allied with Osama bin Laden, a Saudi who currently operates from ungovernable areas of Pakistan, has his own funding, and has conducted terrorist operations all over the world. Zarkawi has claimed responsibility for recent bombings in Jordan and is believed to be a part of an alliance with an Algerian network targeting France. Sebastian Rotella, *Fundamentalism in French Workplace*, L.A. TIMES, Nov. 26, 2005, at A3.

⁴ This is an analogy also drawn on by the White House in the *National Security Strategy*. THE WHITE HOUSE, THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA 6 (2002), available at <http://www.whitehouse.gov/nsc/nss.pdf>.

⁵ Examples include environmental, labor, anti-landmine, and narcotic trafficking. See John Arquilla & David Ronfeldt, *The Advent of Netwar (Revisited)*, in NETWORKS AND NETWARS, *supra* note 2, at 1, 5, 15–16.

distances.⁶ This access and ability to move information via the Internet, cellular phone, fax, and other emerging digital technologies has shifted the most functional organizational form from hierarchy to network. The network organization often includes small, dispersed units, or nodes, formed from various groups that can deploy nimbly anywhere, anytime.⁷ Such a networked web has a relative advantage over a hierarchy because it can communicate, develop, change, coordinate, regroup rapidly, and respond quickly, with no regard for time or territorial boundaries.⁸

Thus, non-state actors are challenging states and institutions for increased social, political, or economic influence. Cross-border operations often are conducted through loosely-knit alliances of smaller groups with strong social or ideological ties, but not necessarily with shared individual goals.⁹ They may or may not have leadership¹⁰ and usually, but not always, operate without visible state sponsorship. Much, if not all, funding comes from private sources or criminal activities.¹¹

⁶ *Id.*; see also M. Cherif Bassiouni, *Legal Control of International Terrorism: A Policy-Oriented Assessment*, 43 HARV. INT'L L.J. 83, 87–88 (2002).

⁷ Arquilla & Ronfeldt, *supra* note 5, at 7–10. Groups also may adopt a hybrid hierarchic-network approach.

⁸ See John P. Sullivan, *Gangs Hooligans, and Anarchists—The Vanguard of Netwar in the Streets*, in NETWORKS AND NETWORKS, *supra* note 2, at 99, 105, 111; Secretary General's Report, *supra* note 1 at 60 (“Al-Qaeda is the first instance—not likely to be the last—of an armed non-state network with global reach and sophisticated capacity. Attacks against more than ten member states on four continents in the past five years have demonstrated that Al-Qaeda and associated entities pose a universal threat to the membership of the United Nations and the United Nations itself.”).

⁹ See Zanini & Edwards, *supra* note 2, at 32–33. Typically, nomadic terrorist goals are not well understood by outside observers, and the nodes may link themselves opportunistically to any number of international causes to lend legitimacy to their activities. Chameleon-like, they appear to be proponents of ideas (such as Palestinian statehood) that appeal to certain audiences. In the Iraqi environment, the stated goal of hostage beheadings varied from U.S. withdrawal of support of Israel, to removal of allied forces from Iraq, to coercion of Iraqi nationals toward rejection of a new local government. See also HARRIS O. SCHOENBERG, COMBATING TERRORISM: THE ROLE OF THE UNITED NATIONS at 13, 15 (2003); but see MOHAMMAD-MAHMOUD OULD MOHAMEDOU, HARVARD PROGRAM ON HUMANITARIAN POLICY AND CONFLICT RESEARCH, NON-LINEARITY OF ENGAGEMENT: TRANSNATIONAL ARMED GROUPS, INTERNATIONAL LAW, AND THE CONFLICT BETWEEN AL QAEDA AND THE UNITED STATES 17–19 (2005), http://www.hpcr.org/pdfs/Non-Linearity_of_Engagement.pdf (arguing that Al Qaeda's goals are clearly articulated but ignored by the United States and its allies in order to paint Al Qaeda as irrational purveyors of violence).

¹⁰ See generally Louis Beam, *Leaderless Resistance*, SEDITIONIST, Feb. 1992, www.louisbeam.com/leaderless.htm (discussing leaderless organizations).

¹¹ Zachary Abuza, *Funding Terrorism in Southeast Asia: The Financial Network of Al Qaeda and Jamaah Islamiya*, 25 CONTEMPORARY SOUTHEAST ASIA 169 (2003); Ilias Bantekas, *The International Law of Terrorist Financing*, 97 AM. J. OF INT'L L. 315 (2003).

Ironically, the new network dynamic is a mutation of the well-documented nomadic tradition, which has historically conflicted with the territorially-defined state entity.¹² For the nomadic mindset, no borders exist, and confrontation with state-oriented culture is inevitable.¹³ Osama bin Laden is an excellent example, claiming that Islam has no boundaries and Muslim national states are artificial Western creations that separate the Muslim world, perpetuating Western tyranny. Bin Laden is a literal nomad, who is not attached to any territory on a permanent basis. The Al Qaeda organization is composed of cells and groups all over the world that sustain links with sympathetic governments and Islamic organizations with similar views. It contests Western cultural concepts on ideologic, economic, and military levels.¹⁴

When such a nomadic network attacks, its units may swarm¹⁵ from multiple directions in multiple modes, in apparent disarray. Traditional, hierarchical, state actors are ill-equipped to respond quickly and effectively to such chaotic assaults.

Today's nomadic conflicts use information dissemination to shape conduct and outcome. Nomadic adversaries emphasize media-oriented measures intended to attract global attention and disorient the victim. These measures are used in conjunction with, or instead of, coercion. Media reports that generate insecurity in a society may be as potent a weapon as physical destruction.¹⁶

The availability of inexpensive weapons of enormous violence allows these protagonists to stage occasional attacks of major destructiveness.¹⁷ The

¹² SHAUL SHAY, *THE RED SEA TERROR TRIANGLE: SUDAN, SOMALIA, YEMEN, AND ISLAMIC TERROR*, 175 (Rachel Liberman trans., 2005).

¹³ *Id.*

¹⁴ *Id.* at 175–81; *see also* Ould Mohamedou *supra* note 9.

¹⁵ “Swarming is a seemingly amorphous, but deliberately structured, coordinated, strategic way to strike from all directions at a particular point or points, by means of a sustainable pulsing of force and/or fire, close-in as well as from stand-off positions.” Arquilla & Ronfeldt, *supra* note 5, at 12. It may be literal or “metaphorical,” as in a volley of emails or faxes. *Id.* Examples provided are Chechen resistance to the Russian army and the anti-World Trade Organization “Battle of Seattle.” *Id.*

¹⁶ Uncertainty among a population about the correctness of a government course of action may undermine government policies such as the use of force. *See id.* at 1–2; Zanini & Edwards, *supra* note 2 at 41–42 (describing the sophistication of these groups in perception management and propaganda).

¹⁷ Car-bombs, shoulder-fired missiles, and chemical weapons (Japan subway attack) have been used, among others. *See, e.g.*, U.S. DEP’T OF DEF. COMM’N ON BEIRUT INT’L AIRPORT TERRORIST ACT, OCT. 23, 1983, REPORT 98 (1983) (on file with author). (“The Federal Bureau of

enormity of a violent attack will be on the front pages of every newspaper, and Internet communication will speed information about an attack in one part of the world to remote locations. The added publicity—often accompanied by self-justifying press releases and claims of responsibility by the protagonists—then attracts more disenfranchised participants in an increasing spiral of violence, which is not geographically limited.¹⁸

Political commentary on terrorist events by some news media and public officials, couched in terms of traditional international law concepts, adds confusion to the ongoing interactive process. Misstated and perhaps misunderstood international legal principles, or a particular legal viewpoint stated as undisputed fact, may become popularly perceived truth, favoring the nomadic movement and disadvantaging the traditional hierarchy. The nomadic terrorist model is in contrast to, or has evolved from, the “national liberation movement” model, under which terrorists—warriors, guerilla fighters, or revolutionaries, if you prefer—seeking freedom from state dominance focus on attacking single states from within that state’s borders.¹⁹ Nomadic terrorism is distinguishable from “national liberation movements.”²⁰ Nomadic terrorists operate “in decentralized, flexible network structures”²¹ across state boundaries in multinational nodes supported by multinational donors.²² No single state contains the terrorist organization, which may opportunistically utilize ungovernable areas and failed states as staging areas.²³ The pervasive nature of these attacks dating back at least to the first World Trade Center bombing in 1993 should cause a re-assessment of the methodologies for handling them.

Investigation (FBI) assessment is that the [truck] bomb employed a gas-enhanced technique to greatly magnify its explosive force which has been estimated at 12,000 pounds effective yield equivalent of TNT.”). The truck bomb was the largest conventional blast ever seen by the explosive experts and utilized bottled gas, readily available in every country throughout the world. *Id.* at 99-100.

¹⁸ See Bassiouni, *supra* note 6, at 86 (referring to a “symbiotic” relationship between the media and terrorists).

¹⁹ This model has caused so much dissension due to the “political offense” exception that even a recognized/agreed definition of terrorism in world bodies has been impossible to achieve. The Palestine Liberation Organization (PLO) pioneered modern transnational terror, but the PLO’s goals are philosophically distinct from the hydra-headed set of goals of Al Qaeda, which may include destruction of Western culture. See SCHOENBERG, *supra* note 9, at 22, 23, 61-62; *but see* Ould Mohamedou, *supra* note 9, at 19.

²⁰ Zanini & Edwards, *supra* note 2, at 32 (stating that many national liberation movements have operated on a Marxist hierarchical model).

²¹ *Id.* Al Qaeda may have morphed from a hierarchic to a networked organization in the last few years. Ould Mohamedou, *supra* note 9, at 15.

²² See Ould Mohamedou, *supra* note 9, at 14.

²³ SHAY, *supra* note 12, at 177.

III. THE DILEMMA

Nomadic terrorists operate outside of the “rule of law” and are seldom within the control or reach of individual state governments. Usually only an individual node will be within a single state’s jurisdiction and destroying one node does little to disable the entire organization.²⁴ Accordingly, members of the United Nations generally do not admit to supporting, condoning, training, or allowing nomadic terrorist groups to organize, train, operate, or solicit funds within their borders.²⁵

On point, the United Nations has passed numerous resolutions requiring states to cooperate in the suppression of terrorism.²⁶ Arguably, if nation-states had the ability to stop terrorists and terrorism within and across their borders, terrorism would have been eliminated long ago.²⁷ Even so,

²⁴ See SHAY, *supra* note 12, at 184, 188 (noting that US actions against Al Qaeda have not affected its worldwide cells).

²⁵ This is a departure from state practice involving national liberation-type movements, which often set up the protagonists as Cold War proxies. See SCHOENBERG, *supra* note 9, at 66 fn. 82. Cuba, for example, openly exported its revolution to Angola and other African states, supporting “freedom fighters” against established regimes. However, SHAY *supra* note 12, discusses at length Iran and Sudan’s support to global jihad.

²⁶ For example, all nations are bound to comply with Security Council Resolution 1373, passed after the 9/11 attacks, which requires them to refrain from, among other things: actively or passively supporting entities or individuals engaged in terrorism; permitting commission of terrorist acts; providing or permitting safe haven for terrorists; allowing terrorist financing; and allowing movement of terrorists across borders. S.C. Res. 1373, U.N. Doc. S/RES/1373 (Sept. 28, 2001).

²⁷ Both the League of Nations and the United Nations have struggled with the threat of terrorism and have sought ways to prevent and eliminate terrorist acts, with limited success. See, e.g., Convention for the Prevention and Punishment of Terrorism, *opened for signature* Nov. 16, 1937, 19 L.N.O.J. 23 (never entered into force); Convention on Offences and Certain Other Acts Committed on Board Aircraft, Sep. 14, 1963, 20 U.S.T. 2941, 704 U.N.T.S. 219; Convention for the Suppression of Unlawful Seizure of Aircrafts, Dec. 16 1970, 22 U.S.T. 1641, 860 U.N.T.S. 105; Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, Sep. 23, 1971, 24 U.S.T. 564, 974 U.N.T.S. 177 [hereinafter Montreal Convention]; Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents, Dec. 14, 1973, 28 U.S.T. 1975, 1035 U.N.T.S. 167; International Convention Against the Taking of Hostages, Dec. 17, 1979, T.I.A.S. 11,081, 1316 U.N.T.S. 205; Convention on the Physical Protection of Nuclear Material, Mar. 3, 1980, T.I.A.S. 11,080, 1456 U.N.T.S. 101; Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving Civil Aviation, Feb. 24, 1988, S. Treaty Doc. 100-19, 1589 U.N.T.S. 474; Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, Mar. 10, 1988, S. Treaty Doc. 101-1, 1068 U.N.T.S. 22 [hereinafter SUA Convention]; Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf, Mar. 10, 1988, S. Treaty Doc. 101-1, 1678 U.N.T.S. 304 [hereinafter SUA II Convention]; International Convention for the Suppression of Terrorist Bombings New York, Dec. 15, 1997, S. Treaty Doc. 106-6, 37 I.L.M. 249. Protocols amending the SUA Convention and the SUA II Convention have just been finalized. Press Briefing, Int’l Mar. Org., Revised Treaties

states have been unable to control the “traditional” national liberation forms of terrorist activities under the current international rules and will be even less successful in controlling nomadic terrorism. Use of municipal law to prosecute and destroy nodes does not affect the viability of the whole network, and even local prosecution is sometimes lacking.²⁸ The unwillingness or inability of a state to respond to actions of nomadic terrorists creates a fertile breeding ground,²⁹ evidenced by the frequent use of failed states, such as Somalia, by terrorists for training sites or operational bases.³⁰

Most major international conventions on terrorism rely on criminal extradition for their effectiveness, but extradition has worked poorly in practice.³¹ States have been reluctant to permit extradition for numerous reasons, some totally unrelated to terrorist activities. The effect has been to leave non-state terrorist actions in legal No-Man’s Land.³² Thus traditional criminal law formulae have not worked to control the threat. Nation-states will continue to be hamstrung by the new nomadic actors until this circumstance somehow is changed.³³

The dilemma for international law is that the concept of nomadic terrorism defies effective action under the traditional rules. The protagonists are operating under different rules not well understood by the Establishment (whether it be nation-states or the United Nations). With the failure of state-

to Address Unlawful Acts at Sea Adopted at International Conference (Oct. 17, 2005) (available at <http://www.imo.org/home.asp> (follow “NEWSROOM” hyperlink, then follow “Press Briefings” hyperlink, then follow “2005” hyperlink)).

²⁸ As in Rwanda and Yugoslavia, where judicial systems failed, requiring the establishment of international tribunals through the mediation of the United Nations.

²⁹ See Christopher Greenwood, *Terrorism: The Proper Law and the Proper Forum*, in INTERNATIONAL LAW AND THE WAR ON TERROR 353, 365–69 (Fred L. Borch & Paul S. Wilson eds., 2003).

³⁰ See SHAY, *supra* note 12, at 73 (The deterioration of a central government viewed as a window of opportunity to develop an Islamic fundamentalist infrastructure.).

³¹ See W. Michael Reisman, *International Legal Responses to Terrorism*, 22 HOUS. J. INT’L L. 3, 22–30 (1999); see also David Rising, *Germany frees terror suspect from prison*, BOSTON.COM, July 18, 2005, http://www.boston.com/news/world/europe/articles/2005/07/18/germany_blocks_terror_suspect_extradition?mode=PF.

³² Ivan Shearer, *The Limits of Coalition Cooperation in the War on Terrorism*, in INTERNATIONAL LAW AND THE WAR ON TERROR, *supra* note 29, at 275, 286–90 (discussing the extradition/jurisdiction mismatch between civil and common law countries and the impediment to extradition posed by potential imposition of the death penalty). When municipal authorities will not act and international authorities cannot act because the actors are not proper subjects of international law, the legal No Man’s Land is established.

³³ States are perfectly capable of using these actors for their own ends. Thus the attempts to control terrorism are in some cases only apparent. See Reisman, *supra* note 31, at 22–30.

based solutions, the uncertain international status of the nomadic (criminal or combatant) has defined much of the debate.

Modern international law is based on nation-states with territorial authority and boundaries that can treat with one another to resolve disputes, engage in intercourse and adopt agreements regularizing activities between the states and their citizens.³⁴ Traditionally, compliance has been induced through the concept of reciprocity. When diplomacy fails or is reduced to armed conflict, an extensive set of rules exists to limit and govern military activities, authorized participants, and the capture, detention and interrogation of hostile combatants.³⁵

When terrorists perpetrate major destructive actions, international legal practitioners have attempted to fit both actions and actors into these existing categories. In the past, some argued for recognizing terrorist groups as legitimate non-governmental organizations and engaging them at the UN, imposing state-like obligations. Self-interest then would require them to relinquish terrorist ways.³⁶ The concept of co-option did not work with the PLO,³⁷ and is unlikely to work with the new protagonists, such as bin Laden, whose objectives do not include becoming a party to the United Nations. Regardless of whether bin Laden is the leader as the term is understood in a hierarchical organization, any commitment given is likely to be ineffective.

Some have noted that the acts of nomadic terrorists have been designed not to change a particular policy, as in the past, but to destroy the “social and economic structures and values of a system of world public order, along with the international law that sustains it.”³⁸ This view is consistent

³⁴ LOUIS SOHN & THOMAS BUERGENTHAL, *THE INTERNATIONAL PROTECTION OF HUMAN RIGHTS* 1 (1973), *quoting* Hersch Lauterpacht.

³⁵ *See* Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Geneva Convention III] (containing several provisions geared toward the protection of civilians and civilian property).

³⁶ HEATHER A. WILSON, *INTERNATIONAL LAW AND THE USE OF FORCE BY NATIONAL LIBERATION MOVEMENTS* 119–23, 160 (1988).

³⁷ Chairman Arafat had the opportunity to establish Palestinian self-determination in exchange for ending terrorism. Notwithstanding renouncing terrorism numerous times, he was unwilling or arguably unable, to do so. *See, e.g.*, G.A. Res. 3375 (XXX), U.N. GAOR, 30th Sess., Supp. No. 34, U.N. Doc. A/L.768/Rev.1 & Rev.1/Add.1 (Nov. 10, 1975) (inviting the PLO to participate as representative of the Palestinian people in all Middle East efforts of the UN on an equal footing with other parties); *see also* ALAN M. DERSHOWITZ, *WHY TERRORISM WORKS: UNDERSTANDING THE THREAT, RESPONDING TO THE CHALLENGE* 57 (2002); Dennis B. Ross, *Yasir Arafat (Think Again)*, *FOREIGN POL’Y*, July-Aug. 2002, at 18-22.

³⁸ Michael Reisman, *In Defense of World Public Order*, 95 *AM. J. OF INT’L L.* 833 (2002); *see also* Philip G. Cerny, *Terrorism and the New Security Dilemma*, 58 *NAVAL WAR C. REV.* 11 (2005) (analyzing current developments as “neomedieval”).

with the idea that the nomadic terrorist is a part of a larger culture war (nomadics v. established order), of which the physical attacks are only a small part.³⁹

The “war on terror” analysis raises the issue of whether a state of war can exist between one state and unincorporated groups of individuals spread throughout multiple states, without territory or identifying marks and without a territorial battle ground.⁴⁰ In the past, some writers took the view that the lack of an opposing state and identifiable combatants dictated the confrontation be deemed domestic in nature and only subject to the municipal law of the state where the conflict occurs. Such an approach, while recognizing the traditional view that international law applies to nations and not to individuals, ignores the multi-state reality of nomadic terrorism. It has the effect of limiting enforcement to the prosecution of individual criminal acts in individual states, with all the jurisdictional limits imposed by municipal laws. As we have seen, this approach is ineffective for management of a transnational threat.⁴¹ It allows non-state actors to take advantage of their status to paralyze/neuter the responses of the authorities.

A number of writers now argue that a state may use force in self-defense under Article 51 of the United Nations Charter, without regard for whether the adversary is a state or another entity.⁴² It is not clear whether an armed conflict follows if the other entity is not a state. The parties to a conflict contemplated by the Geneva Conventions are states.⁴³ If an armed

³⁹ See SHAY, *supra* note 12. Millennial plots to destroy random targets, the massacre of schoolchildren in Russia, and the assassinations in Iraq, including those of the United Nations Secretary General’s representative, the CARE International chief, and the Egyptian diplomatic envoy, support this point of view. See *Egypt’s envoy in Iraq killed*, CNN.COM, July 7, 2005, <http://www.cnn.com/2005/WORLD/meast/07/07/iraq.main/index.html>; *Leaders Condemn ‘Hassan Murder’*, BBC NEWS, Nov. 17, 2004, http://news.bbc.co.uk/2/hi/uk_news/4018335.stm.

⁴⁰ Reisman, *supra* note 31, at 11–12 (“[O]ne cannot, as an analytical matter, remove terrorism from the field of armed conflict, because it is an irregular technique of armed conflict, sometimes intentionally used as part of the ensemble of techniques that constitute contemporary Totalkrieg. Terrorism is unlawful under the law of armed conflict, whether because of its explicit choice of an illicit target or the context in which the terrorist operation is planned and carried out. This does not mean that rational responses to terrorism must be or should always be military but only that one should not rule out military responses a priori, by means of an unapprised definition”); *but see* Ould Mohamedou, *supra* note 9, at 7, 12 (articulating Al Qaeda’s basis for asserting itself as a state substitute in an armed conflict with the United States).

⁴¹ See Reisman, *supra* note 31, at 39–41 (discussing the refusal of U.S. courts to accept jurisdiction of claims after the explosion of Pan Am Flight 103).

⁴² See, e.g., Michael Schmitt, *Counter-Terrorism and the Use of Force in International Law*, in *INTERNATIONAL LAW AND THE WAR ON TERROR*, *supra* note 29, at 7.

⁴³ See Geneva Convention III, *supra* note 35, arts. 2, 4(1), & 4(2); *but see* Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Victims of International Armed Conflicts (Protocol I) arts. 44 (3) & (4), June 8, 1977, 1125 U.N.T.S. 3 (the United States is not a

conflict results from the Article 51 action, the rules of international humanitarian law are activated.⁴⁴ This presents its own set of status difficulties and in any event, does not resolve the dilemma of how to cope with the nomadic terrorist.

The problem of the status of conflict participants who are not a part of a recognized military group or militia but who occasionally engage in hostilities was recognized throughout the 20th Century, but a resolution was never codified, neither in the Hague nor in the Geneva Conventions. Nomadics do not appear to qualify for POW status, and even if they do, the determination of status is not effective to address the threat.⁴⁵ Today, the risk posed by nomadic terrorists is greater than, but in many ways similar in nature to, the previously recognized risks presented by spies, guerrillas and saboteurs. Such individuals or groups who operate outside the principle of distinction during hostilities present a unique danger to their opponent that supports the recognition of the broadest set of responses to their activities.⁴⁶

Nomadic terrorists dress themselves as civilians, move in and out of society and across borders without markings or identification, and are virtually

party) (expanding such eligible parties to a conflict to include national liberation movements that comply with certain criteria).

⁴⁴ Members of the regular armed forces, including militias and volunteer corps forming a part of them, and civilians accompanying the armed forces are entitled to prisoner of war (POW) status upon capture by the opposing forces. Geneva Convention III, *supra* note 35, arts. 4(A)(1) & 4(A)(4). Members of other militias and other volunteer corps, including organized resistance movements belonging to a Party to the conflict qualify for prisoner-of-war status upon capture provided they are commanded by a person responsible for their conduct, are uniformed or bear a fixed distinctive sign recognizable at a distance, carry arms openly, and conduct their operations in accordance with the law of armed conflict. Geneva Convention III, *supra* note 35, art. 4(A)(2). Being neither part of the regular forces of a party to a conflict nor utilizing distinctive uniforms or signs, nomadic terrorists do not fall within the codified definition of those entitled to POW status. If terrorists are engaged in hostilities against a state and do not qualify for POW status, they are subject to punishment under municipal law upon capture. Thus, subjection of the individual terrorist to the laws of armed conflict under these circumstances is not productive.

⁴⁵ Kenneth Watkin, *Warriors Without Rights? Combatants, Unprivileged Belligerents, and the Struggle Over Legitimacy*, 2 HARV. PROGRAM ON HUMANITARIAN POL'Y AND CONFLICT RES. OCCASIONAL PAPER SERIES, Winter 2005, at 21–22, 26, available at <http://www.hpcr.org/pdfs/OccasionalPaper2.pdf> (last visited December 21, 2005) (noting codification gaps on this issue dating from the 1907 Hague Conferences and continuing currently). Although some effort to address this form of combatant was undertaken in Protocol I, that effort was seriously flawed.

⁴⁶ Richard R. Baxter, *So-Called "Unprivileged Belligerency": Spies, Guerrillas, and Saboteurs*, 28 BRIT. Y.B. INT'L L. 323, 343 (1951) ("International law deliberately neglects to protect unprivileged belligerents because of the danger their acts present to their opponent. The peril to the enemy inherent in attempts to obtain secret information or to sabotage his facilities and in attacks by persons whom he cannot distinguish from the peaceful population is sufficient to require the recognition of wide regulatory powers.").

impossible to identify from the general population. Not only are they indistinguishable, their targets are frequently other civilians and civilian objects, making it more difficult to mount a defense against such attacks.⁴⁷ Their activities render the structure and rules of targeting based upon the dual distinctive classes of combatant and civilian impractical and futile.⁴⁸ Using civilian status in order to attack civilians, they distort and corrupt the entire work of international law that focuses on protecting civilians.⁴⁹

IV. TOWARD A NEW APPROACH

The old rules are not working, but most commentators are still trying to force nomadic terrorists and their activities into the existing framework, usually based on a status argument. As discussed above, the nomadic form is qualitatively and philosophically distinct from other forms of terrorism. The nomadic terrorist has opportunistically exploited the resources and structure of modern society, particularly in unregulated areas and where gaps in government institutions occur, to create a new and previously unknown type of threat.

Because the “war” is between cultures and is much broader than physical attacks,⁵⁰ nomadic terrorism should not be categorized across the board as automatically activating the laws of armed conflict.⁵¹ These actors create an environment in which military response may be difficult (or need augmentation).⁵² The interest of a nation in containing and thereby limiting

⁴⁷ Secretary General’s Report, *supra* note 1, ¶ 18 (“Global economic integration means that a major terrorist attack anywhere in the developed world would have devastating consequences for the well-being of millions of people in the developing world. The World Bank estimates that the attacks of 11 September 2001 alone increased the number of people living in poverty by 10 million; the total cost to the world economy probably exceeded 80 billion dollars. These numbers would be far surpassed by an incident involving nuclear terrorism.”).

⁴⁸ See Watkin, *supra* note 45 (noting that the distinction between combatants and civilians is only as effective as the certainty with which the term “combatant” is defined).

⁴⁹ SCHOENBERG *supra* note 9, at 61 (discussing the failure of many human rights advocates to recognize that the threat to human rights from terrorists is just as serious as the threat to human rights from counter-terrorist actions and arguing that this double standard is attributable, at least partially, to a failure to extend accountability to private actors who are using violence on the same scale as military personnel carrying out military dictates of a state).

⁵⁰ Ould Mohamedou makes the case that Al Qaeda has substituted itself for the weak sovereignty of Arab states to pursue a next-generation “war” for identified political goals. See Ould Mohamedou, *supra* note 9, at 9. If this is Al Qaeda’s intent, recognition of this “war” by states would not seem to be in their best interest. See Adam Roberts, *The Laws of War in the War on Terror*, in *INTERNATIONAL LAW AND THE WAR ON TERROR*, *supra* note 29, at 175–76, 184–87.

⁵¹ See Roberts, *supra* note 50, at 184–87.

⁵² Law enforcement may function more flexibly and pervasively in local communities; may be a more acceptable coercive authority in those communities; is not bound by the requirement of distinctive uniform; has its own intelligence-gathering apparatus; and is appropriately involved

the impact of war on its citizens and resources, the basis for most rules of international law relating to armed conflict, dictates that anticipatory and pre-emptive self-defense should be available options.⁵³ In a given set of circumstances, however, the military option may not be the most effective means to achieve the goal.⁵⁴

A state victimized or about to be victimized by nomadic terrorism needs the maximum number of available responses at its disposal, whether military, political, economic or social in order to develop the “ensemble of techniques that constitute contemporary Totalkrieg.”⁵⁵ A state will only have this ability if it acts with the support of the international community⁵⁶ because nomadic terrorism is beyond the management capacity of any state, even a superpower. Neither the military option nor mere law enforcement is sufficient. While extradition can be a useful tool in the ensemble, the conflicted and complex nature of state relationships has not allowed it to be more than a percentage part of the solution.⁵⁷

V. UNIVERSAL JURISDICTION

Maximum jurisdiction must attach to nomadic terrorists, regardless of where they may flee or be found. Any new regime will define what actions will be considered nomadic terrorism.⁵⁸ Such agreed actions must be subject

when domestic laws have been violated. See Bassiouni, *supra* note 5; Watkin, *supra* note 45, at 66; Kenneth Watkin, *Controlling the Use of Force: A Role for Human Rights Norms in Contemporary Armed Conflict*, 98 AM. J. INT’L L. 1 (2004). Other options may be available as well.

⁵³ See Rein Müllerson, *Jus ad Bellum and International Terrorism*, in INTERNATIONAL LAW AND THE WAR ON TERROR, *supra* note 29, at 75, 116.

⁵⁴ See Greenwood, *supra* note 29 (noting that elevating a terrorist organization to the status of a belligerent is to confer upon it an international status to which it is not entitled and to suggest “a degree of equality”; that a state engaged in an armed conflict must conduct its operations via its military, limiting its options to use other enforcement entities; and that the law of armed conflict may result in declarations of neutrality with the potential for serious consequences).

⁵⁵ Reisman, *supra* note 31, at 12.

⁵⁶ Traditionally, international law is based on states foregoing specified rights. In this instance, states should receive international authorization beyond the standard authority of individual states, i.e., international law would be enabling rather than proscriptive.

⁵⁷ See Greenwood, *supra* note 29, at 365–69; Shearer, *supra* note 32, at 286–90; compare *Top al Qaeda Suspect Given to U.S.*, CNN.COM, June 6, 2005, <http://www.cnn.com/2005/WORLD/asiapcf/06/06/pakistan.libbi/index.html> (discussing the successful extradition to U.S. custody by Pakistan of recently captured Al Qaeda operators, including Abu Farraj al-Libbi), with Rising, *supra*, note 31 (describing a case in which a German court released a terror suspect, holding that the European Union-wide warrant under which he was arrested was contrary to the German Constitution).

⁵⁸ Some progress is being made toward effectively defining terrorist offenses in international instruments. International Convention for the Suppression of the Financing of Terrorism arts. 13–

to universal jurisdiction,⁵⁹ so that any state apprehending any actor for an agreed offense could itself take action under its own domestic laws or deliver the actor to a jurisdiction of its selection.

The principle of universal jurisdiction is already applied (at least theoretically) by the international community to a number of acts considered *hostis humani generis* (common enemy of mankind)⁶⁰ in addition to the quintessential universal jurisdiction offense: piracy.⁶¹ The principle is based on a common belief that certain crimes are so heinous and so widely condemned that any state that captures an alleged perpetrator may prosecute on

14, Dec. 9, 1999, G.A. Res. 54/109, Annex, U.N. Doc. A/RES/54/109/Annex, 39 I.L.M. 270 (2000) (containing a provision specifically precluding a refusal extradition of suspects on the basis of “political offense” and “fiscal offence” exceptions).

⁵⁹ See UNIVERSAL JURISDICTION: NATIONAL COURTS AND THE PROSECUTION OF SERIOUS CRIMES UNDER INTERNATIONAL LAW (Stephen Macedo ed., 2004) (discussing all aspects of universal jurisdiction principles). In any case activating universal jurisdiction, international law purports to regulate individuals *as well as* states. Anne-Marie Slaughter, *Defining the Limits: Universal Jurisdiction and National Courts*, in UNIVERSAL JURISDICTION, *supra*, at 168, 172, 184. It is most effective in practice when supported by enabling legislation that clearly grants extraterritorial authority over the offense, as well as a defined underlying municipal criminal violation. M. Cherif Bassiouni, *The History of Universal Jurisdiction and Its Place in International Law*, in UNIVERSAL JURISDICTION, *supra*, at 39, 45–47 (articulating how the underlying municipal violation, which comprises a distinct offense, may be the basis for a conviction even if the international offense cannot be proven).

⁶⁰ RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 404 cmt. a (1987) (“Universal jurisdiction is increasingly accepted for certain acts of terrorism, such as assaults on the life or physical integrity of diplomatic personnel, kidnapping, and indiscriminate violent assaults on people at large.”); Stephen Macedo, *Introduction to Universal Jurisdiction*, *supra* note 59, at 1, 4; *see also* Colleen Enache-Brown & Ari Fried, *Universal Crime, Jurisdiction and Duty: The Obligation of Aut Dedere Aut Judicare in International Law*, 43 MCGILL L.J. 613 (1998) (presenting an argument for the existence of a general duty to extradite or prosecute perpetrators of universal crimes irrespective of the context in which they occur, to include the duty of non-asylum); Eugene Kontorovich, *The Piracy Analogy: Modern Universal Jurisdiction’s Hollow Foundation*, 45 HARV. INT’L L.J. 183 (2004) (critiquing the theory that acts of a certain level of heinousness are subject to universal jurisdiction); *but see* Reisman, *supra* note 31, at 56, (“Yet there has been great reluctance to extradite terrorists so that they can be tried in states that are pursuing them. Until now, the international conventions that have been concluded are all extradition treaties based on the principle of *aut judicare aut dedere*.”).

⁶¹ U.S. courts recognized this principle, as applied to piracy, in the early 19th century. Adam W. Wegner, Note, *Extraterritorial Jurisdiction under International Law: The Yunis Decision as a Model for the Prosecution of Terrorists in U.S. Courts*, 22 LAW & POL’Y INT’L BUS 409, 421 (1991). While universal jurisdiction over piracy originally developed under customary international law, states eventually entered into treaties prohibiting such acts and stipulating what actions capturing states could take. Wegner, *supra*, at 421. The current codified definition of piracy is quite narrow. *See* United Nations Convention on the Law of the Sea art. 101, Dec. 10, 1982, 1833 U.N.T.S. 397. However, the history of piracy demonstrates a wide variety of factual variations that provide useful analogies to current nomadic terrorism. *See* ALFRED P. RUBIN, THE LAW OF PIRACY 317-19 (1988). Rubin’s definitive analysis demonstrates the extraordinarily complex history of the terms “pirate” and “piracy”.

behalf of all humanity, without a nexus between criminal and prosecuting state. Accordingly, pirates, and actors similar to or analogized to pirates,⁶² have long been excluded from the protections of the law of armed conflict and may be subjected to either military or law enforcement suppressive action.

As noted previously, the struggle with those who hide among civilians but occasionally return to hostile activity is not new. As early as the U.S. Civil War, such actors were analogized to pirates. This can be found in the Lieber Rules of 1863, which are recognized as being perhaps the first codification of laws for the conduct of hostilities and treatment of captured combatants. Even then, military doctrine was deemed inadequate to account for combatants hiding among civilians. In any event, the Lieber rules authorize treating such “combatants” as pirates.⁶³

The piracy of the 18th and 19th centuries had important similarities to current nomadic terrorism.⁶⁴ Pirates were usually private parties operating beyond the pale of any nation-state—but as now, states sometimes supported their activities. Their targets were civilians and civilian enterprises. They frequently pretended to be one nationality or another in order to lure their potential targets to draw close prior to attack, creating a chaotic situation difficult to handle under the established order. Their bases of operations often

⁶² Baxter, *supra* note 46, at 337 fn. 4. Baxter dismisses the suggested analogy of guerrillas and spies with pirates because most of the former act from allegiance to a sovereign and not for private motives.

⁶³ ADJUTANT GENERAL’S OFFICE, WAR DEP’T, GEN. ORDERS NO. 100, INSTRUCTIONS FOR THE GOVERNMENT OF ARMIES OF THE UNITED STATES IN THE FIELD para. 82 (24 Apr. 1863), reprinted in THE LAWS OF ARMED CONFLICTS 3 (Dietrich Schindler & Jiri Toman eds., 2004) On April 24, 1863, President Abraham Lincoln signed General Orders No. 100, promulgating the Instructions for the Government of Armies of the United States in the Field, (Lieber Code). Article 82 provides:

Men, or squads of men, who commit hostilities, whether by fighting, or inroads for destruction or plunder, or by raids of any kind, without commission, without being part and portion of the organized hostile army, and without sharing continuously in the war, but who do so with intermitting returns to their homes and avocations, or with the occasional assumption of the semblance of peaceful pursuits, divesting themselves of the character or appearance of soldiers—such men, or squads of men, are not public enemies, and therefore, if captured, are not entitled to the privileges of prisoners of war, but shall be treated summarily as highway robbers or pirates.

Id.

⁶⁴ Douglas R. Burgess, Jr., *Piracy Law as a Weapon in the War on Terror*, A.B.A. NAT’L SEC. L. REP., June 2005, at 3, 3–6; G. Edward White, *The Marshall Court and International Law: The Piracy Cases*, 83 AM. J. INT’L L. 727, 727–35 (1989).

were located in uninhabited or isolated areas beyond the reach of local authorities or in areas where the government tacitly supported their operations or was unable or unwilling to stop their activities.⁶⁵ All civilized nations had an interest in eliminating their activities.⁶⁶ The characteristics that made the sea free for all travelers made it vulnerable to piracy and not susceptible to regulation by individual states. The absence of geographic boundaries on the high seas; the eternally changing character of the environment; and the high probability that perpetrators would flee and not be brought to justice at the municipal level, made enforcement through “the law of nations” the only practical approach.

A common statement is that extraterritorial jurisdiction to prosecute pirates historically attached only on the high seas. On its face, the statement is correct; a state has sovereignty over its territorial waters and land mass. However, the statement is an oversimplification. The history of 18th and 19th century efforts to suppress piracy was fraught with the same kinds of frustrations encountered in today’s world. In 1755 and 1756, the British suppressed an Indian pirate enterprise that had operated outside the control of the Indian government for over fifty years. In 1813 the United States sent marines to destroy a pirate base in the Malay archipelago after a U.S. flagged ship was seized. In 1849 the British destroyed the Borneo bases of a major pirate enterprise that had operated with the consent of the local sovereign.⁶⁷ Just as today, private violence occurred in areas not controlled by states or over which states could not or would not assert control. The failure of states to act in the historic cases was deemed an abrogation of sovereignty allowing the suppressing state to treat the area as non-sovereign and intervene directly.⁶⁸

Pirate activities were crimes against nations separate from the municipal law of any single country.⁶⁹ Pirates could be pursued beyond the jurisdictional limits of an individual state and could be tried by any authority that caught them or could be turned over to another jurisdiction for trial. The trial could be summary in nature. This development may have occurred because states felt that “[n]on-state actors caus[ing] damage equivalent to that

⁶⁵ See White, *supra* note 64, at 729–30.

⁶⁶ Until the late 18th century, most major European powers in fact encouraged and supported piracy as a means of undercutting other states. However, by the end of the 18th century, this support, which generated problems for the state sponsors, had ceased, and suppression efforts began in earnest. JANICE E. THOMSON, *MERCENARIES, PIRATES, AND SOVEREIGNS: STATE-BUILDING AND EXTRATERRITORIAL VIOLENCE IN EARLY MODERN EUROPE* 107–16 (1994).

⁶⁷ *Id.* at 113–14.

⁶⁸ *Id.* at 116.

⁶⁹ RUBIN, *supra* note 61, at 317–19.

of an aggressive nation must not be allowed to hide behind their status as non-state actors.”⁷⁰

The history of state enforcement actions against piracy demonstrates that states struggled with issues similar to those now encountered in the struggle with nomadic terrorism. For example, the record contains much discussion of the ragged boundary between crime and belligerent activities.⁷¹ One of the series of early U.S. Supreme Court piracy cases, *U.S. v. Klintock*, stands for the conviction of the Marshall Court that:

[P]ersons on board of a vessel not at the time belonging to the subjects of any foreign power, but in possession of a crew acting in defiance of all law, and acknowledging obedience to no government whatever, . . . [are] punishable in the Courts of the United States. Persons of this description are proper objects for the penal code of all nations . . . who by common consent are equally amenable to the laws of all nations.⁷²

Similarly today, the irrelevance of geographic boundaries, eternally changing character of the borderless environment, high probability that perpetrators can evade capture and justice, and the character of cyberspace and instant communications have made the world vulnerable to nomadic terrorism. As in the case of piracy, territorial-based solutions are frustrated by nomadic terrorists, who frequently are “acting in defiance of all law” and utilizing ungovernable areas and failed states to avoid obedience to any government. They are “equally amenable to the laws of all nations” and only such an international solution can effectively grapple with them.

In *Klintock*, Marshall applied a United States statute to acts of piracy committed where neither the pirate nor the victims were U.S. nationals. Similarly, subjecting nomadic terrorist acts to a piracy-like universal jurisdiction regime with a proper foundation would provide needed flexibility. Military action would be authorized, when appropriate, along with other law

⁷⁰ Michael Novak, *Just Peace and the Asymmetric Threat: National Self-Defense in Uncharted Waters*, 27 HARV. J.L. & PUB. POL’Y 817, 829 (2004).

⁷¹ RUBIN, *supra* note 61, at 272.

⁷² *U.S. v. Klintock*, 18 U.S. (5 Wheat.) 144, 152 (1820).

enforcement measures,⁷³ to create a more seamless, cross-functional capability against a multi-faceted adversary.

VI. A NEW APPROACH

Many terrorist acts are already prohibited by customary international law as codified in the numerous international conventions cited above. These conventions are the recognized starting point for agreement on inclusion of terrorist acts in a universal jurisdiction regime.⁷⁴ But as we have seen, merely giving an international criminal categorization to an activity is not an effective means of overcoming the threat.⁷⁵ An actuating link must be created between the international criminality and the use of force to suppress it. Many of the international conventions allow for enforcement mechanisms in the nature of universal jurisdiction where allowed by national law. Some even oblige states to prosecute offenders if they are not released to another state for prosecution.⁷⁶ Unfortunately, none explicitly provides for a streamlined procedure to obtain personal jurisdiction over a terrorist protagonist when other, more traditional means, have failed.⁷⁷

The lack of an international enforcement mechanism reflects the unwillingness of states to commit to a regime that might disrupt world order. But where the adversary is already undermining world order, effective response is critical. The world community must reach consensus on and codify the right of a state, as an integral part of its actions in self-defense, to take control of a nomadic terrorist outside of its own territory. Thus, if a state in whose territory a nomadic is located cannot or will not effectively carry out the enforcement obligation or extradite, the "pursuing" state must have the agreed right to enter the territory of the inactive state and seize the nomadic terrorist.⁷⁸ This right would echo the piracy suppression actions historically

⁷³ The panel of scholars who recently proposed the Princeton Principles of Universal Jurisdiction did not include acts of terrorism in its list of actions to which universal jurisdiction ought to be applied. However, there was sensitivity about the serious international character of these acts. PRINCETON PROJECT ON UNIVERSAL JURISDICTION, PRINCETON PRINCIPLES OF UNIVERSAL JURISDICTION, *reprinted in* UNIVERSAL JURISDICTION, *supra* note 59, at 21, 31.

⁷⁴ The Secretary General's Report leans in this direction but makes no meaningful recommendations about how the content and consensus of these conventions might be leveraged into meaningful action against the threat to world order. *See* Secretary General's Report, *supra* note 1.

⁷⁵ Watkin, *supra* note 45, at 4–6.

⁷⁶ *See, e.g.*, Montreal Convention, *supra* note 27; SUA Convention, *supra* note 27.

⁷⁷ Even the international terrorism convention currently under consideration does not take the next step of authorizing such jurisdiction.

⁷⁸ Abductions are disfavored in international law. State practice in this area often is associated with seizing persons for violations long after the fact, when they pose no further immediate threat,

pursued when sovereigns failed to fulfill their obligations to suppress pirates bases located in their territories.⁷⁹ It is also analogous to the right of a belligerent in time of war when a neutral nation fails to prohibit the use of neutral territory as a sanctuary or base of operations by another belligerent.⁸⁰

Such a streamlined procedure for obtaining personal jurisdiction is critical where nomadics are utilizing areas subject to ineffective government or no government at all. In most such circumstances, the breakdown of sovereignty justifying the action is well-documented, as in the historic piracy cases. Principles of reciprocity and consultation will govern interactions by effective sovereigns in most circumstances. Once the nomadic terrorist actor is captured, the state may exercise jurisdiction under its own national laws or convey the terrorist to another state for adjudication.

States, including the United States, must facilitate the implementation of universal jurisdiction over nomadic terrorists by enacting domestic legislation to apply universal jurisdiction to nomadic terrorist acts.⁸¹ With individual legal frameworks in place, multilateral discussions can develop and codify mechanisms for multi-jurisdictional cooperation, undertaking of joint operations, and procedures for resolving conflicts that may arise. Standing, mandatory obligations to apprehend, prosecute or extradite must be clearly articulated in the resulting agreements and in implementing national statutes. The obligation must include supplementary enforcement language as discussed above to ensure success where the numerous attempts to codify counter-terrorism obligations have failed.

State concerns about disruptions caused by enforcement rights are not trivial, and multilateral agreements must ensure enhanced communication and

although their crimes may have been of the most heinous variety. The seizure of terrorist actors by a state's military as a part of an action in self-defense, when they still pose an immediate threat to the state's citizens, falls into an entirely different category. The U.S. has occasionally seized suspects extraterritorially, commencing with Fawaz Yunis in 1987, taken into custody on the high seas. Subsequent incidents within the territory of other states have normally occurred with the concurrence of the host state.

⁷⁹ Even today, piracy often occurs in areas with no effective governments. Recent pirate attacks off the coast of Somalia, a country with no effective government, demonstrate the immediacy of this problem.

⁸⁰ See OFFICE OF THE CHIEF OF NAVAL OPERATIONS ET AL., DEP'T OF THE NAVY, NWP 1-14M, THE COMMANDER'S HANDBOOK ON THE LAW OF NAVAL OPERATIONS para 7.3 (Oct. 1995).

⁸¹ A number of states have domestic legislation for prosecution of crimes against humanity, including Canada, Israel, Germany, France, Belgium, and Switzerland. Bassiouni, *supra* note 59, at 52 (noting that in practice these states tend to apply extraterritorial jurisdiction based on grounds other than pure universality).

cooperation to reduce the potential for controversy.⁸² Such agreements should continue efforts to improve the performance of extradition.⁸³

In spite of all efforts, disputes about extraterritorial enforcement are sure to arise and would be resolved through some kind of international review and resolution where multilateral agreements are not in place or have failed.⁸⁴ Such a forum for vetting a state's actions would defuse tensions that might result from an extraterritorial action to take control of an individual in another state's jurisdiction or on the high seas. Sovereignty issues concerning authority to act in self-defense may be avoided by limiting the remedy available to an award of money damages to the citizens or to the country subject to the exercises of such authority.⁸⁵ An arbitral tribunal whose members are selected by the parties may provide a useful model for these circumstances. Damage awards can be used to establish a bright line between

⁸²An example of controversy is that between the U.S. and Italy concerning the seizure of a suspected terrorist in Italy by U.S. operatives and his removal to Egypt. See Tracy Wilkinson, *Italy Orders Arrest of 13 CIA Operatives*, L.A. TIMES, June 25, 2005, at A1. Agreements must emphasize combined operations across institutions, both domestic and international. Networking through collaborative intelligence gathering is a priority (at the international, national, and local levels), and collaboration should include all areas of terrorist activities: military, psychological operations, financing, propagandizing, movement, identity, etc. A multi-state response from cross-functional nodes (with greater cooperation and communications across all levels of government, both domestically and internationally) would permit swarming against the adversary. There is some evidence this has happened in the investigations of the recent London bombings. See, e.g., Nick Fielding & Gareth Walsh, *Mastermind of Madrid is Key Figure*, SUNDAY TIMES (London), July 10, 2005, at 5; Anwar Iqbal, *US Raises Terror Alert, Sends FBI Team to UK*, DAWN: THE INTERNET EDITION, July 8, 2005, <http://www.dawn.com/2005/07/08/top7.htm>; Nic Robertson et al. contributing, *Sources: Explosive Found in Biochemist's Flat*, CNN.COM, July 16, 2005, http://www.cnn.com/2005/WORLD/europe/07/15/london.attacks/?section=cnn_topstories.

⁸³ However, the inclusion of the right of entry where other means have failed would substitute for the procedures of extradition. As noted, in most such cases, effective sovereignty is not available to engage in extradition in any event.

⁸⁴ The authors do not support the inclusion of nomadic terrorist acts in the Charter of the recently created International Criminal Court, nor in the jurisdiction of a similar body. The politicization of some actions taken by international courts in the past make it unlikely that some nations, and the United States in particular, will consent to compromise sovereignty by allowing an international court to determine what actions it can or cannot take in self-defense or whether its citizens violated international law in carrying out such actions. Nor is a standing enforcement body necessary, given the robust body of domestic law to be used for prosecutions once control over terrorists is effected, as well as the precedents for *ad hoc* tribunals mandated by the Security Council where domestic law has broken down. See Michael Newton, *International Criminal Law Aspects of the War Against Terrorism*, in INTERNATIONAL LAW AND THE WAR ON TERROR, *supra* note 29, at 323, 344–49.

⁸⁵ A model is the payment of compensation to individuals subject to improper criminal proceedings, which is available in various municipal law systems and under various international human rights treaties. See Stuart Beresford, *Redressing the Wrongs of the International Justice System: Compensation for Persons Erroneously Detained, Prosecuted, or Convicted by the Ad Hoc Tribunals*, 96 AM. J. INT'L L. 628.

acceptable and unacceptable actions. The international indictment that will accompany the award of damages should be sufficient to cause a policy review and revision by the offending state if appropriate. As is always the case, conformity within the international community would be achieved through a mixture of perceived self-interest and the desire for reciprocity.

These steps taken together would constitute a bold initiative to confront the tendency of nomadics to fade into the fabric of society, only to swarm anew with increasing violence.

VII. CONCLUSION

The nomadic terrorist has opportunistically exploited the resources and structure of modern society, particularly in unregulated areas and where gaps in government institutions occur, to create a new, previously unknown type of threat whose goal is Armageddon. To counter the threat, an equally aggressive response is required from the international community.

The nomadic form is qualitatively and philosophically distinct from other forms of terrorism. Old solutions are ineffective in the face of this threat. Precedents such as historic responses to piracy that utilize recognized but rarely used legal concepts have the potential to cut through inertia and allow meaningful response. A key step would be the adoption of a streamlined procedure for the assertion of personal jurisdiction through extraterritorial jurisdiction—universal jurisdiction—over nomadic terrorism. When combined with agreements ensuring enhanced levels of cooperation among governments to reduce the potential for controversy, this step would allow the threat of nomadic terrorism to be confronted head-on for the first time. The governments of the world owe their citizens no less.

FROM GITMO¹ WITH LOVE

REDEFINING HABEAS CORPUS JURISDICTION IN THE WAKE OF THE ENEMY COMBATANT CASES OF 2004

Mitchell B. Malachowski*

I. Introduction

Since the beginning of American military operations in Iraq and Afghanistan, the United States has detained at any given moment as many as 750 foreign nationals with suspected links to terrorism at the U.S. Naval Station at Guantanamo Bay, Cuba.² Many of these detainees were held without being charged with any crime.³ Reports indicate that certain detainees have been subject to two or more years of harsh treatment, including being shackled to the floor in only their underwear as strobe lights flashed, music blared, and air conditioning chilled the air.⁴

In 2002, fourteen of the prisoners sought an explanation for their captivity by seeking the ancient and time-honored writ of habeas corpus.⁵ The writ has existed since the dawn of common law to provide for judicial review of executive detention.⁶ In June 2004, the U.S. Supreme Court in *Rasul v.*

¹ "Gitmo" is military slang for Guantanamo Bay, Cuba. See GLENN B. KNIGHT, AN UNABRIDGED UNOFFICIAL DICTIONARY FOR MARINES, <http://4mermarine.com/USMC/dictionary.html#G> (last visited Nov. 22, 2005).

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² See, e.g., Douglas Jehl with Reporting Contributed by Neil A. Lewis & Tim Golden, *Pentagon Seeks to Shift Inmates from Cuba Base*, N.Y. TIMES, Mar. 11, 2005, at A1; Neil A. Lewis, *Broad Use of Harsh Tactics Is Described at Cuba Base*, N.Y. TIMES, Oct. 17, 2004, § 1, at 1 [hereinafter *Harsh Tactics*].

³ See, e.g., Carlotta Gall with Neil A. Lewis, *Threats and Responses: Captives; Tales of Despair from Guantanamo*, N.Y. TIMES, June 17, 2003, at A1; Neil A. Lewis, *A Nation Challenged: The Detainees; U.S. is Seeking Basis to Charge War Detainees*, N.Y. TIMES, Apr. 21, 2002, § 1, at 1.

⁴ *Harsh Tactics*, *supra* note 2.

⁵ See *Rasul v. Bush*, 542 U.S. 466, 471 (2004).

⁶ See *Williams v. Kaiser*, 323 U.S. 471, 484 n.2 (1945) (Frankfurter, J., dissenting) (quoting *Secretary of State for Home Affairs v. O'Brien*, [1923] A.C. 603 (H.L.) (U.K.)).

Bush,⁷ and its companion cases, *Rumsfeld v. Padilla*⁸ and *Hamdi v. Rumsfeld*,⁹ may have fundamentally redefined the scope, reach, and application of the writ of habeas corpus.¹⁰

This comment seeks to elucidate and explain the changing nature of the writ in the wake of these cases. Part II traces the historical development of the writ, beginning with the writ's English common law roots and finishing with its adoption in the United States. Part III explores the writ's modern form, including the landmark twentieth century cases affecting its jurisdictional reach and the impact of the Court's holdings in *Rasul*, *Padilla*, and *Hamdi*. Part IV propounds a new theory of writ jurisdiction that seeks to avoid potential problems created by the Court's seemingly contradictory holdings in the Enemy Combatant Cases, possible legislative enactments to alter the reach of the writ, and executive strategies to avoid problematic implementation of the writ.

II. A Brief History of the Writ of Habeas Corpus

A. English Common Law Roots

The writ of habeas corpus has long been celebrated for its persistence and importance.¹¹ Notable in most judicial discussions of the writ is the respect paid to its longevity, with language taking forms like: "We are dealing with a writ antecedent to statute, and throwing its root deep into the genius of our common law."¹² The first instances of use of the writ appeared at least as far back as the thirteenth century.¹³ While there are a variety of different forms of the writ, the most celebrated form is that of habeas corpus ad

⁷ See *Rasul*, 542 U.S. 466.

⁸ See *Rumsfeld v. Padilla*, 542 U.S. 426 (2004).

⁹ See *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004).

¹⁰ This comment shall refer to *Rasul*, *Padilla*, and *Hamdi* collectively as the Enemy Combatant Cases.

¹¹ See *Williams*, 323 U.S. at 484 n.2 (Frankfurter, J., dissenting) ("It is perhaps the most important writ known to the constitutional law of England, affording as it does a swift and imperative remedy in all cases of illegal restraint or confinement. . . . It has through the ages been jealously maintained by Courts of Law as a check upon the illegal usurpation of power by the Executive at the cost of the liege." (quoting Secretary of State for Home Affairs v. O'Brien, [1923] A.C. 603, 609 (H.L.) (U.K.))).

¹² See *Williams*, 323 U.S. at 484 n.2 (Frankfurter, J., dissenting) (quoting Secretary of State for Home Affairs v. O'Brien, [1923] A.C. 603, 609 (H.L.) (U.K.)).

¹³ Clarke D. Forsythe, *The Historical Origins of Broad Habeas Corpus Review Reconsidered*, 70 NOTRE DAME L. REV. 1079, 1080 (1995).

subjiciendum.¹⁴ History indicates that the writ grew out of power struggles between the English courts of law and competing courts such as those of equity and admiralty, as well as the ecclesiastical courts.¹⁵ Courts of law used the writ to undercut the actions of the other courts in a sort of trial court appellate review to undo the actions of competitors.¹⁶

The purpose of the writ, as described by Blackstone, is to “determine whether the cause of [the detainee’s] commitment be just, and thereupon do as to justice shall appertain.”¹⁷ Critically, Blackstone also described the reach of the writ as “running into all parts of the king’s dominions: for the king is at all times intitled to have an account, why the liberty of any of his subjects is restrained, wherever that restraint may be inflicted.”¹⁸ The U.S. Supreme Court has emphasized the historical purpose of the writ as a means of review of executive detention, stating: “At its historical core, the writ of habeas corpus has served as a means of reviewing the legality of executive detention, and it is in that context that its protections have been strongest.”¹⁹

The writ itself was famously codified by Parliament in 1679 by “An Act for the Better Securing the Liberty of the Subject, And for Prevention of Imprisonments Beyond the Seas,” which is more commonly known as the Habeas Corpus Act.²⁰ Chief Justice Marshall later articulated that this statute “enforces the common law.”²¹ Parliament passed this statute in response to a growing fear of judicial weakness in the face of executive power.²² The Habeas Corpus Act provided:

Whensoever any person or persons shall bring any habeas corpus directed unto any sheriffe or sheriffes gaoler minister or other person whatsoever, for any person in his or their

¹⁴ Robert D. Sloane, *AEDPA’s “Adjudication on the Merits” Requirement: Collateral Review, Federalism, and Comity*, 78 ST. JOHN’S L. REV. 615, 623 (2004). Early forms of the writ include habeas corpus ad respondendum and habeas corpus cum causa. WILLIAM F. DUKER, A CONSTITUTIONAL HISTORY OF HABEAS CORPUS 17–24, 25–33 (1980). The habeas corpus ad respondendum was used to compel the appearance of individuals before civil courts, while the habeas corpus cum causa was notable for combining the requirements that the party in custody be brought before the court and that the custodian account for the cause of the custody. *Id.*

¹⁵ See DUKER, *supra* note 14, at 33–41.

¹⁶ See *id.*

¹⁷ 1 WILLIAM BLACKSTONE, COMMENTARIES *131.

¹⁸ 3 BLACKSTONE, *supra* note 17, at *131.

¹⁹ *INS v. St. Cyr*, 533 U.S. 289, 301 (2001).

²⁰ Habeas Corpus Act, 1679, 31 Car. 2, c. 2, §§ 1 *et seq.* (Eng.); DUKER, *supra* note 14, at 52 (“[T]he Habeas Corpus Act of 1679 . . . with the exception of the Magna Carta, is probably the most famous statute in the annals of English Law . . .”).

²¹ *Ex Parte Watkins*, 28 U.S. (3 Pet.) 193, 202 (1830).

²² See DUKER, *supra* note 14, at 52–53.

custody . . . [the custodian shall] bring or cause to be brought the body of the partie soe committed or restrained unto or before . . . the judges or barons of the said court from whence the said writt shall issue . . . and shall likewise then certifie the true causes of his detainer or imprisonment . . .²³

An important characteristic of the writ is immediately apparent in the text of the statute. The writ takes the form of a court order directed to the custodian of the detainee.²⁴ This important distinction would become critical to the twentieth century American understanding of the territorial reach of the writ.²⁵

An important characteristic of the historical jurisdictional reach of the writ was its applicability to the so-called “exempt jurisdictions,” such as the Channel Islands of Jersey and Guernsey and the Counties Palatine.²⁶ These territories existed in something of a grey area where not all Parliamentary legislation had legal effect.²⁷ Section 10 of the Act provided that:

an habeas corpus according to the true intent and meaning of this Act may be directed and runn into any county palatine the cinque ports or other priviledged places within the kingdome of England dominion of Wales or towne of Berwicke upon Tweede and the islands of Jersey or Guernsey any law or usage to the contrary notwithstanding.²⁸

The legal status and applicability of the habeas writ to the cinque-ports, counties palatine, and the islands of Jersey and Guernsey was considered and discussed by the U.S. Supreme Court in the Enemy Combatant Cases of 2004.²⁹

Regardless of the legal status of these places, the intent of Parliament that the writ shall run to them is clearly expressed in the text of the statute

²³ Habeas Corpus Act § 1; *see also* Maxwell Cohen, *Habeas Corpus Cum Causa—The Emergence of the Modern Writ—II*, 18 CANADIAN B. REV. 172, 185–96 (1940) (analyzing the Habeas Corpus Act of 1679).

²⁴ *See* Habeas Corpus Act § 1.

²⁵ *See infra* notes 132–35 and accompanying text.

²⁶ *See Rasul v. Bush*, 542 U.S. 466, 481–82 (2004).

²⁷ *See id.* at 482 nn.12–14.

²⁸ Habeas Corpus Act § 10.

²⁹ *Rasul*, 542 U.S. at 481–82; *infra* Part III.a.

itself.³⁰ As to the legal status of some of the territory that the writ clearly runs to, Blackstone stated:

The islands of Jersey [and] Guernsey are governed by their own laws The king's writ, or process from the courts of Westminster, is there of no force; but his commission is. They are not bound by common acts of our parliaments, unless particularly named. All causes are originally determined by their own officers, the bailiffs and jurats of the islands; but an appeal lies from them to king in council, in the last resort.³¹

Lord Coke also wrote of the status of these places, stating: "Berwick is no part of England, nor governed by the laws of England; and yet they that have been born there, since they were under the obedience of one King, are natural-born subjects, and no aliens"³²

While English understanding of the extraterritorial application of the writ was tied up in concepts of national territory gained by regnal ascent, many sources opined that the jurisdictional reach of the writ should be quite broad. Lord Mansfield argued for a broad reach, stating that "upon a proper case, [writs of habeas corpus] may issue to every dominion of the Crown of England."³³ Commentators on English legal history have stated: "Though the writ could not issue into the foreign dominions of a prince who succeed to the throne of England, and therefore not into Scotland or Hanover, it could issue into any other part of the King's dominions."³⁴ Analysis of historical sources tends to indicate that the writ ran to all of the King's dominions, including territory to which other acts of Parliament did not apply.³⁵ This English

³⁰ See Habeas Corpus Act § 10.

³¹ 1 BLACKSTONE, *supra* note 17, at *104. The section of the quote describing how these areas are "not bound by common acts of our parliaments, unless particularly named" is strikingly similar to the modern American approach to the extraterritorial effect of Congressional legislation. See *Rasul*, 542 U.S. at 480 ("[C]ongressional legislation is presumed not to have extraterritorial application unless such intent is clearly manifested." (citing *EEOC v. Arabian American Oil Co.*, 499 U.S. 244, 248 (1991))). The conclusion to be drawn is that habeas corpus had a presumed extraterritorial effect, because it ran where acts of Parliament did not. See Habeas Corpus Act § 10. The counterargument, of course, is that the Habeas Corpus Act did in fact particularly name these places. See *id.* However, it must be remembered that this statute is viewed as "enforc[ing] the common law." *Ex Parte Watkins*, 28 U.S. (3 Pet.) 193, 202 (1830). Perhaps a common law mechanism can have a presumed extraterritorial effect that Parliamentary legislation is incapable of possessing.

³² *Calvin's Case*, (1608) 77 Eng. Rep. 377, 405, 7 Co. Rep. 1 a, 23 b (C.P.).

³³ *Rex v. Cowle*, (1759) 97 Eng. Rep. 587, 599, 2 Burr. 834, 856 (K.B.).

³⁴ 9 WILLIAM HOLDSWORTH, A HISTORY OF ENGLISH LAW 124 (3d. ed. 1944) (citations omitted).

³⁵ See *supra* notes 26–30 and accompanying text.

common law and statutory tradition was then carried over to the North American colonies.³⁶

B. Early American Adoption

While persistent throughout American history, the writ of habeas corpus has always been a difficult judicial mechanism to properly characterize.³⁷ There have always been contradictions inherent in the writ and tension in such areas as whether habeas proceedings should best be characterized as civil or criminal, original or appellate, and equitable or legal.³⁸

Significant disagreement existed over whether English habeas law applied in the pre-revolutionary North American colonies.³⁹ The arguments for either position were concerned with the method of acquisition of the territory.⁴⁰ The English legal understanding at the time was that if the Americas had been conquered or ceded, acts of Parliament and English common law would have no effect there.⁴¹ However, if the colonies were acquired by discovery, then English law would have full effect.⁴² This disagreement became less significant as over time the right to the writ was secured in many colonial charters, in statutes passed by colonial assemblies, and by judicial application.⁴³ By the time of the Declaration of Independence in 1776, the common law writ was in operation in all thirteen colonies.⁴⁴ The Supreme Court recognized that: “By the time the American Colonies achieved independence, the use of habeas corpus to secure release from unlawful

³⁶ DUKER, *supra* note 14, at 115.

³⁷ See 1 RANDY HERTZ & JAMES S. LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE § 2.2 (4th ed. 2001).

³⁸ *Id.*

³⁹ DUKER, *supra* note 14, at 95–100.

⁴⁰ *Id.* These arguments tended to take on a rather racist tone, as they were principally concerned with how disparagingly to view the civilization of the displaced Native Americans. See *id.*

⁴¹ *Id.* at 96. This was the position of Blackstone. *Id.* (citing 1 BLACKSTONE, *supra* note 17, at 106–08).

⁴² *Id.* at 96–97. This position was articulated by Joseph Story. *Id.* (citing JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 152, at 101–02 (1851)). This position also appears to be more disparaging towards Native Americans, as it considered them to be savages incapable of forming a civilization, to such extent that the Americas could functionally be considered uninhabited at the time of the arrival of European settlers, therefore making them “discovered.” DUKER, *supra* note 14, at 96–97.

⁴³ *Id.* at 101–15. The method and time of adoption varied widely from colony to colony. *Id.*

⁴⁴ *Id.* at 115.

physical confinement, whether judicially imposed or not, was thus an integral part of our common-law heritage.”⁴⁵

The Framers of the Constitution felt that the writ was so important as a check on executive detention that they included the following provision against its suspension in article I of the original constitution: “The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.”⁴⁶ In the *Federalist* No. 83, Hamilton described this provision as working with the right to trial by jury to protect against arbitrariness and judicial despotism in criminal cases.⁴⁷

Federal courts were given the jurisdiction to issue writs of habeas corpus by Congress with the Judiciary Act of 1789.⁴⁸ The jurisdiction of the writ was expanded and began to take its most common modern form, federal review of state convictions for constitutional defects, with the passage by Congress of the Habeas Corpus Act of 1867.⁴⁹ With this Act, federal courts were given broad jurisdiction to hear habeas petitions from state prisoners.⁵⁰

As stated earlier, a central and long-standing principle of the writ is that it acts upon the custodian rather than the detainee.⁵¹ The Supreme Court has long acknowledged this principle, stating:

The important fact to be observed in regard to the mode of procedure upon this writ is, that it is directed to, and served upon, not the person confined, but his jailer. It does not reach the former except through the latter. The officer or

⁴⁵ *Preiser v. Rodriguez*, 411 U.S. 475, 485 (1973).

⁴⁶ U.S. CONST. art. I, § 9, cl. 2. The exact language that eventually became the Suspension Clause, according to Madison’s notes, was proposed by Gouverneur Morris on August 28 during the federal convention of 1787. *DUKER*, *supra* note 14, at 128–29 (citations omitted). The Articles of Confederation lacked an equivalent to the Suspension Clause. *See* ARTICLES OF CONFEDERATION. There is no mention of habeas corpus among the grievances enumerated by Jefferson in the Declaration of Independence. *See* THE DECLARATION OF INDEPENDENCE (U.S. 1776).

⁴⁷ THE FEDERALIST NO. 83, at 444 (Alexander Hamilton) (J.R. Poole ed., 2005) (“Arbitrary impeachments, arbitrary methods of prosecuting pretended offenses, and arbitrary punishments upon arbitrary convictions, have ever appeared to me to be the great engines of judicial despotism; and these have all relation to criminal proceedings. The trial by jury in criminal cases, aided by the habeas corpus act, seem therefore to be alone concerned in the question. And both of these are provided for in the most ample manner in the plan of the [constitutional] convention.”).

⁴⁸ Judiciary Act of 1789, ch. 20, § 14, 1 Stat. 73; *DUKER*, *supra* note 14, at 182.

⁴⁹ The Habeas Corpus Act of 1867, ch. 28, 14 Stat. 385.

⁵⁰ Forsythe, *supra* note 13, at 1101.

⁵¹ *Braden v. 30th Jud. Cir. Ct. of Ky.*, 410 U.S. 484, 495 (1973) (citing *In re Jackson*, 15 Mich. 417, 439–40 (1867)) (citing *Ex parte Endo*, 323 U.S. 283, 306 (1944)).

person who serves it does not unbar the prison doors, and set the prisoner free, but the court relieves him by compelling the oppressor to release his restraint. The whole force of the writ is spent upon the respondent.⁵²

This principle that the writ acts on the custodian rather than the detainee continues to shape our understanding of the jurisdictional reach of the writ today.⁵³

One longstanding principle of habeas jurisdiction, known as the immediate custodian rule, controls who may be properly named as respondent in a habeas proceeding.⁵⁴ This principle, first articulated in the 1885 case of *Wales v. Whitney*, provides that statutes granting habeas jurisdiction “contemplate a proceeding against some person who has the immediate custody of the party detained, with the power to produce the body of such party before the court”⁵⁵ While this may have been dicta within *Wales*, the reasoning has been relied on by many subsequent courts.⁵⁶ This rule is still rigidly applied; if the immediate custodian is not named as the respondent, courts will dismiss the petition.⁵⁷

C. Twentieth-Century Developments

The modern general habeas corpus statute provides, in pertinent part, that: “Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective

⁵² *Braden*, 410 U.S. at 495 (quoting *Jackson*, 15 Mich. at 439–40).

⁵³ See *infra* notes 133–135 and accompanying text.

⁵⁴ See Megan A. Ferstenfeld-Torres, *Who Are We to Name? The Applicability of the “Immediate-Custodian-As-Respondent” Rule to Alien Habeas Corpus Claims Under 28 U.S.C. § 2241*, 17 GEO. IMMIGR. L.J. 431, 431–32 (2003).

⁵⁵ *Wales v. Whitney*, 114 U.S. 564, 574 (1885).

⁵⁶ See Ferstenfeld-Torres, *supra* note 54, at 441–42 & 442 n.56 (“The proper respondent in a federal habeas corpus petition is the petitioner’s ‘immediate custodian.’” (quoting *Brittingham v. United States*, 982 F.2d 378, 379 (9th Cir. 1992) (per curiam) (citing *Blango v. Thornburgh*, 942 F.2d 1487, 1491–92 (10th Cir. 1991) (per curiam) (holding prison warden only proper respondent under 28 U.S.C. § 2241) (citing *Mounce v. Knighten*, 503 F.2d 967, 969 (5th Cir. 1974) (stating unequivocally that respondent to habeas petition must be “immediate custodian”) (citing *Jones v. Biddle*, 131 F.2d 853, 854 (8th Cir. 1942) (“The statutes relating to habeas corpus manifestly contemplate that the respondent named in an application for habeas corpus shall be the person, within the territorial jurisdiction of the court, who has the physical custody of the person of the petitioner and who is capable of producing him in court.” (quoting *Wales*, 114 U.S. at 574))))). The cases relied on by Ms. Ferstenfeld-Torres to support her proposition are all court of appeals cases. Ferstenfeld-Torres, *supra* note 54, at 442 n.56.

⁵⁷ See *Rumsfeld v. Padilla*, 542 U.S. 426 (2004); *infra* Part III.b.

jurisdictions.”⁵⁸ The U.S. Code contains a catch-all provision, 28 U.S.C. § 2241, which confers habeas jurisdiction on federal courts when such jurisdiction is not controlled by another controlling statute.⁵⁹ Most notably, § 2241 is used by INS detainees to challenge their detention.⁶⁰ The significantly more common form of habeas petition, a challenge of a state court conviction,⁶¹ is governed by a different section with far more complex requirements, 28 U.S.C. § 2254.⁶²

Unique to law of the writ of habeas corpus is the Court’s willingness “to overturn or modify its earlier views of the scope of the writ, even where the statutory language authorizing judicial action has remained unchanged.”⁶³ In the twentieth century, the Court has done this a number of times.⁶⁴

In *Ex parte Quirin*, enemy aliens imprisoned within the territorial jurisdiction of a district court were implicitly recognized to have the right to challenge the legality of their detention by means of a habeas petition in that district.⁶⁵ *Quirin* involved a group of German saboteurs who were captured within the United States and tried before a military commission pursuant to a Presidential Proclamation.⁶⁶ This proclamation also provided that enemy aliens would be denied access to American courts to challenge their detention.⁶⁷ The prisoners were confined in the District of Columbia and the

⁵⁸ 28 U.S.C. § 2241(a) (2000). The nucleus of this law was enacted in 1867. See The Habeas Corpus Act of 1867, ch. 28, 14 Stat. 385; *Ahrens v. Clark*, 335 U.S. 188, 191 (1948). There is legislative history to evidence that the language “within their respective jurisdictions” was added in order to prevent district court judges from issuing writs to prisoners confined in different judicial districts. *Id.* at 192 (citing CONG. GLOBE, 39th Cong., 2d Sess. 790 (1868)).

⁵⁹ Ferstenfeld-Torres, *supra* note 54, at 431. The vast majority of habeas petitions are brought by persons confined in state prisons. ADMIN. OFFICE OF THE U.S. COURTS, FEDERAL JUDICIAL CASELOADS: RECENT TRENDS 1, 5 (2001), available at <http://www.uscourts.gov/recenttrends2001/20015yr.pdf> [hereinafter FEDERAL CASELOADS]. There are separate code sections that deal with the habeas petitions brought by persons convicted of federal crimes and imprisoned by federal authorities. See 28 U.S.C. §§ 2241–2255 (2000) (setting out the laws applicable to the seeking of habeas relief in the federal courts); 1 HERTZ & LIEBMAN, *supra* note 37, § 3.2 (discussing recent amendments to federal habeas corpus law); 2 HERTZ & LIEBMAN, *supra* note 37, §41.1 (discussing habeas law relating to federal prisoners and detainees).

⁶⁰ Ferstenfeld-Torres, *supra* note 54, at 431.

⁶¹ FEDERAL CASELOADS, *supra* note 59, at 5.

⁶² Compare 28 U.S.C. § 2241 with 28 U.S.C. § 2254 (2000).

⁶³ See *Wainwright v. Sykes*, 433 U.S. 72, 81 (1977).

⁶⁴ See *Braden v. 30th Judicial Circuit Court of Kentucky*, 410 U.S. 484 (1973); *Ahrens v. Clark*, 335 U.S. 188 (1948).

⁶⁵ *Ex parte Quirin*, 317 U.S. 1 (1942).

⁶⁶ *Quirin*, 317 U.S. at 20–24.

⁶⁷ *Id.* at 23. The Proclamation provided that enemy aliens who “enter the United States or any possession or territory thereof, through coastal or boundary defenses, and are charged with

habeas petition was brought in the district court for the same.⁶⁸ The U.S. Supreme Court rejected arguments by the government that the Presidential Proclamation precluded access to the courts by means of a habeas writ, stating: “[N]either the Proclamation nor the fact that they are enemy aliens forecloses consideration by the courts of petitioners’ contention that the Constitution and laws of the United States constitutionally enacted forbid their trial by military commission.”⁶⁹ The Court then proceeded to rule on the habeas petitioners’ detention on the merits.⁷⁰ Though not groundbreaking with regard to issues of jurisdiction, *Quirin* is significant because it reinforces the importance and primacy of the habeas writ as a mechanism for judicial evaluation of the causes for executive detention, especially in the face of an executive strongly favoring a policy of avoidance of judicial review of its actions.⁷¹

The Court severely curtailed the jurisdictional reach of the writ in *Ahrens v. Clark*.⁷² In *Ahrens* the detainees were “some 120 Germans who [were] being held at Ellis Island, New York, for deportation to Germany.”⁷³ The detainees brought their habeas petition in the District Court for the District of Columbia on the theory that the detainees were under the custody and

committing or attempting or preparing to commit sabotage, espionage, hostile or warlike acts, or violations of the law of war, shall be subject to the law of war and to the jurisdiction of military tribunals; and that such persons shall not be privileged to seek any remedy or maintain any proceeding directly or indirectly, or to have any such remedy or proceeding sought on their behalf, in the courts of the United States, or of its States, territories, and possessions” Proclamation 2561, 7 Fed. Reg. 5101 (July 7, 1942). This proclamation seems to have sought to completely preempt any judicial oversight of the detention of attempted saboteurs by the executive. *See id.*

⁶⁸ *Quirin*, 317 U.S. at 6 (reporter’s statement of the case).

⁶⁹ *Quirin*, 317 U.S. at 25.

⁷⁰ *Id.* at 25–48. The Court held that the use of military commissions to try the petitioners to be constitutionally and legally permissible. *Id.* at 46–48. The petitioners were later convicted by such a commission and executed. Thomas J. Lepri, *Safeguarding the Enemy Within: The Need for Procedural Protections for U.S. Citizens Detained as Enemy Combatants Under Ex Parte Quirin*, 71 FORDHAM L. REV. 2565, 2570–71 (2003) (noting that some of the petitioners were executed before the Court issued its full opinion).

⁷¹ *See Quirin*, 317 U.S. at 24–25. This of course has parallels to the situation that confronted the *Rasul* Court. *See Rasul v. Bush*, 542 U.S. 466, 470–71 (2004). The Court, in another WWII-era case, reinforced the notion of the power of the writ in the face of executive policy, proclaiming: “[T]he Executive branch of the Government could not, unless there was a suspension of the writ, withdraw from the courts the duty and power to make such inquiry into the authority of the commission as may be made by habeas corpus.” *In re Yamashita*, 327 U.S. 1, 9 (1946). *Yamashita* concerned a Japanese general convicted of war crimes by a military commission and imprisoned in the Philippines. *Id.* at 4–6. *Yamashita* did not raise any habeas jurisdiction issues, as the petition was filed in the insular courts of the Philippines, courts from which the Supreme Court at the time had the jurisdiction to hear appeals. *See Johnson v. Eisentrager*, 339 U.S. 763, 779–80 (1950) (discussing *Yamashita*, 327 U.S. 1).

⁷² *Ahrens v. Clark*, 335 U.S. 188 (1948).

⁷³ *Id.* at 189.

control of the Attorney General.⁷⁴ The Court dismissed the petition, holding that a district court may only grant a writ of habeas to a prisoner confined within its territorial jurisdiction.⁷⁵ The chief basis for this decision was the “within their respective jurisdictions” language of the habeas statute.⁷⁶ While the Court did note that the habeas writ is directed towards the custodian rather than the detainee, it interpreted the habeas statute as requiring the physical presence of the petitioner before the court.⁷⁷ The Court proceeded to note the logistical difficulties that would arise from the potentially nationwide transportation of prisoners for habeas proceedings.⁷⁸ The Court at all times seemed to proceed as if Clark, the Attorney General and the only named respondent, was in fact the correctly named respondent.⁷⁹ The Court briefly mentioned the immediate custodian rule, but only in saying that: “Since there is a defect in the jurisdiction of the District Court that remains uncured, we do not reach the question whether the Attorney General is the proper respondent”⁸⁰

One of the key cases construing the reach of the writ was *Johnson v. Eisentrager*.⁸¹ The case concerned twenty-one German nationals who were being held by American military authorities in Germany.⁸² The imprisoned Germans brought a petition in the District Court of the District of Columbia.⁸³ The Supreme Court held that the detainees had no constitutional or statutory right to habeas review.⁸⁴

⁷⁴ *Id.* at 189.

⁷⁵ *Id.* 190. The *Ahrens* Court, in reaching this result, relied on both lower court rulings and the legislative history of the habeas statute. *Id.* at 190–92.

⁷⁶ *Id.* at 190.

⁷⁷ *Id.* at 190–91.

⁷⁸ *Id.* at 191.

⁷⁹ *Id.* at 190. Application of the immediate custodian rule would render the resolution of *Ahrens* strikingly like that of *Padilla* and make the case rather simple to decide. See *infra* notes 152–53 and accompanying text. *Padilla* would require the Court to dismiss the petitions filed in *Ahrens*, because the immediate custodian of the petitioners was not physically located within the district court’s territorial jurisdiction. See *Rumsfeld v. Padilla*, 542 U.S. 426 (2004); *infra* notes 152–53 and accompanying text.

⁸⁰ *Ahrens*, 335 U.S. at 193.

⁸¹ *Johnson v. Eisentrager*, 339 U.S. 763 (1950).

⁸² *Eisentrager*, 339 U.S. at 765. The German prisoners had been convicted of continuing military operations in China against the United States in support of Japan after the surrender of the German government. *Id.* at 765–66. After capture by American forces, the prisoners were convicted of war crimes by a military commission sitting in Nanking, China. *Id.* After conviction the prisoners were imprisoned in Landsberg Prison, in Germany, their location at the time they sought habeas relief. *Id.*

⁸³ *Id.* at 765.

⁸⁴ *Id.* at 768 (“Nothing in the text of the constitution extends such a right, nor does anything in our statutes.”).

The *Eisentrager* Court devoted the overwhelming majority of its analysis to whether or not the German confinees had a constitutional entitlement to seek habeas relief.⁸⁵ Writing for the Court, Justice Jackson framed the habeas petitioners' argument, stating:

We are here confronted with a decision whose basic premise is that these prisoners are entitled, as a constitutional right, to sue in some court of the United States for a writ of *habeas corpus*. To support that assumption we must hold that a prisoner of our military authorities is constitutionally entitled to the writ, even though he (a) is an enemy alien; (b) has never been or resided in the United States; (c) was captured outside of our territory and there held in military custody as a prisoner of war; (d) was tried and convicted by a Military Commission sitting outside the United States; (e) for offenses against laws of war committed outside the United States; (f) and is at all times imprisoned outside the United States.⁸⁶

Relying on the above factors, the Court proceeded to hold that aliens, especially those from enemy countries, were not entitled to the full panoply of constitutional protections.⁸⁷ The Court concluded that the right to habeas review, as guaranteed to citizens unless there is a constitutional suspension of the writ pursuant to the provisions of Article I, did not extend to enemy aliens confined abroad.⁸⁸

The *Eisentrager* Court cited *Ahrens* approvingly for the principle that a habeas petitioner must appear before the reviewing court but did not cite *Ahrens* for any statutory interpretation.⁸⁹ While there is no discussion of the petitioner's statutory right to habeas review, it is likely that the Court *sub silentio* relied on the jurisdictional doctrine established by *Ahrens* to find the

⁸⁵ *Id.* at 777–85. The structure of the *Eisentrager* opinion, with no statutory interpretation, lends credence to the arguments of the Court in *Rasul*. See *infra* notes 128–130 and accompanying text.

⁸⁶ *Eisentrager*, 339 U.S. at 777.

⁸⁷ *Id.* at 785 (“We hold that the Constitution does not confer a right of personal security or an immunity from military trial and punishment upon an alien enemy engaged in the hostile service of a government at war with the United States.”).

⁸⁸ *Id.* at 778–79.

⁸⁹ *Id.* at 778.

existence of no statutory right.⁹⁰ The Court did mention that the district court relied on the authority of *Ahrens* to dismiss the petition.⁹¹

A line of cases implicitly recognizes that American citizens confined abroad by the United States government have a right to challenge their detentions by seeking a habeas relief in the District Court for the District of Columbia.⁹² In *Burns v. Wilson*, the Court heard the case of court martial convicts convicted on Guam and imprisoned in Japan.⁹³ The convicts sought a writ in the District Court for the District of Columbia.⁹⁴ Neither the district court, the court of appeals, nor the Supreme Court questioned whether the District of Columbia was a proper location for the petition to be filed, and the case was considered on the merits.⁹⁵

The case of *Toth v. Quarles* involved a former American serviceman convicted by court martial and confined in Korea.⁹⁶ The serviceman petitioned for a writ of habeas corpus in the District Court for the District of Columbia while imprisoned in Korea.⁹⁷ The jurisdiction of the district court to hear the case was not discussed and is seemingly unquestioned by the district court, the court of appeals, and the Supreme Court.⁹⁸ The case was decided on the merits by the Supreme Court.⁹⁹

Of course, it should be noted that there is Supreme Court authority suggesting that “the existence of unaddressed jurisdictional defects has no precedential authority.”¹⁰⁰ However, the persistence of the principle of providing American citizens with a mechanism for judicial review of the

⁹⁰ See *Rasul v. Bush*, 542 U.S. 466, 477–90 (2004) (describing *Ahrens* as the “statutory predicate” to *Eisentrager’s* holding); *Eisentrager*, 339 U.S. at 768 (“Nothing in the text of the constitution extends such a right, nor does anything in our statutes.”).

⁹¹ *Eisentrager*, 339 U.S. at 767 (“Thereupon the petition was dismissed on authority of *Ahrens v. Clark*.”) (citation omitted).

⁹² See *Braden v. 30th Judicial Circuit Court of Kentucky*, 410 U.S. 484 (1973); *Ex parte Hayes*, 414 U.S. 1327, 1329 (Douglas, Circuit Justice 1973).

⁹³ *Burns v. Wilson*, 346 U.S. 137 (1953), *aff’g sub nom. Burns v. Lovett*, 202 F.2d 335 (D.C. Cir. 1952), *aff’g sub nom. Dennis v. Lovett*, 104 F. Supp. 310 (D.D.C. 1952).

⁹⁴ *Burns*, 346 U.S. 137.

⁹⁵ See *id.*

⁹⁶ *United States ex rel. Toth v. Quarles*, 350 U.S. 11, 13 (1955).

⁹⁷ *Toth v. Talbott*, 113 F. Supp. 330 (D.D.C. 1953).

⁹⁸ See *Toth*, 350 U.S. at 11; *Talbott v. U.S. ex rel. Toth*, 215 F.2d 22 (D.C. Cir. 1954); *Toth v. Talbott*, 114 F. Supp. 468 (D.D.C. 1953); *Toth*, 113 F. Supp. at 330. The two separate reported district court cases are the order issuing the writ and the order discharging Toth from custody; the jurisdiction issue is raised in neither. See *Toth*, 114 F. Supp. at 468; *Toth*, 113 F. Supp. at 330.

⁹⁹ *Toth*, 350 U.S. at 13–23.

¹⁰⁰ *Lewis v. Casey*, 518 U.S. 343, 352 n.2, *quoted in Rasul v. Bush*, 542 U.S. 466, 497 (2004) (Scalia, J., dissenting).

causes of their detention would seem to indicate the authority of the above discussed cases.¹⁰¹ Furthermore, at least in the case of American citizens, a total denial of a forum in which to bring a habeas petition would raise constitutional concerns due to the potential of running afoul of the Suspension Clause.¹⁰² It may amount to an unconstitutional suspension of the writ of habeas corpus to hold that there is no forum available to citizens to challenge the causes for their detention.¹⁰³ The Court may have allowed jurisdiction in *Burns* and *Toth* to avoid this potential constitutional defect.

In 1971, the Court decided *Schlanger v. Seamans*, a case involving a military serviceman who contended that he was being illegally held in military service.¹⁰⁴ The petition was brought in the District of Arizona, where the petitioner was physically located, while the named respondent, the petitioner's ultimate commanding officer, was located in Georgia.¹⁰⁵ As the Court stated, the controlling question was whether "any custodian, or one in the chain of command, as well as the person detained, must be in the territorial jurisdiction of the District Court."¹⁰⁶ The Court dismissed the petition for lack of jurisdiction, relying on the authority of *Ahrens* to hold that the custodian, in this case the petitioner's commanding officer, must be in the territorial jurisdiction of the district court.¹⁰⁷

Schlanger is significant in that it appears to recognize a gloss on the immediate custodian rule that was only implicitly recognized in *Toth* and *Burns*.¹⁰⁸ In both *Toth* and *Burns*, the Court failed to discuss the fact that the named respondents, high-ranking military officials, were not the immediate custodians of the detainees.¹⁰⁹ Theoretically, the immediate custodian rule

¹⁰¹ See *supra* notes 89–95 and accompanying text.

¹⁰² See U.S. CONST. art. I, § 9, cl. 2 ("The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.").

¹⁰³ See *id.*

¹⁰⁴ *Schlanger v. Seamans*, 401 U.S. 487, 488 (1971).

¹⁰⁵ *Id.* at 488–89. The officer in Georgia was the commander of an Air Force Base located there. He was seeking to have the petitioner reassigned from a ROTC program at Arizona State University to his command. *Id.*

¹⁰⁶ *Id.* at 489.

¹⁰⁷ See *Schlanger*, 401 U.S. at 490–91. A lower court example of a somewhat similar fact pattern recurred during the first Persian Gulf War. In *Centa v. Stone*, a soldier stationed in Saudi Arabia, through a next friend, filed a habeas petition in the Northern District of Ohio, seeking to be released from military service. *Centa v. Stone*, 755 F. Supp. 197, 197–98 (N.D. Ohio 1991). The named respondents were Michael Stone, Secretary of the Army, and General H. Norman Schwarzkopf, commander of Operation Desert Storm. *Id.* at 198. The district court dismissed the petition for lack of jurisdiction, as none of the named respondents were within the jurisdiction of the Northern District of Ohio. *Id.* at 199.

¹⁰⁸ See *Schlanger*, 401 U.S. at 490–91; *supra* notes 89–95 and accompanying text.

¹⁰⁹ See *Burns*, 346 U.S. 137; *Toth*, 350 U.S. 11.

could have operated to dismiss the claims,¹¹⁰ but in those cases it did not.¹¹¹ The Court in *Toth* and *Burns* seems to have tacitly found jurisdiction in the district courts over the chain of command of the immediate custodian.¹¹² This exact principle was more explicitly explored in *Schlanger*, with the Court questioning “whether any custodian, or one in the chain of command, . . . must be in the territorial jurisdiction of the District Court.”¹¹³ It may be that this “chain of command” gloss only operates when the citizen petitioner is not within a judicial district, as in *Toth* and *Burns*, but it must be recalled that *Schlanger* was physically in Arizona.¹¹⁴

To modify the immediate custodian rule in such a way that a link in the chain of command would be proper to name as respondent would completely eviscerate the immediate custodian rule. The basis for the rule is that the grant of habeas jurisdiction contemplates that there is one proper respondent to name, but this would no longer be true should the chain of command be fair game as respondents.¹¹⁵ Nevertheless, the Court proceeded to interpret the immediate custodian rule strictly when the petitioners were within a U.S. judicial district and to ignore the rule when the petitioners were without a U.S. judicial district.¹¹⁶ This seeming conflict in the immediate custodian rule was propagated by the Court in the Enemy Combatant Cases of 2004.¹¹⁷

The Court further expanded the jurisdictional reach of the writ in *Braden v. 30th Judicial Circuit Court of Kentucky*.¹¹⁸ In *Braden*, the petitioner was confined on state felony charges in Alabama, with an unrelated detainer lodged against him by a Kentucky court.¹¹⁹ A habeas petition was brought in

¹¹⁰ See *supra* notes 53–57 and accompanying text.

¹¹¹ See *Burns*, 346 U.S. 137; *Toth*, 350 U.S. 11.

¹¹² See *Burns*, 346 U.S. 137; *Toth*, 350 U.S. 11.

¹¹³ *Schlanger*, 401 U.S. at 489.

¹¹⁴ See *Schlanger*, 401 U.S. at 488.

¹¹⁵ See *supra* notes 51–57 and accompanying text.

¹¹⁶ See *Rasul v. Bush*, 542 U.S. 466, 471 (2004); *Rumsfeld v. Padilla*, 542 U.S. 426 (2004). This principle was briefly acknowledged by a footnote in *Padilla*. *Padilla*, 542 U.S. at 447 n.16 (citing *Burns* 346 U.S. 137) (citing *Toth*, 350 U.S. 11) (“In such cases, we have allowed the petitioner to name as respondent a supervisory official and file the petition in the district where the respondent resides.”).

¹¹⁷ See *infra* Part III.

¹¹⁸ See *Braden v. 30th Jud. Cir. Ct. of Ky.*, 410 U.S. 484 (1973).

¹¹⁹ *Braden*, 410 U.S. at 485–87. The detainer was an indictment for “one count of storehouse breaking and one count of safecracking.” *Id.* at 486.

the Western District of Kentucky, seeking to free the petitioner of the non-physical “confinement” caused by the detainer.¹²⁰

The *Braden* Court first recognized that on its face § 2241 required nothing more than the district court having jurisdiction over the custodian.¹²¹ Next, the Court specifically addressed *Ahrens*’ holding that a habeas petitioner’s physical “presence within the territorial confines of the district is an invariable prerequisite to the exercise of the District Court’s habeas corpus jurisdiction.”¹²² Without explicitly overruling *Ahrens*, the Court reasoned that developments subsequent to that decision were reason enough to decline to follow it.¹²³ The developments subsequent to *Ahrens* that the Court rested its holding on were amendments to habeas statutes other than § 2241, the recognition of the right of American citizens located overseas to seek habeas relief, and a broadened definition of “custody” for habeas purposes.¹²⁴ The Court concluded that the petitioner should be permitted to bring his habeas petition in Kentucky, despite the fact that he was physically present in Alabama.¹²⁵

III. The Enemy Combatant Cases of 2004

A. *Rasul v. Bush*

The detainees in *Rasul* were a number of foreign citizens confined at the U.S. Naval Station at Guantanamo Bay, Cuba.¹²⁶ They were all captured during American military actions in Afghanistan and designated “enemy

¹²⁰ *Id.* at 487. A violation of the constitution right to a speedy trial was alleged, as the indictment was over three years old. *Id.* at 487. The petitioner claimed that the existence of the Kentucky indictment was impairing his ability to be paroled from Alabama custody. *Id.* at 487.

¹²¹ *Id.* at 495.

¹²² *Id.* at 495.

¹²³ *Id.* at 497. In dissent, then-Justice Rehnquist argued that the Court was in fact overruling *Ahrens*. *Id.* at 502 (Rehnquist, J., dissenting).

¹²⁴ *Id.* at 497–99.

¹²⁵ *Id.* at 500–01.

¹²⁶ *Rasul v. Bush*, 542 U.S. 466, 470 (2004). The detainees were twelve Kuwaiti nationals and two Australian nationals. *Id.* at 470–71. The named respondents were: the United States; George W. Bush, President of the United States; Donald Rumsfeld, Secretary of Defense; General Richard B. Meyers, Chairman of the Joint Chiefs of Staff; Brigadier General Rick Baccus, Commander of Joint Task Force-160; and Colonel Terry Carrico, Commandant of Camp X-Ray/Camp Delta. Petitioners’ Brief on the Merits at ii, *Rasul* 542 U.S. (No. 03-334), 2003 U.S. Briefs 334, ii, 2004 U.S. S. Ct. Briefs LEXIS 61, 1–2. General Baccus, Colonel Carrico, and their commands were physically located at U.S. Naval Station, Guantanamo Bay, Cuba. See Scott MacKay, *General: Detainees Handled Humanely Under My Watch*, PROVIDENCE J. (R.I.), Oct. 18, 2005, at A1; Bill Douthat, *Routine Doesn’t Change for Detainees at Camp X-Ray*, PALM PEACH POST (FLA.), Mar. 1, 2002, at A10.

combatants” by the military.¹²⁷ The station is not in the territorial jurisdiction of any federal judicial district.¹²⁸ By the terms of the 1903 treaty that permitted the establishment of the station, the United States would exercise “complete jurisdiction and control” over the forty-five square mile area, while the Republic of Cuba would retain “ultimate sovereignty.”¹²⁹ The detainees filed in the District Court for the District of Columbia various actions, which were construed by the court as petitions for writs of habeas corpus and dismissed for lack of jurisdiction.¹³⁰ The court of appeals affirmed the dismissal, relying directly on *Eisentrager*.¹³¹

The Supreme Court reversed, distinguishing the situation from the facts of *Eisentrager*.¹³² Writing for the Court, Justice Stevens read *Eisentrager* to be concerned solely with whether in the absence of a statutory basis for habeas jurisdiction there is some other, fundamental right to the writ.¹³³ The Court explained that in that case there was not such a fundamental right because of the nature of the detainees and their confinement.¹³⁴ The Court concluded its reasoning by stating that decisions subsequent to *Eisentrager*, most notably *Braden*, had altered § 2241 jurisdiction so that a district court could now properly hear a habeas petition when the custodian of the detainee was within the court’s territorial jurisdiction.¹³⁵

The Court next addressed arguments that § 2241 did not have extraterritorial effect. The Court first noted that by the terms of the 1903 lease agreement with Cuba, the United States exercises “complete jurisdiction and

¹²⁷ *Rasul*, 542 U.S. at 470–72.

¹²⁸ *Id.* at 490 (Scalia, J., dissenting); see U.S. Const art. III & art. IV, § 3, cl. 2. (establishing the judicial powers of the federal government in relating to the states and territories); 28 U.S.C. §§ 81–144 (2000) (establishing the federal judicial districts for the states, the District of Columbia, and Puerto Rico); 48 U.S.C. §§ 1424–24c, 1611–17 & 1821–26 (2000) (establishing federal judicial districts for Guam, the U.S. Virgin Islands, and the Northern Marianas Islands respectively); *Rasul*, 542 U.S. at 477–79; ADMIN. OFFICE OF THE U.S. COURTS, GEOGRAPHIC BOUNDARIES OF THE UNITED STATES COURTS OF APPEALS AND UNITED STATES DISTRICT COURTS, <http://www.uscourts.gov/images/CircuitMap.pdf> (last accessed Nov. 29, 2005) (setting out the geographic boundaries of the federal judicial districts).

¹²⁹ *Rasul*, 542 U.S. at 471.

¹³⁰ *Id.* at 471–72.

¹³¹ *Id.* at 472–73.

¹³² *Id.* at 478–79. Justice Stevens’ opinion for the Court was joined by Justices O’Connor, Souter, Ginsburg, and Breyer. *Id.* at 468 (reporter’s syllabus).

¹³³ *Id.* at 476–77. The Court explained that the *Eisentrager* Court found no statutory basis for jurisdiction, because the *Eisentrager* Court was relying on the holding of *Ahrens*. *Id.*

¹³⁴ *Id.* at 475–76.

¹³⁵ *Id.* at 478–79.

control” over the base at Guantanamo Bay.¹³⁶ The Court proceeded to rely on historical sources to note that at common law, habeas writs ran to English “exempt jurisdictions” where other writs did not run.¹³⁷ However, the Court concluded its reasoning by simply relying on *Braden* to restate that if a district court has jurisdiction over the custodian, then jurisdiction is proper.¹³⁸ Therefore, the Court concluded that the habeas petition should be heard on the merits by the district court.¹³⁹

While the Court found that the petitioners could proceed based on the custodian’s presence within the jurisdiction of the district court, the Court did not specify which of the named respondents the custodian was.¹⁴⁰ Three of the respondents were within the territorial jurisdiction of the District of Columbia: President Bush, Secretary of Defense Rumsfeld, and Chairman of the Joint Chiefs, General Meyers.¹⁴¹ The *Rasul* Court did not discuss the application of the immediate custodian rule at all.¹⁴² Assuming, however, that the immediate custodian rule continued to operate to provide that there was one and only one proper respondent,¹⁴³ *Rasul’s* failure to provide guidance on identifying the custodian is somewhat problematic. Based on the above assumption and on the high level in the chain of command of the named respondents within the district court’s territorial jurisdiction, it appears that the Court has extended to aliens the principle that citizens confined outside of a judicial district may always seek habeas relief in the District of Columbia.¹⁴⁴ Apparently, if a soldier imprisoned in Korea can name the Secretary of the Air Force as a habeas respondent, then a Kuwaiti national in Guantanamo Bay can name the President, Secretary of Defense, or Chairman of the Joint Chiefs of Staff.¹⁴⁵

The opinion of the Court is followed by a brief concurrence by Justice Kennedy in which he argues that while courts should defer to military

¹³⁶ *Id.* at 480–81.

¹³⁷ *Id.* at 481–82.

¹³⁸ *Id.* at 483–84. This conclusion does not rely at all on the reasoning that preceded it. *See id.* The Court seems to be saying that while the writ is capable of running on its own to Guantanamo, it is unnecessary to hold this because § 2241 confers jurisdiction. *See id.*

¹³⁹ *See id.* at 485. Subsequently, the District Court for the District of Columbia dismissed several habeas petitions filed by Guantanamo detainees, holding that they failed to state a claim upon which a writ of habeas corpus could be granted. *Khalid v. Bush*, 355 F. Supp. 2d 311 (D.D.C. 2005).

¹⁴⁰ *See Rasul*, 542 U.S. 466.

¹⁴¹ *See supra* note 121 and accompanying text.

¹⁴² *See Rasul*, 542 U.S. 466.

¹⁴³ *See supra* notes 51–51 and accompanying text.

¹⁴⁴ *See supra* notes 92–103 and accompanying text.

¹⁴⁵ *Compare United States ex rel. Toth v. Quarles*, 350 U.S. 11 (1955) with *Rasul*, 542 U.S. 466.

decisions, judicial oversight was warranted in this case due to the prolonged confinement.¹⁴⁶

In dissent, Justice Scalia argued that *Eisentrager* was controlling precedent that precluded jurisdiction.¹⁴⁷ Justice Scalia argued that *Braden* did not overrule *Ahrens* but merely distinguished it by creating a new class of detainees, those confined in one jurisdiction under the auspices of a judicial detainer issued from a second jurisdiction.¹⁴⁸ Furthermore, he argued that even if *Ahrens* had been overruled, *Eisentrager* was still good law, because it was decided based on constitutional principles rather than an interpretation of § 2241.¹⁴⁹ Justice Scalia also argued that the Court's analysis of the reach of the writ to areas of England such as Jersey and Guernsey was incorrect, arguing that these territories were historically considered fully parts of England.¹⁵⁰

B. Padilla v. Rumsfeld

In *Padilla v. Rumsfeld* the central issues were the application of the immediate custodian rule and the extent of the jurisdictional reach of a district court in habeas matters when the petitioner and custodian are physically present in a different judicial district within the United States. The petitioner, Jose Padilla, was an American citizen imprisoned in Charlestown, South Carolina.¹⁵¹ The named respondents were Secretary of Defense Donald H. Rumsfeld and Melanie A. Marr, Commander of the naval brig in which Padilla was detained.¹⁵² The habeas petition was filed in the Southern District of New York, where Padilla was formerly confined.¹⁵³ The district court

¹⁴⁶ *Rasul*, 542 U.S. at 487–88 (Kennedy, J., concurring). Apparently, Justice Kennedy would have habeas jurisdiction rest on the subjective judgment of the judiciary as to whether the executive has gone too far in exercising its power. *See id.* (Kennedy, J., concurring). Justice Kennedy was alone in his concurrence. *Id.* at 485 (Kennedy, J., concurring).

¹⁴⁷ *Rasul*, 542 U.S. at 488–89 (Scalia, J., dissenting). Justice Scalia was joined in his dissent by Chief Justice Rehnquist and Justice Thomas. *Id.* at 488 (Scalia, J., dissenting).

¹⁴⁸ *Id.* at 494 (Scalia, J., dissenting).

¹⁴⁹ *Id.* at 492–93 (Scalia, J., dissenting).

¹⁵⁰ *See Rasul*, 542 U.S. at 502–05 (Scalia, J., dissenting); *but see supra* notes 26–31 and accompanying text.

¹⁵¹ *Rumsfeld v. Padilla*, 542 U.S. 426, 430–32 (2004).

¹⁵² *Padilla*, 542 U.S. at 432. Secretary Rumsfeld's office is located in the Pentagon. OFFICE OF THE FED. REGISTER, NAT'L ARCHIVES AND RECORDS ADMIN., THE UNITED STATES GOVERNMENT MANUAL: 2005–2006 151 (2005). The Pentagon is located in the Eastern District of Virginia. *United States v. Capital Transit Co.*, 338 U.S. 286, 288 (1949) (stating that the Pentagon is in Virginia); *Saleh v. Titan Corp.*, 361 F. Supp. 2d 1152, 1166 (S.D. Cal. 2005) (finding that the Pentagon is located within the Eastern District of Virginia).

¹⁵³ *Padilla*, 542 U.S. at 430–31. Padilla was initially taken into custody in Chicago on May 8, 2002. *Id.* On June 9, 2002, Padilla was designated an enemy combatant by Presidential order and transported to Charleston. *Id.* at 431. Padilla's counsel filed a habeas corpus petition in the

dismissed the petition against Commander Marr due to the fact that she was outside of the territorial reach of the district court, but allowed the petition to be heard on the merits against Secretary Rumsfeld, by virtue of New York's long-arm statute.¹⁵⁴ The court of appeals agreed that the district court had jurisdiction to hear the case.¹⁵⁵

The Supreme Court, in an opinion delivered by Chief Justice Rehnquist, reversed the finding of jurisdiction, holding that the only individual who could properly be named as respondent was Commander Marr, who could not be reached by the Southern District of New York, because she was outside of its territorial jurisdiction and therefore unavailable for service of process.¹⁵⁶ The Court began its analysis by restating the principle that: "[T]here is generally only one proper respondent to a given prisoner's habeas petition. . . . This Custodian, moreover, is 'the person' with the ability to produce the prisoner's body before the habeas court."¹⁵⁷ The *Padilla* Court firmly reiterated the continued operation of the immediate custodian rule.¹⁵⁸ *Braden*, in which the petitioner was not in the physical custody of the named respondent, was distinguished on the basis that the named respondent was the Kentucky court that possessed a form of immediate legal custody over the petitioner.¹⁵⁹ The Court concluded that Secretary Rumsfeld could not be named as respondent, because Commander Marr was the one and only custodian under the immediate custody rule.¹⁶⁰

This reflexive and resolute application of the immediate custodian rule sharply contrasts with the total lack of attention paid to it in *Rasul*, a companion case decided on the same day.¹⁶¹

District Court for the Southern District of New York on June 11, 2002. *Id.* at 432. The factual record indicates that Padilla's counsel was fully aware of his client's whereabouts at the time that the petition was filed. *Id.* at 449 n.17 ("When counsel filed Padilla's habeas petition on June 11, she averred that 'Padilla is being held in segregation at the high-security Consolidated Naval Brig in Charleston, South Carolina.'").

¹⁵⁴ *Id.* at 432-33.

¹⁵⁵ *Id.* at 433.

¹⁵⁶ *Id.* at 441-43, 450-51. The Chief Justice's opinion for the Court was joined by Justices O'Connor, Scalia, Kennedy, and Thomas. *Id.* at 429 (reporter's syllabus). Justice Kennedy filed a concurrence joined by Justice O'Connor. *Id.* A dissent by Justice Stevens was joined by Justices Souter, Ginsburg, and Breyer. *Id.*

¹⁵⁷ *Id.* at 434-35.

¹⁵⁸ *Id.* at 435 ("[T]he proper respondent is the warden of the facility where the prisoner is being held, not the Attorney General or some other remote supervisory official.").

¹⁵⁹ *Id.* at 437.

¹⁶⁰ *Id.* at 442.

¹⁶¹ Compare *id.* with *Rasul v. Bush*, 542 U.S. 466 (2004)

Next, the Court held that the Southern District of New York was incapable of reaching Commander Marr due to her physical presence in South Carolina.¹⁶² The basis for this holding was the “within their respective jurisdictions” language in the habeas statute.¹⁶³ The Court concluded that anything less than a narrow construction of this language would result in such evils as forum shopping and inconvenience, expense, and embarrassment to respondents named for jurisdictional purposes only.¹⁶⁴ In a footnote, the Court recognized an exception to this principle for citizens confined overseas and thus having no immediate custodian within a judicial district.¹⁶⁵ As the Court stated: “In such cases, we have allowed the petitioner to name as respondent a supervisory official and file the petition in the district where the respondent resides.”¹⁶⁶

The Court dismissed the habeas petition, because the Southern District of New York did not have jurisdiction over Commander Marr, the one proper respondent to be named.¹⁶⁷

¹⁶² *Padilla*, 542 U.S. at 446–47.

¹⁶³ *Id.*

¹⁶⁴ *Id.* at 446–47.

¹⁶⁵ *Id.* at 447 n.16.

¹⁶⁶ *Id.* at 447 n.16. This principle was surely what was relied on to escape the immediate custodian rule in *Rasul*. See *Rasul*, 542 U.S. 466. However, it must be noted that the *Rasul* petitioners were not American citizens. *Id.* at 470. There is no discussion in *Rasul* of the fact that this exception to the immediate custodian rule was apparently expanded to include aliens within its ambit. See *Rasul*, 542 U.S. 466. Also, in operation this exception functions slightly differently than the Court describes it, specifically in regards to the filing of the petition where the respondent resides. The cases where this exception has been applied are universally filed in the District of Columbia. See *United States ex rel. Toth v. Quarles*, 350 U.S. 11 (1955); *Burns v. Wilson*, 346 U.S. 137 (1953). The respondents named in these cases, however, were military service secretaries with their offices in the Pentagon, *Toth*, 350 U.S. 11; *Burns*, 346 U.S. 137, which is physically located within the Eastern District of Virginia. *United States v. Capital Transit Co.*, 338 U.S. 286, 288 (1949) (stating that the Pentagon is in Virginia); *Saleh v. Titan Corp.*, 361 F. Supp. 2d 1152, 1166 (S.D. Cal. 2005) (finding that the Pentagon is located within the Eastern District of Virginia). Perhaps a more accurate statement of this exception to the immediate custody rule would provide that in cases where an individual is imprisoned outside of a judicial district they are permitted to name as respondent a supervisory official and file the petition in the District of Columbia. Note that this aside is concerned only with which respondent should be named, rather than the availability of habeas review in the first place, which was the central issue in *Rasul*. See *Rasul*, 542 U.S. at 470 (“These two cases present the narrow but important question whether United States courts lack jurisdiction to consider challenges to the legality of the detention of foreign nationals captured abroad in connection with hostilities and incarcerated at the Guantanamo Bay Naval Base, Cuba.”).

¹⁶⁷ See *Padilla*, 542 U.S. at 449–51.

C. Hamdi v. Rumsfeld

The last of the three companion Enemy Combatant Cases, *Hamdi v. Rumsfeld*, refreshingly presents everything done correctly from the jurisdictional standpoint.¹⁶⁸ The petitioner, Yaser Esam Hamdi, was an American citizen imprisoned at the U.S. Naval Brig in Norfolk, Virginia.¹⁶⁹ The named respondents were Secretary of Defense Donald H. Rumsfeld and Commander W. R. Paulette, commanding officer of the brig.¹⁷⁰ The habeas petition was brought in the District Court for the Eastern District of Virginia.¹⁷¹ Both the petitioner and his immediate custodian, who was named as a respondent, were within the territorial jurisdiction of the district court, thus satisfying the immediate custodian rule.¹⁷² There was no jurisdictional issue in the case, and the Supreme Court considered the case fully upon its merits.¹⁷³

IV. Redefining the Jurisdictional Requirements of the Writ

A. Potential Problems

In the wake of the Enemy Combatant Cases, there are several glaring questions remaining regarding the nature of habeas corpus jurisdiction. Justice

¹⁶⁸ See *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004).

¹⁶⁹ *Hamdi*, 542 U.S. at 510.

¹⁷⁰ *Hamdi v. Rumsfeld*, 316 F.3d 450 (4th Cir. 2003); Tim McGlone, *Defender Wants Meeting with Locally Held Taliban*, VIRGINIAN-PILOT (Norfolk, Va.), May 23, 2002, at A1.

¹⁷¹ *Hamdi*, 542 U.S. at 511.

¹⁷² *United States v. Capital Transit Co.*, 338 U.S. 286, 288 (1949) (stating that the Pentagon is in Virginia); *Saleh v. Titan Corp.*, 361 F. Supp. 2d 1152, 1166 (S.D. Cal. 2005) (finding that the Pentagon is located within the Eastern District of Virginia); see U.S. Const. art. III & art. IV, § 3, cl. 2. (establishing the judicial powers of the federal government in relating to the states and territories); 28 U.S.C. §§ 81–144 (2000) (establishing the federal judicial districts for the states, the District of Columbia, and Puerto Rico); ADMIN. OFFICE OF THE U.S. COURTS, GEOGRAPHIC BOUNDARIES OF THE UNITED STATES COURTS OF APPEALS AND UNITED STATES DISTRICT COURTS, <http://www.uscourts.gov/images/CircuitMap.pdf> (last accessed Nov. 29, 2005) (setting out the geographic boundaries of federal courts).

¹⁷³ *Hamdi*, 542 U.S. at 525 (“[I]t is undisputed that Hamdi was properly before an Article III court to challenge his detention . . .”). While habeas jurisdiction was not an issue in *Hamdi*, the case is significant in its holding that enemy combatants detained by the military in furtherance of the war against terror are entitled to due process protections, specifically “notice of the factual basis for the classification, and a fair opportunity to rebut the Government’s factual assertions . . .” *Id.* at 533. Hamdi himself was later released by the military and returned to Saudi Arabia, after being imprisoned for almost three years without being charged with a crime. Joel Brinkley & Eric Lichtblau, *U.S. Releases Saudi-American It Had Captured in Afghanistan*, N.Y. TIMES, Oct. 12, 2004, at A15.

Scalia raised the specter of potential problems in his dissent in *Rasul*.¹⁷⁴ The holding of *Rasul* can very plausibly be read to extend the jurisdictional grant of § 2241 to allow a habeas petition to be brought by any individual held by executive action anywhere in the world in any circumstance, as long as a district court has territorial jurisdiction over some part of the custodian's chain of command.¹⁷⁵ This would theoretically grant every single prisoner of war taken into custody by American military forces the ability to challenge their detention in an American court.¹⁷⁶

Such a sweeping grant of jurisdiction would have the potential to cripple the ability of a battlefield commander to deal effectively with surrendered enemy soldiers, as he would need to be mindful of potential challenges brought to their detention in a federal courthouse half a world away.¹⁷⁷ This potential problem may also have the indirect effect of inducing American military forces to develop an attitude of reluctance to take prisoners in the first place.¹⁷⁸

There is very little in the text of § 2241 that would prevent this outcome, especially when the phrase "within their respective jurisdictions" is construed to require jurisdiction only over the custodian.¹⁷⁹ Furthermore, little imagination is required to conceive of a situation in which this actual problem arises. Suppose, for example, that American forces arrest an Iraqi insurgent

¹⁷⁴ *Rasul v. Bush*, 542 U.S. 466, 506 (2004) (Scalia, J., dissenting). Justice Scalia may have been overly alarmist when he stated that "under today's strange holding Guantanamo Bay detainees can petition in any of the 94 federal judicial districts." *Id.* (Scalia, J., dissenting).

¹⁷⁵ *Rasul*, 542 U.S. at 483 ("No party questions the District Court's jurisdiction over petitioners' custodians. Section 2241, by its terms, requires nothing more.") (citation omitted).

¹⁷⁶ *See Rasul*, 542 U.S. at 497-98 (Scalia, J., dissenting). Justice Scalia noted: "Over the course of the last century, the United States has held millions of alien prisoners abroad." *Id.* at 498 (Scalia, J., dissenting) (citation omitted).

¹⁷⁷ *See Rasul*, 542 U.S. at 497 (Scalia, J., dissenting). As Justice Scalia stated: "[F]ederal courts will entertain petitions from these prisoners, and others like them around the world, challenging actions and events far away, and forcing the courts to oversee one aspect of the Executive's conduct of a foreign war." *Id.* at 499 (Scalia, J., dissenting).

¹⁷⁸ In the opinion of this author, such an attitude is rather undesirable from a policy standpoint. Also, such a policy would run afoul of the Geneva Convention concerning prisoners of war, a treaty to which the United States is a party. *See Geneva Convention Relative to the Treatment of Prisoners of War*, August 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Geneva Convention]; *see generally* Yoram Dinstein, *Prisoners of War*, in III MAX PLANCK INST. FOR COMPARATIVE PUB. LAW AND INT'L LAW, ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 1109, 1109 (Rudolf Bernhardt, ed., 1997). The Geneva Convention arguably requires that at the very least signatories cease hostilities against surrendering enemy soldiers. *See Geneva Convention*, *supra*, art. 3; *see generally* Dinstein, *supra*, at 1109. Such surrendering parties, if captured, will likely be entitled to the benefits of prisoner of war status. *See Geneva Convention*, *supra*, art. 4; *see generally* Dinstein, *supra*, at 1109.

¹⁷⁹ 28 U.S.C. § 2241 (2000); *see supra* note 175.

fighter in Baghdad and confine him there.¹⁸⁰ Theoretically, the captured insurgent could, through a next friend, file a habeas petition in the District of Columbia seeking to challenge the legitimacy of his detention, naming as respondent an individual within the territorial jurisdiction of that district court, such as Secretary of the Army, the Army Chief of Staff, or another element of the chain of command of the actual custodian soldier in Baghdad.¹⁸¹ It could be argued under the authority of *Rasul* that if the district court has jurisdiction over the custodians, then “section 2241, by its terms, requires nothing more.”¹⁸² Because the right to have a habeas petition heard arises statutorily under § 2241, the insurgent’s lack of a constitutional right to habeas, as established by *Eisentrager*, is irrelevant.¹⁸³ Therefore, any insurgent captured by American forces in Iraq with genuine or contrived complaints regarding the lawfulness of his detention would be able to challenge that detention in the District of Columbia.¹⁸⁴

A more satisfactory state of affairs might be reached if “habeas corpus” is more explicitly defined to account for the opinions of the Court and the anomaly created by the unique way in which the United States came into possession of the Naval Station at Guantanamo Bay.¹⁸⁵ The following sections outline how the nightmare scenarios suggested by Justice Scalia may be avoided through action by the judiciary, the legislature, or the executive.

B. Judicial Redefinition

The language of § 2241 offers very few terms that can be narrowly redefined in order to prevent the undesirable results discussed above.¹⁸⁶ This is especially true given the broad interpretation of the “in their respective

¹⁸⁰ See Ian Fisher, *2 More Hostages Seized, but Progress Reported in Talks for Release of 7 Others*, N.Y. TIMES, Aug. 1, 2004, § 1, at 10 (reporting the arrest by American troops of the top aide to an Iraqi rebel leader).

¹⁸¹ See *Schlanger v. Seamans*, 401 U.S. 487, 489 (1971) (“The question in the instant case is whether any custodian, or one in the chain of command, as well as the person detained, must be in the territorial jurisdiction of the District Court.”); *supra* note 177. The chain of command exception to the immediate custodian rule would presumably apply to the aliens confined outside of a judicial district in this hypothetical, as it was apparently applied to the Guantanamo detainees in *Rasul*. See *supra* notes 136–39 and accompanying text.

¹⁸² *Rasul*, 542 U.S. at 483.

¹⁸³ See *id.* (“No party questions the District Court’s jurisdiction over petitioner’s custodians. Section 2241, by its terms, requires nothing more.”) (citation omitted).

¹⁸⁴ See *supra* note 161.

¹⁸⁵ See *Rasul*, 542 U.S. at 480–82; *supra* notes 126–131 and accompanying text.

¹⁸⁶ See 28 U.S.C. § 2241 (2000) (“Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions.”).

jurisdictions language” in *Braden* and *Rasul*.¹⁸⁷ Surprisingly, one of the terms that presents itself most readily to a narrow construction is “habeas corpus” itself.¹⁸⁸ A judicial construction of the term “habeas corpus” that wraps its jurisdictional reach up in its definition has the potential to preserve the writ as a bulwark against arbitrary executive detention while avoiding the extension of judicial oversight into areas that are more properly the sole domain of the Executive, such as the conduct of wars.¹⁸⁹

Blackstone defined the writ as one that “run[s] into all parts of the king’s dominions: for the king is at all times intitled to have an account, why the liberty of any of his subjects is restrained, wherever that restraint may be inflicted.”¹⁹⁰ This description of habeas jurisdiction is still viable and consistent with *Eisentrager*, *Braden*, *Rasul*, and *Padilla*.¹⁹¹ When the terms “king,” “dominions,” and “subjects” are defined in twenty-first century American terms, however, a jurisdictional reach emerges that yields the same result as in *Rasul*, but prevents a torrent of habeas petitions brought by prisoners of war and other such situations.¹⁹²

The word “king” indicates the ultimate sovereign, and may straightforwardly be read to mean the United States government, through which the people exercise their sovereignty.¹⁹³ Within the Blackstone quote the second usage of “king” may more narrowly be read as to refer to the judiciary of the United States, as that is the branch of government compelling and reviewing the accounting of the bases for the subject restraint.¹⁹⁴

The word “dominions” can be read to mean territory over which the United States exercises complete jurisdiction and control. This would include the territory of every state and non-state district, territory, and possession.¹⁹⁵

¹⁸⁷ See *Rasul*, 542 U.S. at 483–85; *Braden v. 30th Jud. Cir. Ct. of Ky.*, 410 U.S. 484, 499–500 (1973).

¹⁸⁸ See 28 U.S.C. § 2241.

¹⁸⁹ See *Rasul*, 542 U.S. at 499 (Scalia, J., dissenting).

¹⁹⁰ 3 BLACKSTONE, *supra* note 17, at *131.

¹⁹¹ See *Rasul*, 542 U.S. 466; *Rumsfeld v. Padilla*, 542 U.S. 426 (2004); *Braden*, 410 U.S. 484; *Johnson v. Eisentrager*, 339 U.S. 763 (1950).

¹⁹² See *supra* Part III.a.

¹⁹³ See U.S. CONST. pmbl (“We the people of the United States, in order to form a more perfect union . . . do ordain and establish this Constitution of the United States of America.”).

¹⁹⁴ *Peyton v. Rowe*, 391 U.S. 54, 58 (1968) (“The writ of habeas corpus is a procedural device for subjecting executive, judicial, or private restraints on liberty to judicial scrutiny.”) (footnotes omitted).

¹⁹⁵ See U.S. CONST. art. III & art. IV, § 3, cl. 2. (establishing the judicial powers of the federal government in relating to the states and territories); 28 U.S.C. §§ 81–144 (2000) (establishing the federal judicial districts for the states, the District of Columbia, and Puerto Rico); 48 U.S.C. §§ 1424–24c, 1611–17 & 1821–26 (2000) (establishing federal judicial districts for Guam, the U.S.

This definition would also cover the U.S. Naval Station at Guantanamo Bay, as by the terms of the 1903 Treaty with Cuba, the United States exercises “complete jurisdiction and control” over the base.¹⁹⁶

The Guantanamo Bay base was one of the first American overseas military bases, and its method of creation is considered archaic.¹⁹⁷ Today, when the United States establishes a military base abroad, the agreement with the host country takes the form of a lease, granting only a right to use a certain territory for a specific purpose.¹⁹⁸ This is not a transfer of jurisdiction and control over the territory of the military installation, but rather a mere right of use.¹⁹⁹ The laws of the host country would govern American servicemen abroad at these bases, were it not for treaties signed between the United States and the host country.²⁰⁰ These treaties, typically called “Status of Forces” agreements, provide that military personnel stationed abroad are generally subject to the criminal and disciplinary jurisdiction of the sending state rather than the host state.²⁰¹ The treaty, by its terms, only applies to members of the armed services of the sending state, civilian personnel of the sending state accompanying the military component, and the accompanying spouses and children of the same.²⁰²

The key difference in the Guantanamo approach versus the modern approach is that in the former, the United States is exercising jurisdiction over territory, whereas in the latter the United States is exercising jurisdiction over people.²⁰³ Therefore, any person at a modernly established American military

Virgin Islands, and the Northern Marianas Islands respectively); ADMIN. OFFICE OF THE U.S. COURTS, GEOGRAPHIC BOUNDARIES OF THE UNITED STATES COURTS OF APPEALS AND UNITED STATES DISTRICT COURTS, <http://www.uscourts.gov/images/CircuitMap.pdf> (last accessed Nov. 29, 2005) (setting out the geographic scope of judicial power specifically). Congress is given plenary power and sovereignty over non-state territories by the constitution. U.S. CONST. art. IV, § 3, cl. 2. Some of these territories are provided with their own judicial districts. 48 U.S.C. §§ 1424–24c, 1611–17 & 1821–26.

¹⁹⁶ Agreement between the United States and Cuba for the Lease of Lands for Coaling and Naval Stations art. III, U.S.-Cuba, Feb. 23, 1903, T.S. No. 418 [hereinafter Lease of Lands].

¹⁹⁷ See Gerald L. Newman, *Closing the Guantanamo Loophole*, 50 LOY. L. REV. 1, 36 (2004) (“The highly unusual character of U.S. rights at Guantanamo results from the base’s origins in the period of colonialism, when such arrangements were more common.”).

¹⁹⁸ See Helmut Rumpf, *Military Bases on Foreign Territory*, in III MAX PLANCK INST. FOR COMPARATIVE PUB. LAW AND INT’L LAW, ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 381, 384–85 (Rudolf Bernhardt, ed., 1997).

¹⁹⁹ See *id.*

²⁰⁰ See, e.g., Agreement between the Parties to North Atlantic Treaty Regarding the Status of Their Forces, June 19, 1951, 4 U.S.T. 1792, 199 U.N.T.S. 67 [hereinafter NATO SOFA].

²⁰¹ See NATO SOFA, *supra* note 200, art. VII.

²⁰² See NATO SOFA, *supra* note 200, arts. I & VII.

²⁰³ Compare Lease of Lands, *supra* note 196, art. III, with NATO SOFA, *supra* note 200, art. VII.

installation overseas who is not covered by the Status of Forces agreement is not subject to its terms.²⁰⁴ The laws of the United States, notably § 2241, would have no application to a person so situated, as the United States explicitly does not have complete jurisdiction and control.²⁰⁵ A non-American citizen confined at a modernly formulated American base abroad would not have any right to avail themselves of a habeas petition in any American court.²⁰⁶ Of course, the laws of the host country would apply, so this same individual would be free to exercise whatever legal mechanisms exist in the host country for the review of the lawfulness of detentions.²⁰⁷

Recast in modern terms, Blackstone's use of the word "dominions" would include areas such as Guantanamo Bay, where the United States has complete jurisdiction and control, but exclude these newer bases.²⁰⁸

There is ambiguity when the term "subjects" is recast in twenty-first century terms. It would be natural to equate "subjects" with "citizens," but then *Rasul's* finding of jurisdiction over non-citizen writ petitions is difficult to reconcile.²⁰⁹

It may be best to give "subjects" the admittedly circular definition of "persons within areas under the complete control and jurisdiction of the United States."²¹⁰ This definition would include the detainees in *Rasul* and exclude the detainees in *Eisentrager*.²¹¹ It would also notably exclude any individuals confined in locations where American troops are operating, but where the American government lacks complete jurisdiction and control, such as Iraq.²¹²

Because Blackstone could not have written to take account of the Suspension Clause of the U.S. Constitution, a minor tweaking of his words is necessary to do that.²¹³ Interestingly, Blackstone's definition applies perfectly to citizens if it is excised of its first clause, so as to read: "[T]he king is at all times intitled to have an account, why the liberty of any of his subjects is

²⁰⁴ See NATO SOFA, *supra* note 200.

²⁰⁵ See NATO SOFA, *supra* note 200, arts. I & VII.

²⁰⁶ See *Johnson v. Eisentrager*, 339 U.S. 763, 768 (1950) ("Nothing in the text of the Constitution extends such a right . . .").

²⁰⁷ See NATO SOFA, *supra* note 200.

²⁰⁸ See *supra* notes 195–207 and accompanying text.

²⁰⁹ See *Rasul v. Bush*, 542 U.S. 466 (2004).

²¹⁰ See *supra* note 189 and accompanying text.

²¹¹ See *Rasul*, 542 U.S. 466; *Eisentrager*, 339 U.S. 763.

²¹² See Bradley Graham & Peter Baker, *Deadline for Troop Withdrawal Ruled Out*, WASH. POST, Jan. 30, 2005, at A1 (reporting on the continued presence of American troops in Iraq for the foreseeable future).

²¹³ See U.S. CONST. art. I, § 9, cl. 2.

restrained, wherever that restraint may be inflicted.”²¹⁴ If “king” is replaced with “federal judiciary” and “subject” is replaced with “citizen,” then that statement rather accurately describes the modern reach of the writ for citizens.²¹⁵ It appears that American citizens always have a right to challenge the causes for their detention by way of a writ of habeas corpus in a federal court, no matter where in the world they might be confined.²¹⁶

For aliens, a workable, modernized definition of the writ of habeas corpus would read: “[A] writ running into all areas that the United States exercises complete jurisdiction and control over: for the judiciary is at all times entitled to have an account, why the liberty of any individual with an area under the complete jurisdiction and control of the United States is restrained, wherever that restraint may be inflicted.”²¹⁷

If the words “habeas corpus” themselves are defined as suggested above and the new definition is read into § 2241, then the jurisdictional scope of § 2241 is immediately narrowed to areas over which the United States exercises complete jurisdiction and control.²¹⁸ Simply put, when defined in this fashion, habeas corpus is unavailable to an individual outside of areas under the complete jurisdiction and control of the United States government.²¹⁹ This definition would allow the writ to continue to operate to provide a check on arbitrary executive detention for all citizens and all aliens within areas under firm American control, while avoiding nightmare scenarios where every POW files a petition.

C. Potential Legislative Enactments

Habeas review of confined enemy combatants can be sharply curtailed through a Congressional amendment to the text of § 2241.²²⁰ Though potentially difficult to obtain, Congressional support for amendment would create myriad possibilities for altering the extraterritorial reach of habeas writs.

²¹⁴ 3 BLACKSTONE, *supra* note 17, at *131.

²¹⁵ See *United States ex rel. Toth v. Quarles*, 350 U.S. 11 (1955); *Burns v. Wilson*, 346 U.S. 137 (1953).

²¹⁶ See *Toth*, 350 U.S. 11; *Burns*, 346 U.S. 137.

²¹⁷ See 3 BLACKSTONE, *supra* note 17, at *131; *supra* notes 186–207 and accompanying text.

²¹⁸ See 28 U.S.C. § 2241 (2000); *supra* notes 186–217 and accompanying text.

²¹⁹ See *supra* text accompanying notes 210–12.

²²⁰ See U.S. CONST. art. I, § 1 (“All legislative Powers herein granted shall be vested in a Congress of the United States . . .”).

The jurisdictional grant of § 2241 reads: “Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions.”²²¹ *Ahrens* could be codified by altering the text to read: “Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions, provided the petitioner is physically located within the territorial jurisdiction of that court.”²²² This may, however, lead to an unconstitutional suspension of the writ, as American citizens situated like the petitioners in *Toth* and *Quarles* would have no forum to seek habeas review.²²³ To cure this possible constitutional defect, an additional section may be added to the statute reading: “The District Court for the District of Columbia may grant writs of habeas corpus when the place of confinement of a citizen is not within any other judicial district.”

Alternately, § 2241 could be amended to read: “Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. The writ of habeas corpus shall not extend to an alien unless he is confined within the territorial jurisdiction of a district court.” This would codify *Eisentrager*, while taking into account the holding of *Braden*.²²⁴ The holding of *Braden* would still be viable, because the limiting language only applies to aliens confined abroad.²²⁵ The emerging classes of habeas petitioners contemplated by *Braden* are still entitled to file habeas petitions wherever it is most convenient, which may not be the same district in which the petitioner is confined.²²⁶ Also, the wording of this proposed amendment to the statute would not prevent aliens confined within a judicial district from filing a habeas petition in a district other than the one of their confinement, if the proper respondent to name is located elsewhere.²²⁷ American citizens would have the right to a habeas petition wherever they may be confined, so that the amendment would not have any effect on individuals such as the *Toth* and *Burns* petitioners.²²⁸ The limiting language of “aliens” protects without

²²¹ 28 U.S.C. § 2241(a) (2000).

²²² See *Ahrens v. Clark*, 335 U.S. 188 (1948).

²²³ See *United States ex rel. Toth v. Quarles*, 350 U.S. 11 (1955); *Burns v. Wilson*, 346 U.S. 137 (1953).

²²⁴ See *Braden v. 30th Jud. Cir. Ct. of Ky.*, 410 U.S. 484 (1973); *Johnson v. Eisentrager*, 339 U.S. 763 (1950).

²²⁵ See *supra* notes 121–125 and accompanying text.

²²⁶ See *Braden*, 410 U.S. 484.

²²⁷ See *supra* notes 121–25 and accompanying text.

²²⁸ See *Toth*, 350 U.S. at 11; *Burns*, 346 U.S. 137.

alteration the habeas rights of citizens. Constitutional concerns would be avoided.²²⁹

The Guantanamo detainees would be excluded from seeking habeas review under this statute, because the base is not within the territorial jurisdiction of any district court and because the detainees are not citizens.²³⁰ There is no constitutional concern, as *Eisentrager's* holding that aliens confined abroad have no constitutional right to habeas relief has not been overruled.²³¹

Finally, § 2241 may be amended to read: “Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions whenever a person is confined in an area under the complete control and jurisdiction of the United States.” This would codify the holding of *Rasul*.²³² The Guantanamo detainees would have the right to challenge their confinement, but most of the alarmist scenarios would be precluded.²³³ Again, constitutional concerns for citizens could be remedied with the additional language discussed above.²³⁴

D. Executive Avoidance

In order for the executive to avoid judicial review of his actions with regard to enemy combatants, he must move the detainees to a place where the United States exerts enough control that the local government is either incapable or unwilling to review the actions of the United States, but not so much control as to bring the detainees within the jurisdictional grant of § 2241 as interpreted above in Part IV.b.

Such a location may be created by treaty with a foreign state. In this model, a nation in which the United States already has a base established would agree by treaty that their own laws have no effect and application to persons declared “enemy combatants” by the United States and confined by U.S. forces within the base.²³⁵ These so-defined individuals would not be protected by the laws of the United States, due to their exclusion from the

²²⁹ See *supra* notes 221–23 and accompanying text.

²³⁰ See *Rasul v. Bush*, 542 U.S. 466 (2004).

²³¹ See *Johnson v. Eisentrager*, 339 U.S. 763, 768 (1950).

²³² See *Rasul*, 542 U.S. 466.

²³³ See *supra* Part IV.a.

²³⁴ See *supra* notes 213–16 and accompanying text.

²³⁵ This is the designation that the United States has assigned the individuals confined at Guantanamo Bay. John Daniszewski, *British Inmates at Guantanamo to Be Released*, L.A. TIMES, Jan. 12, 2005, at A3.

Status of Forces Agreement, and would have no legal recourse in the host country by the terms of the above described treaty.²³⁶ These individuals would have no legal recourse to challenge their confinement and no legal rights of any kind because of the treaty.²³⁷

Similarly, the United States could confine individuals in a host country where the legal system does not provide for inquiry into the causes of detention in the first place.²³⁸ However, such a country would most likely be a despotic regime such as antebellum Iraq.²³⁹ Presupposing that the United States is on favorable enough diplomatic terms to establish a base in such a country, the problem is the potential for a huge public relations nightmare. It might appear unseemly for the United States to take advantage of an environment in foreign countries that is conducive to human rights abuses.²⁴⁰ Notably, there are unsubstantiated accounts that actions similar to the above described may already be taking place.²⁴¹

Another proposal to effectuate confinement beyond judicial review is to detain individuals in a country without a functioning government. An example of this would be Iraq between the abdication of Saddam Hussein and the establishment of its new government.²⁴² Conventional international law

²³⁶ See *supra* notes 197–207 and accompanying text.

²³⁷ See *supra* notes 197–207 and accompanying text.

²³⁸ The writ of habeas corpus is only present in legal systems that have descended from that of England. See *Johnson v. Eisentrager*, 339 U.S. 763, 779 (1950).

²³⁹ Iraq under the regime of Saddam Hussein was noted for its human rights abuses. See Karen DeYoung, *Bush Urges U.N. to Stand Up to Hussein, Or U.S. Will Act*, WASH. POST, Sept. 15, 2002, at A3.

²⁴⁰ Furthermore, such actions would seem to run counter to stated American policy, as recently articulated in President Bush's inaugural address. President George W. Bush, Inaugural Address, 41 WEEKLY COMP. PRES. DOC. 74, 74 (Jan. 20, 2005) ("We will persistently clarify the choice before every ruler and every nation: The moral choice between oppression, which is always wrong, and freedom, which is eternally right.").

²⁴¹ Megan K. Stack & Bob Drogin, *Detainee Says U.S. Handed Him Over for Torture*, L.A. TIMES, Jan. 13, 2005, at A1. At least one former Guantanamo detainee, an Australian national since repatriated, claims that he was confined by American and Pakistani officials in Pakistan for three months before being handed over by the Americans to Egyptian authorities. *Id.* He further claims that he was repeatedly tortured by his Egyptian captors for six months before being relocated to Guantanamo. *Id.* Between the submission of this article and press time, media sources have revealed that secret facilities of the type described above actually exist. See Dana Priest, *CIA Holds Terror Suspects in Secret Prisons; Debate Is Growing Within Agency About Legality and Morality of Overseas System Set Up After 9/11*, WASH. POST, Nov. 2, 2005, at A1.

²⁴² The Iraqi Transitional Government assumed power on June 28, 2004. The Iraqi Transitional Government, Path to Democracy, http://www.iraqigovernment.org/index_en.htm (then follow "Path to Democracy" hyperlink under "NEWS & INFO") (last visited Nov. 30, 2005). A constitution for the Republic of Iraq was ratified through a popular referendum held on October 15, 2005. Independent Electoral Commission of Iraq, Welcome!, http://www.ieciraq.org/English/Frameset_english.htm (last visited Nov. 30, 2005). Iraqi voters

provides that when military forces are “in belligerent occupation of territory,” then they are governed only by the laws of war.²⁴³ If American forces can be considered in “belligerent occupation of territory,” and a persuasive argument can be made that it currently is in Iraq,²⁴⁴ then the only limitation on the actions of our forces are the laws of war, which provide scant protections for unlawful combatants.²⁴⁵ Furthermore, enforcement of the laws of war is weak at best.²⁴⁶ Opportunities to find and exploit such extra-governmental territory are, however, rare.

V. Conclusion

The writ of habeas corpus has enjoyed a long and storied path through the long arc of Anglo-American legal history.²⁴⁷ While the writ continues to serve a critical role in the prevention of arbitrary executive detentions, it stands at a critical juncture. There is a possibility that the ambit of the writ may be expanded in such a way that critical executive functions, long considered beyond the review of the judiciary, will be crippled by litigation, or at least the fear of such.

But all is not so bleak. A judicial recognition of the above proposed jurisdictional limits on the writ would have the effect of retaining the most important features of habeas review, while giving the executive the freedom to “preserve, protect and defend the Constitution of the United States.”²⁴⁸ The cold reality is that there are situations and circumstances that call for executive action to be significantly more expedient than is possible with judicial oversight. The critical balance is to provide for this freedom of action while still maintaining a judicial check against arbitrary actions.

will elect a Council of Representatives on December 15, 2005. Independent Electoral Commission of Iraq, Welcome!, http://www.ieciraq.org/English/Frameset_english.htm (last visited Nov. 30, 2005).

²⁴³ Derek W. Bowett, *Military Forces Abroad*, in III MAX PLANCK INST. FOR COMPARATIVE PUB. LAW AND INT’L LAW, ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 388, 388 (Rudolf Bernhardt, ed., 1997).

²⁴⁴ See Erik Eckholm, *Sunni Group Says It Killed Cleric’s Aide In Bombing*, N.Y. TIMES, Jan. 15, 2005, at A6 (reporting on continuing violence against American military personnel in Iraq).

²⁴⁵ See Dinstein, *supra* note 178, at 1109; see also Alfred-Maurice De Zayas, *Combatants*, in I MAX PLANCK INST. FOR COMPARATIVE PUB. LAW AND INT’L LAW, ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 668, 668–69 (Rudolf Bernhardt, ed. 1992).

²⁴⁶ See G.I.A.D. Draper, *War, Laws of, Enforcement*, in IV MAX PLANCK INST. FOR COMPARATIVE PUB. LAW AND INT’L LAW, ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 1381, 1381–82 (Rudolf Bernhardt, ed. 2000).

²⁴⁷ See *supra* Part II.

²⁴⁸ U.S. CONST., art. II, § 1, cl. 7.

By explicitly redefining the jurisdictional sweep of the writ so that it is only available to those confined within areas under the complete jurisdiction and control of the United States, the proper balance is reached, providing safeguards against arbitrary executive detention while maintaining executive freedom to prosecute wars.²⁴⁹

Alternately, legislative amendment to § 2241 may provide this same executive freedom.²⁵⁰ Even in the face of broad judicial construction of the habeas statute, there are still methods by which the executive may evade its sweep.²⁵¹

Even with the extraterritorial reach of habeas corpus jurisdiction altered by the Enemy Combatant Cases of 2004, it is still entirely possible for the executive to aggressively pursue its policy of countering terrorism around the globe.

²⁴⁹ See *supra* notes 210–16 and accompanying text.

²⁵⁰ See *supra* section IV.c.

²⁵¹ See *supra* section IV.d.

DON'T TREAD ON ME: ABSENCE OF JURISDICTION BY THE INTERNATIONAL CRIMINAL COURT OVER THE U.S. AND OTHER NON-SIGNATORY STATES

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I. Introduction

On July 1, 2002, the International Criminal Court (“ICC”) entered into force, promising to “guarantee lasting respect for . . . the enforcement of international justice.”¹ For many, the ICC finally established the appropriate forum to oversee the prosecution of international crimes; crimes that had been outside the reach of the international community for decades. Since World War I (“WWI”), the international community has been seeking a forum in which to charge, prosecute, and convict war criminals who committed large-scale atrocities affecting international interests.²

The jurisdiction of the ICC is limited to “the most serious crimes of concern to the international community as a whole.”³ The applicable enumerated crimes are: genocide, crimes against humanity, war crimes, and acts of aggression.⁴ Using the U.S. as an example of a non-signatory state,

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¹ Rome Statute of the International Criminal Court, preamble, Jul. 17, 1998, available at http://www.icc-cpi.int/library/about/officialjournal/Rome_Statute_120704-EN.pdf [hereinafter *Rome Statute*]; see also International Criminal Court (“ICC”): Historical Introduction, available at <http://www.icc-cpi.int/about/ataglance/history.html> (last visited April 20, 2005) [hereinafter *ICC*].

² M. CHERIF BASSIOUNI, *THE STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A DOCUMENTARY HISTORY* 2-4 (1998).

³ *Rome Statute*, supra note 1, at art. 5.

⁴ *Id.* Aggression has yet to be affirmatively defined by the international community. David Scheffer -- United States Ambassador-at-Large for War Crimes issues during the Rome Conference -- testified in 1998 that the definition of aggression “was to be decided by a subsequent amendment to be adopted seven years after entry into force.” *Is a U.N. International Criminal Court in the U.S. National Interest?: Hearing before the Subcom. on Int'l Operations of the Senate Comm. On Foreign Relations*, 105th Cong. (1998) (statement of David Scheffer) [hereinafter *1998 Scheffer Senate testimony*]. Based on these numbers, aggression will not be defined until 2009, precluding prosecution until then, despite the contention that certain acts of

this article focuses on the presumption that the ICC has jurisdiction to prosecute the war crimes of individuals hailing from non-signatory states.⁵

Part II outlines the evolution of the definition of international war crimes, and analyzes whether the conduct of United States soldiers during the War on Terror falls within the modern definition of war crimes. There are four arguably legitimate bases for ICC jurisdiction over war crimes: universal jurisdiction over all the enumerated core crimes; ratification of the *Rome Statute*; referral of a matter to the ICC by the United Nations Security Council; or prosecution validated by a customary norm. Part III will analyze whether universal jurisdiction with respect to war crimes is appropriate. Part IV will analyze applicable treaty law to assess whether there is a valid precedent to bind non-signatory parties to treaty obligations. Finally, Part V will analyze whether customary international law mandates that non-signatory states cede prosecutorial power over its nationals to the ICC. This paper will focus primarily on the actions of U.S. soldiers during the War on Terror and ultimately conclude that the ICC may not prosecute U.S. soldiers as a matter of international law, even if said actions amounted to the commission of war crimes.

II. What constitutes a war crime subject to ICC jurisdiction?

A. While war crimes have plagued the battlefield throughout history; the characterization of these crimes has evolved to meet the realities of warfare.

War crimes have plagued the international scene throughout the course of history. Atrocities including poisoning wells, mistreatment of enemy forces, besieging defenseless civilian towns, and indiscriminate murder can be traced back much earlier than the 20th century.⁶ As Professor Ball pointed out, while the conduct of war throughout history has remained the same, the conventions of war have changed.⁷ In order to properly analyze the questions regarding ICC jurisdiction, the impetus for international involvement in these matters must be understood.

aggression would be probably be deemed as criminal, i.e. Iraq's 1991 invasion of Kuwait. See ANTONIO CASSESE, INTERNATIONAL CRIMINAL LAW 110-14 (2003).

⁵ *Rome Statute*, *supra* note 1, art 8.

⁶ HOWARD BALL, PROSECUTING WAR CRIMES AND GENOCIDE 11 (1999).

⁷ *Id.*

War crimes are characterized as serious violations of the international law of war that violate the customs of war and the “conscience of humanity.”⁸ The law of war encompasses evolving regulations initiated by the international community almost one hundred years ago at The Hague.⁹ The Convention was designed to inspire the “desire to diminish the evils of war,” and to set forth a code by which belligerent states were to abide during a war.¹⁰

The U.S. had already addressed its concerns about wartime conduct prior to the Hague Convention, during the Civil War. President Lincoln solicited a draft of a manual outlining the acceptable behavior of Union soldiers during the Civil War, which was ultimately drafted by Francis Lieber, a Columbia University law professor.¹¹ The code of behavior -- “Lieber’s Code” -- became General Order No. 100 on April 24, 1863, and was disseminated to every commander in both the Union and Confederate armies.¹² Entitled *Instructions for the Government of Armies of the United States in the Field*, the manual covered issues ranging from the “the use of private property of the enemy” to “prisoners of war ‘who shall be fed upon plain and wholesome food, whenever practicable, and treated with humanity.’”¹³

As the first major conflict after the Hague convention, World War I provided the first opportunity to address war crimes on an international scale.¹⁴ Wartime strategy had changed with the injection of technologically advanced weaponry.¹⁵ Countries which had previously advocated “civilized” wars engaged in propaganda battles with enemy states, engendering harsh feelings between the Allied and Central Powers post-WWI.¹⁶ The resulting animosity led to states such as France trying enemy soldiers within its own courts-martial system, forcing the Germans to reciprocate and try French soldiers in the German system.¹⁷ Situations such as these sparked the first

⁸ *Id.*; CASSESE, *supra* note 4, at 48.

⁹ Convention Respecting the Laws and Customs of War on Land, Preamble, Oct. 18, 1907, 205 C.T.S. 277, available at <http://www.icrc.org/ihl.nsf/0/1d1726425f6955aec125641e0038bfd6?OpenDocument>.

¹⁰ *Id.*

¹¹ BALL, *supra* note 6, at 14. The United States was not alone in its effort to limit war crimes prior to the Hague Convention. For example, Russia signed a treaty banning the use of explosive bullets in battle in 1868. *Id.* at 13.

¹² *Id.* See also Gen. Order No. 100 (Apr. 24, 1863) reprinted in RICHARD SHELLY HARTIGAN, LIEBER’S CODE AND THE LAW OF WAR (1983).

¹³ BALL, *supra* note 6, at 14.

¹⁴ *Id.*

¹⁵ *Id.* at 17.

¹⁶ *Id.* at 16-19.

¹⁷ *Id.* at 19.

discussions concerning a potential international criminal tribunal, but the talks were ultimately silenced by the United States.¹⁸

After World War II (“WWII”), the international outrage concerning Nazi conduct during the war forced the initiation of International Military Tribunals (“IMT”) in Germany and Japan to prosecute war criminals from those two countries.¹⁹ Each IMT had jurisdiction to prosecute crimes against peace, war crimes and crimes against humanity.²⁰ In 1948, the United Nations passed the Genocide Convention, prohibiting genocide in time of peace or war.²¹ In 1949, the international community addressed future wartime concerns by entering into the four Geneva conventions. These conventions

¹⁸ The United States objected to the establishment of an international criminal court because it felt that each country had the unique responsibility to prosecute its own soldiers; a responsibility the United States was not willing to relinquish. *Id.* at 20. Interestingly enough, the United States advanced a similar argument approximately 80 years later during the *Rome Statute* negotiations. *Id.* See also Statement of Donald Rumsfeld, May 2002, available at http://www.findarticles.com/p/articles/mi_pden/is_200205/ai_2466351755 (stating “The ICC’s entry into force on July 1st means that our men and women in uniform -- as well as current and future U.S. officials -- could be at risk of prosecution by the ICC.”); David Scheffer, *Staying the Course with the International Criminal Court*, 35 CORNELL INT’L. L. J. 47, 64-65 (2002) (stating, “[t]he central U.S. concern has been the exposure of U.S. personnel while the United States remains a non-party to the treaty.”).

¹⁹ After complex negotiations, the four victorious nations -- United States, Russia, the United Kingdom, and France -- signed the London Charter on August 8, 1945, establishing the basis for prosecution of German and Japanese war criminals. BALL, *supra* note 6, at 50-54.

²⁰ War crimes were defined as follows:

Violations of the laws or customs of war. Such violations shall include but are not limited to, murder, ill-treatment or deportation to slave labor or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns, or villages, or devastation not justified by military necessity.

London Charter, Aug. 8, 1945, art. IV, available at <http://www.icrc.org/ihl.nsf/0/1d1726425f6955aec125641e0038bfd6?OpenDocument>.

²¹ Convention on the Prevention and Punishment of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277. There are currently 133 parties to the Genocide Convention. See Office of the High Commissioner for Human Rights website, available at <http://www.unhchr.ch/html/menu3/b/treaty1gen.htm>.

were designed to protect sick and wounded soldiers in the field,²² prisoners taken during combat²³ and non-participating civilians during the time of war.²⁴

The Appeals Chamber of the International Criminal Tribunal for the former Republic of Yugoslavia (“ICTY”) delivered the most recent definition, holding that a war crime must: consist of a “serious infringement” of an international rule resulting in grave consequences to the victim; impact a right explicitly defined by a treaty, or implicated by customary international law; and it must have been previously criminalized.²⁵ This tribunal, along with the International Criminal Tribunal for Rwanda (“ICTR”), provided the modern model for war criminal prosecution prior to the ICC.²⁶

B. Could recent United States actions be properly considered war crimes under the *Rome Statute*?

The *Rome Statute* provides the ICC with jurisdiction over war crimes; crimes which are defined by the previously recognized Geneva Conventions.²⁷ Article Eight of the *Rome Statute* exhaustively defines war crimes subject to ICC enforcement, specifically crimes involving international and internal armed conflicts.²⁸ Jurisdiction will only apply when the crimes are committed as part of a plan, or committed on such a large scale as to adversely impact international interests.²⁹

²² Geneva Convention for the Amelioration of the Condition of the Wounded and Sick Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3144, 75 U.N.T.S. 31 [*hereinafter First Geneva Convention*]; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 [*hereinafter Second Geneva Convention*].

²³ Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [*hereinafter Third Geneva Convention*].

²⁴ Geneva Convention Relative to the Protection of Civilian Persons in the Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [*hereinafter Fourth Geneva Convention*].

²⁵ The Prosecutor v. Dusko Tadic, Decision of the Appeals Chamber on the Defense Motion of the Interlocutory Appeal concerning Jurisdiction at 128-32; Case No. IT-94-1-D, of 2 Oct. 1995.

²⁶ Since 1945 there have been over 100 international and civil wars fought. BALL, *supra* note 6, at 92 (citing A. MARK WEISBURD, USE OF FORCE: THE PRACTICE OF STATES SINCE WORLD WAR II (1997)). During these conflicts, war crimes have inevitably been committed by some of these combatants. *Id.* However, not one war criminal was tried after Nuremburg until the criminal tribunals in Yugoslavia and Rwanda, suggesting that the “strong” international stance against war crimes and genocide wasn’t that strong after all. *Id.*

²⁷ *Rome Statute*, *supra* note 1, art. 8.

²⁸ The statute does not address internal disturbances or sporadic acts of violence, nor does it affect a state’s responsibility to reestablish order within the state. *Id.*

²⁹ *Id.*

1. *If not considered as isolated incidents, the torture of Iraqi prisoners, coupled with the alleged torture of those held captive in Guantanamo Bay, satisfies the ICC war crime definition.*

The gruesome pictures depicting unthinkable actions committed by American soldiers in an Abu Ghraib prison are now etched in the minds of people throughout the world. Considering these photos, along with some of the health concerns currently being faced by the Iraqi people, many would argue that the United States has failed in its duty to “promote the welfare of the Iraqi people through the effective administration of the territory.”³⁰ According to a recently released report, 108 detainees have died thus far in U.S. custody, with prisoner abuse the suspected cause of death in roughly 27 of these cases.³¹ In Guantanamo Bay, the International Committee of the Red Cross recently submitted a report in which it claims that the, “American military has intentionally used psychological and sometimes physical coercion 'tantamount to torture' on prisoners at Guantanamo Bay.”³² As of March, 2005, there were approximately 540 detainees remaining in Cuba; many of whom have ties to al Qaeda or served with the Taliban during the war in Afghanistan.³³

Under the *Rome Statute*, the torture of prisoners in Iraq and Cuba would rightfully be deemed war crimes, as torture is clearly prohibited by Article 8(2)(ii).³⁴ In his final report on the prison abuse, Major General Antonio Taguba stated, “[s]everal US Army Soldiers have committed egregious acts and grave breaches of international law at Abu Ghraib/BCCF and Camp Bucca, Iraq.”³⁵ These are the types of crimes the drafters of the ICC targeted when considering the prosecution of war crimes at the international level.³⁶

³⁰ U.N. S.C. Res. 1483, U.N. SCOR, 58th Sess., U.N. Doc. S/Res/1483 (2003); see also Mark Levine, *War Crimes Have Doomed the Occupation*, at <http://progressivetrail.org/articles/040512LeVine.shtml>.

³¹ *Report: 108 Die in U.S. Custody*, Mar. 16, 2005, at <http://www.cbsnews.com/stories/2005/03/16/terror/main680658.shtml>.

³² Neil A. Lewis, *Red Cross Finds Detainee Abuse in Guantanamo*, N.Y. TIMES, Nov. 30, 2004, at A1, available at <http://query.nytimes.com/gst/abstract.html?res=F30910FF3A5A0C738FDDA80994DC404482>.

³³ Press Release, Department of Defense, *Detainee Transfer Announced* (Mar. 12, 2005), available at <http://www.defenselink.mil/releases/2005/nr20050312-2226.html>.

³⁴ “For the purpose of this Statute, “war crimes” means: Grave breaches of the Geneva Conventions of 12 August 1949, namely . . . [t]orture or inhuman treatment.” *Rome Statute*, *supra* note 1, art 8(2)(ii).

³⁵ EXECUTIVE SUMMARY: ARTICLE 15-6 INVESTIGATION OF THE 800TH MILITARY POLICE BRIGADE 50 (2004).

³⁶ Even the U.S. advocated international jurisdiction with respect to “significant criminal activity during wartime,” but favored national prosecution of “isolated war crimes committed by errant

2. *The deportation of Taliban soldiers from Afghanistan to Guantanamo Bay most likely qualifies as a war crime under the Fourth Geneva Convention.*

Some would argue that the health problems currently being faced by the Iraqi people could also be viewed as a failure under the *Fourth Geneva Convention* by the U.S. in its role as the occupying power.³⁷ However, such conduct could be classified as a war crime only if it is determined that the U.S. has not operated “to the fullest extent of the means available to it.”³⁸ Thus far, there has been no indication that the U.S. has willfully caused great injury to health, shielding any actions from prosecution as a war crime under the *Rome Statute*.³⁹

Though the aforementioned torture cases would fall within the *Rome Statute* war crime definition, the removal of al Qaeda and Taliban forces has been the subject of great debate since the War on Terror began. Under the *Fourth Geneva Convention*, an occupying power is prohibited from deporting prisoners of war from occupied territory to the territory of the occupied power.⁴⁰ The Bush Administration, however, viewed the Geneva Convention as inapplicable to the captured members of al Qaeda and it viewed the Taliban soldiers as unlawful combatants, precluding protection under the Geneva Conventions.⁴¹ If this theory is correct, the members of al Qaeda and the Taliban soldiers did not merit full prisoner of war status; only the generalized protections under Article Three of the conventions would still apply as accepted customary norms.⁴²

soldiers.” David Scheffer, *The United States and the International Criminal Court*, 93 AM. J. INT’L. L. 12, 16 (1999).

³⁷ Levine, *supra* note 30; *Fourth Geneva Convention*, *supra* note 24, at art. 49.

³⁸ *Fourth Geneva Convention*, *supra* note 24 at art. 55.

³⁹ *Id.* at art. 147.

⁴⁰ *Id.* at art. 49.

⁴¹ Memorandum from the President to the Vice President, et al., Humane Treatment of al Qaeda and Taliban detainees (Feb. 7, 2002), available at http://www.library.law.pace.edu/research/020207_bushmemo.pdf [hereinafter *Bush Memorandum*].

⁴² The D.C. Appellate Circuit recently confirmed this, rejecting the administration’s position that Article Three only applied during local conflicts. “It is universally agreed, and is demonstrable in the Convention language itself, in the context in which it was adopted, and by the generally accepted law of nations, that Common Article 3 embodies international human norms.” Hamdan v. Rumsfeld, 344 F. Supp. 2d 152, 163 (D.D.C. 2004) (quoting Mehinovic v. Vukovic, 198 F. Supp. 2d. 1322, 1351 (N.D. Ga. 2002).

In order for a soldier to merit prisoner of war protections under the *Third Geneva Convention* the following four conditions must be fulfilled:

- i. The organization must be commanded by a person responsible for his subordinates;
- ii. the organization's members must have a fixed distinctive emblem or uniform recognizable at a distance;
- iii. the organization's members must carry arms openly; and
- iv. the organization's members must conduct their operations in accordance with the laws of war.⁴³

In 2002, the Eastern District Court of Virginia -- in *United States v. Lindh* -- held that the Taliban did not merit prisoner of war protections.⁴⁴ The court found that Lindh had not established the existence of an entity sufficiently organized to stake claim to the control of the Taliban army, that the Taliban wore no clear insignia designating them as soldiers. The court did find that the Taliban soldiers carried their arms openly -- satisfying the third condition -- but ruled that the Taliban had not conducted its operations in accordance with the laws of war, failing to satisfy the fourth condition.⁴⁵ Consequently, the court yielded to the Bush Administration's determination that the Taliban were excluded from any protections.⁴⁶

In 2002, President Bush determined al Qaeda members to be outside the scope of the conventions because they are not a "High Contracting Party" under the Conventions.⁴⁷ Despite an acknowledgment that the Taliban was a "High Contracting Party," President Bush determined that the Taliban soldiers did not merit prisoner of war protections, characterizing them as unlawful combatants outside the Conventions.⁴⁸ If this analysis persists, then the deportation of al Qaeda and Taliban soldiers would not be actionable, as such action is not precluded by Common Article Three of the Geneva Conventions.⁴⁹ Other recent federal court decisions, however, suggest that the Bush Administration's position is untenable, lacking documented support.

⁴³ *Third Geneva Convention*, *supra* note 23, at art. 4(A)(2).

⁴⁴ *United States v. Lindh*, 212 F. Supp. 2d 541, 557-58 (E.D. Va. 2002).

⁴⁵ *Id.* at 558.

⁴⁶ *Id.*

⁴⁷ *Bush Memorandum*, *supra* note 41.

⁴⁸ *Id.*

⁴⁹ This would be true unless the soldiers were deemed to be hostages, which is not likely considering their participation in an international armed conflict; or, unless the U.S. had been

In *Hamdi v. Rumsfeld*, Justice O'Connor -- speaking for the Court, noted that detention of enemy soldiers is acceptable during on ongoing war.⁵⁰ Interestingly, in his concurring opinion, Justice Souter addressed the Bush Administration's characterization of Taliban soldiers as unlawful combatants.⁵¹ Justice Souter suggested that the Bush Administration's determination of the Taliban status departed from the normal procedure by which prisoners are classified.⁵² Article Five of the *Third Geneva Convention* calls for the formation of a Tribunal to evaluate a prisoner's status, not a unilateral executive ruling.⁵³ Justice Souter stopped short of determining whether the government had violated the Geneva Conventions, but he did find that the detention of Hamdi was a violation of the Authorization of the Use of Military Force passed by Congress.⁵⁴

The United States District Court in the District of Columbia ("D.C. District Court") echoed Justice Souter's concerns in two recent decisions. In her *In Re Guantanamo Detainee Cases* decision, Judge Green held that the Geneva conventions did in fact apply to the Taliban detainees, but not al Qaeda detainees.⁵⁵ Judge Green's reluctance to include members of al Qaeda suggests that the Bush Administration's classification of these "soldiers" is correct, but directly refutes the administration's position regarding the Taliban soldiers.

In *Hamdan v. Rumsfeld*, the D.C. District Court found that the "government's attempt to separate the Taliban from Al Qaeda for Geneva

passing judgments on these people without the requisite judicial guarantees - also not likely considering that most of the detainees have yet to receive any judgment, resulting in questions about their detention. See *Third Geneva Convention*, *supra* note 23, at art. 3.

⁵⁰ *Hamdi v. Rumsfeld*, 124 S. Ct. 2633, 2640-42 (2004) (holding that a United States citizen being held as an enemy combatant must be given meaningful opportunity to contest that factual basis for his detention under Due Process considerations).

⁵¹ *Id.* at 2658 (Souter, J., concurring).

⁵² *Id.*

⁵³ *Id.* See also *Third Geneva Convention*, *supra* note 23, at art. 5, which states:

Should any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy, belong to any of the categories enumerated in Article 4, such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal.

⁵⁴ Justice Souter did not speak about the characterization of al Qaeda soldiers in his opinion. *Hamdi*, 124 S. Ct. at 2652-60 (Souter, J., concurring).

⁵⁵ *In re Guantanamo Detainee Cases*, 355 F. Supp. 2d 443, 480 (D.D.C. 2005) (holding in part that Geneva conventions apply to those Taliban soldiers who have not been excluded from the protections by a competent Article Five tribunal).

Convention purposes finds no support in the structure of the Conventions themselves, which are triggered by the place of conflict, and not by what particular faction a fighter is associated with.”⁵⁶ The court held that the Third Geneva Convention applied to all persons detained in Afghanistan during the hostilities, though some soldiers -- presumably those associated with al Qaeda -- only warranted general Article Three protections.⁵⁷ *Hamden* was reversed on appeal,⁵⁸ but the Supreme Court recently granted certiorari.⁵⁹

Based on these decisions, U.S. soldiers would fall within the jurisdiction of the ICC based on violations Article 8(2)(a)(ii) and (vii) of the *Rome Statute*.⁶⁰ U.S. soldiers unquestionably tortured Iraqi prisoners and perhaps prisoners in Guantanamo Bay as well.⁶¹ The only question regarding the torture is whether the instances are isolated enough to remain below the “grave breaches” threshold, or whether they have been committed as a part of plan or policy, or as a large-scale commission of crimes.

Despite the contentions of some international organizations that the line has already been crossed, there is no evidence yet of a U.S. policy endorsing this behavior. However, as the numbers continue to grow -- which is suggested by new reports -- if the line has yet to be crossed, it has, at the very least, been blurred.⁶² Assuming *arguendo* that these actions do constitute war crimes, what impact, if any do these crimes have on the ICC jurisdiction over the U.S. as a non-signatory nation?

III. There is no basis in international law for authorizing universal jurisdiction over war crimes allegedly committed by non-signatory states.

A. Universal jurisdiction is an extremely powerful prosecutorial tool, which has only been applied in the rarest of circumstances.

The generally accepted bases of international criminal jurisdiction include: territoriality, nationality, protective principle, universality and passive

⁵⁶ The government had argued that because Hamdan was fighting for al Qaeda and not the Taliban in the Afghanistan conflict, the Geneva Convention did not apply. *Hamdan*, 344 F. Supp. 2d at 161.

⁵⁷ *Id.*

⁵⁸ *Hamden*, 415 F.3d 33 (D.C. Cir. 2005).

⁵⁹ *Hamden*, 126 S. Ct. 622 (2005).

⁶⁰ *Rome Statute*, *supra* note 1, art. 8(2)(a)(ii) and (vii).

⁶¹ See Levine, *supra* note 30; *Report: 108 Die in U.S. Custody*, *supra* note 31; Lewis, *supra* note 32.

⁶² Lewis, *supra* note 30.

personality.⁶³ From within these general principles, there are only four legitimate bases upon which ICC jurisdiction could be valid: universal jurisdiction over all core crimes, a state's ratification of the *Rome Statute*, referral to the ICC by the United Nations Security Council or an existing customary norm allowing extension of jurisdiction from states to the ICC over non-signatories.⁶⁴

Universal jurisdiction is an extraordinary international doctrine anointing every single state as a potential prosecutor for certain "special crimes of concern to the entire international community."⁶⁵ This doctrine was initially applied only to pirates on the high seas before being extended to slave traders in the 19th century, as piracy and slave trading were readily identifiable.⁶⁶ The proper determination regarding the applicability of universal jurisdiction can only be made upon consideration of existing international legal norms that are universally accepted by the vast majority of states.⁶⁷ Some well respected experts in the field have argued that war crimes have risen to the level of *jus cogens* international crimes, subjecting transgressors to universal jurisdiction.⁶⁸ The Restatement 3rd of Foreign Relations Law supports Professor Bassiouni's contention:

A state has jurisdiction to define and prescribe punishment for certain offenses recognized by the community of nations as of universal concern, such as piracy, slave trade, attacks on or hijacking of aircraft, genocide, war crime, and perhaps certain acts of terrorism, even where none of the bases of jurisdiction indicated in § 402 is present.⁶⁹

⁶³ Kenneth S. Gallant, *Jurisdiction to Adjudicate and Jurisdiction to Prescribe in International Courts*, 48 VILL. L. REV. 763, 771 (2003).

⁶⁴ *Rome Statute*, *supra* note 1, art. 12, 13.

⁶⁵ Bartram S. Brown, *U.S. Objections to the Statue of the International Criminal Court: A Brief Response*, 31 N.Y.U. J. INT'L. L. & POL. 855, 873 (1999)

⁶⁶ *Id.*; M. Cherif Bassiouni, *Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practices*, 42 VA. J. INT'L. L. 81, 108, 112 (2002).

⁶⁷ M. Cherif Bassiouni, *Universal Jurisdiction for International Crimes*, *supra* note 66, at 105.

⁶⁸ *Id.* (listing piracy, slavery, slave-related practices, war crimes, crimes against humanity, genocide, apartheid and torture as the other examples of *jus cogens* crimes); Brown, *supra* note 63, at 873 (stating, "[t]oday, this universal jurisdiction applies to the core crimes defined in the ICC Statute."); Michael P. Scharf, *The ICC's Jurisdiction over the Nationals of Non-Party States: A Critique of the U.S. Position*, 64 LAW & CONTEMP. PROBS. 67, 76-86 (2001).

⁶⁹ RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 404 (1987). Note, however, that the Restatement narrows Professor Bassiouni's definition, excluding apartheid and refraining from a forceful statement regarding terrorism.

This definition, however, has not been universally accepted within the United States.⁷⁰ Despite the Restatement, there is little evidence of state practice to corroborate claims of universal jurisdiction regarding war crimes, a fact noted in the reporter's notes of the Restatement (Third) of Foreign Relations § 404.⁷¹ In 1993 -- after the Restatement was drafted -- Belgium instituted a war crime statute attempting to impose universal jurisdiction on those committing grave breaches of the Geneva Conventions.⁷² However, in 2003, amidst international pressure to amend the law, Belgium limited applicability of the statute to cases involving its own citizens.⁷³ International reaction to the statute, coupled with Belgium's self-imposed limitations, merely reinforces the fact that universal jurisdiction has yet to be effectively asserted in the international community.

During the negotiations leading to the final draft of the *Rome Statute*, states haggled over the breadth of the definition of war crimes to be included in the statute.⁷⁴ This suggests that the definition of war crimes is not universally accepted. Had there truly been an accepted definition, there would have been no need for the U.S. to seek a "clearer definition setting a high threshold for war crimes."⁷⁵ Ambassador Scheffer has also expressed concern regarding the possibility that nationals of an occupying power could be charged with a war crime for inserting its nationals into the occupied country.⁷⁶ He noted that this was a new provision subjecting the nationals of countries such as Israel to prosecutions that would be unavailable under customary

⁷⁰ Lee A. Casey & David B. Rivkin, *The Limits of Legitimacy: The Rome Statute's Unlawful Application to Non-State Parties*, 44 VA. J. INT'L. L. 63 (2002); Madeline Morris, *High Crimes and Misconceptions: The ICC and Non-Party States*, 64 LAW & CONTEMP. PROBS. 13, 52 (2001).

⁷¹ "Apparently no state has exercised such jurisdiction [universal] in circumstances where no other basis for jurisdiction under 402 was present." § 404, note 1; *see also* Casey & Rivkin, *supra* note 70, at 76.

⁷² War Crimes Act (1993) (Belg.) (also referred to as, Act of 16 June 1993 concerning the punishment of grave breaches of the Geneva Conventions of 12 August 1949, and their additional Protocols I and II of 18 June 1977).

⁷³ *Belgium: Universal Jurisdiction Law Repealed*, HUMAN RIGHTS NEWS, Aug. 1, 2003, available at <http://www.hrw.org/press/2003/08/belgium080103.htm>. Prosecutions against President George W. Bush, Secretary of State Colin Powell, and Israeli Prime Minister Ariel Sharon, among others, were, therefore, dismissed due to lack of jurisdiction. Stephen Cviic, *Belgium Drops War Crimes Cases*, BBC NEWS, Sept. 24, 2003, at <http://news.bbc.co.uk/2/hi/europe/3135934.stm>.

⁷⁴ Scheffer, *The United States and the International Criminal Court*, *supra* note 36, at 16.

⁷⁵ *Id.* There are other ambiguous issues to consider: the differentiation of combatants and civilians during international armed conflicts, and lack of a precise definition of the term "direct participation in hostilities," among others. Jean-Marie Henckaerts, *Study on customary international humanitarian law: A contribution to the understanding and respect for the rule of law in armed conflict*, 87 INT'L. REV. RED CROSS No. 857, p. 16 (2005).

⁷⁶ Scheffer, *Staying the Course with the International Criminal Court*, *supra* note 18, at 85. The fact that this problem was later corrected does not change the fact that the definition of war crimes is slightly amorphous, unlike the definition of piracy or slave trading. *See id.*

international law.⁷⁷ How can a state knowingly delegate jurisdiction over war crimes to an international tribunal when a reliable definition of the subject crimes has yet to be determined?

B. Analysis of international criminal tribunals to date clearly demonstrates that the concept of universal jurisdiction has not been utilized in prior prosecutions.

1. *Attorney General of Israel v. Eichmann*

The landmark case that allegedly supports the extension of universal jurisdiction to war crimes is *Attorney General of Israel v. Eichmann*. Israel “brought [Eichmann] to Israeli territory . . . unwillingly and without the consent of the country in which he resided.”⁷⁸ The Israeli Supreme Court found Eichmann guilty of acts of murder, expulsion and persecution based on his conduct in the Nazi concentration camps.⁷⁹ Eichmann did not commit any acts in Israel, precluding jurisdiction based on territoriality.⁸⁰ Consequently, it has been argued that universal jurisdiction was imposed to prosecute Eichmann, establishing a precedent for future cases.⁸¹ However, Israel had passed a law in 1950 allowing jurisdiction over crimes committed against Jewish people regardless of where the crimes took place.⁸² This law allowed for jurisdiction based on passive personality jurisdiction as opposed to universal jurisdiction, which at the very least weakens the proposition that a universal jurisdiction precedent had been set.⁸³ This case can also be distinguished from cases before the ICC because the decision was delivered by the Israeli Supreme Court, not an international court.

Despite the fact that piracy and slave trading have received acceptance in customary international law as meriting universal jurisdiction, there is scant evidence supporting the proposition that universal jurisdiction may be delegated by states to an international tribunal with respect to other crimes.⁸⁴

⁷⁷ *Id.*

⁷⁸ 36 I.L.R. 277, 278 (Isr. S. Ct. 1962). Eichmann had earlier escaped from U.S. authorities, and fled to Argentina, where he remained for 10 years. In 1960 the Mossad kidnapped Eichmann, transporting him to Israel to stand trial. See The Nizkor Project, Adolf Eichmann, at <http://www.nizkor.org/hweb/people/e/eichmann-adolf/>.

⁷⁹ *Id.*

⁸⁰ *Id.* at 279.

⁸¹ M. Cherif Bassiouni, *Universal Jurisdiction for International Crimes*, *supra* note 66, at 137.

⁸² *Id.*; Casey & Rivkin, *supra* note 70, at 78.

⁸³ Casey & Rivkin, *supra* note 70, at 78.

⁸⁴ Professor Morris found “no precedent in state practice for the delegation of universal jurisdiction.” Morris, *supra* note 70, at 43.

2. 20th Century international criminal tribunals

There have been four examples of international criminal tribunals in the 20th century: the International Military Tribunal (“Nuremberg Tribunal”), the International Military Tribunal for the Far East (“Tokyo Tribunal”), the ICTY and the ICTR.⁸⁵ Not one of these four tribunals claimed universal jurisdiction in the prosecution of those before the tribunals.⁸⁶

The jurisdiction imposed in the Nuremberg and Tokyo Tribunals was based on the consent of the defendant’s states of nationality, not universal jurisdiction.⁸⁷ After World War II, Japan retained its sovereign rights, and ceded prosecution of Japanese nationals to the Tokyo Tribunal.⁸⁸ According to scholars at the time, Germany had also consented to the prosecutions, as the Allies had assumed German sovereign duties post World War II.⁸⁹ Assuming *arguendo* that the Allies’ assertion of jurisdiction may have been improper during the Nuremberg Tribunal, the resulting prosecutions should be deemed void for lack of jurisdiction, not valid under the guise of universal jurisdiction.⁹⁰

⁸⁵ *Id.* at 32-41.

⁸⁶ *Id.*

⁸⁷ *Id.* at 38-39 (citing Georg Schwarzenberger, *The Problem of an International Criminal Law*, 3 CURRENT LEGAL PROBS. 263, 290-91 (1950)); *but see* Scharf, *supra* note 68, at 99; Jordan Paust, *The Reach of ICC Jurisdiction Over Non-Signatory Nationals*, 33 VAND. J. TRANSNAT’L. L. 1, 14 (echoing the argument that the Nuremberg Trial provided the precedent for application of universal jurisdiction).

⁸⁸ Morris, *supra* note 70, at 37. *See also* Japanese Instrument of Surrender, available at <http://www.ibiblio.org/pha/policy/1945/450729a.html#2>. The provided citation was dated August 10, 1945; Japan did not officially surrender until September 2, 1945. Of note is the following quotation:

The Japanese Government are ready to accept the terms enumerated in the joint declaration which was issued at Potsdam on July 26th, 1945, by the heads of the Governments of the United States, Great Britain, and China, and later subscribed to by the Soviet Government, with the understanding that the said declaration does not comprise any demand which prejudices the prerogatives of His Majesty as a Sovereign Ruler.

Id. As Professor Morris noted, the Potsdam Declaration provided that “stern justice would be meted out to all war criminals,” thus providing the Allies with the requisite jurisdictional hook. Morris, *supra* note 70, at 37; *see also* Potsdam Declaration available at <http://www.ndl.go.jp/constitution/e/etc/c06.html>.

⁸⁹ Hans Kelsen, *Will the Judgment in the Nuremberg Trials Constitute a Precedent in International Law?*, 1 INT’L. L. Q. 153, 167 (1947)

⁹⁰ *See id.* at 168.

The ICTY and ICTR gained their respective jurisdictions under Chapter VII of the United Nations Charter on order of the Security Council.⁹¹ Chapter VII allows the Security Council to “determine the existence of any threat to the peace . . . and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain and restore international peace and security.”⁹² Each of these tribunals established the requisite jurisdiction based on the respective statutes setting forth the procedures for the tribunals.⁹³

Based on these four criminal tribunals, there has yet to be an assertion of universal jurisdiction by an international criminal body. Even if one accepts the argument presented by Professor Scharf stating that there was no sovereign power involved at all in the Nuremberg Tribunal, there is still no basis for universal jurisdiction.⁹⁴ Concerns abound regarding universal jurisdiction because misuse could potentially disrupt world order by causing unnecessary friction between states.⁹⁵ States must be allowed to maintain their sovereign interests without intrusion from the outside world. If no German sovereign existed in the aftermath of World War II as Professor Scharf suggests, then the need for caution with respect to a foreign sovereign was mitigated due to unusual circumstances. To apply the Nuremberg Tribunal as precedent for jurisdiction over an existing sovereign would be overreaching.

Ultimately, the prosecutions undertaken by these four international criminal bodies demonstrate that the ICC’s attempt to impose universal jurisdiction over individuals from non-signatory nations would be a novel concept, and not based on international jurisprudence. Those who point to nations that have enacted laws extending jurisdiction to non-party individuals outside the state incorrectly assume that this power can be delegated.⁹⁶ This position is further weakened by the lack of actual criminal prosecutions undertaken by states under these “long-arm” jurisdictional statutes.⁹⁷ Consequently, the ICC must rely on some other form of jurisdiction to validly prosecute non-signatory war criminals.

⁹¹ U.N. S.C. Res. 827, U.N. SCOR, 48th Sess., U.N. Doc. S/Res/827 (1993); U.N. S.C. Res. 955, U.N. SCOR, 49th Sess., U.N. Doc. S/Res/955 (1994).

⁹² U.N. Charter art. 39.

⁹³ Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, U.N. Doc. S/25704 at 36, U.N. S.C. Res. 955, U.N. SCOR, 49th Sess., U.N. Doc. S/Res/955 (1994).

⁹⁴ Scharf, *supra* note 66, at 105.

⁹⁵ M. Cherif Bassiouni, *Universal Jurisdiction for International Crime*, *supra* note 64, at 82.

⁹⁶ Morris, *supra* note 68, at 43.

⁹⁷ Scheffer, *The United States and the International Criminal Court*, *supra* note 36, at 18.

IV. The Vienna Convention on the Law of Treaties expressly prohibits application of treaty obligations to non-signatory states, absent the consent of those states.

Under Article 26 of the Vienna Convention on the Law of Treaties (“VCLT”), “[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith.”⁹⁸ Non-signatory third parties are generally exempt from any obligations under such treaties.⁹⁹ Perhaps David Scheffer -- United States Ambassador-at-Large for War Crimes issues during the Rome Conference -- said it best when he addressed the Foreign Press Center in 1998, “I can tell you that it would be [a] bizarre, utterly bizarre consequence for governments to think that this treaty can be adopted and brought into force with the presumption that it will cover governments that have not joined the treaty regime. . . . That is unheard of in treaty law.”¹⁰⁰

As of 14 November, 2005, there were 100 signatory members of the ICC statute.¹⁰¹ With respect to these 100 parties, the obligation to adhere to the statute is obvious. Each party must comply with every article set forth in the statute, as reservations are not valid with respect to this treaty.¹⁰² The framers of the ICC feared that reservations would restrict the ICC’s power to the point of ineffectiveness; so the drafters took the extraordinary route of prohibiting reservations, despite the general acceptance of reservations within the realm of international treaty law.¹⁰³

Despite its ardent participation in the drafting and negotiating process prior to passage, the United States declined to join the ICC or accept the terms of the *Rome Statute*.¹⁰⁴ On December 31, 2000, President Clinton signed the

⁹⁸ Vienna Convention on the Law of Treaties, May 23, 1969, art. 26, 1155 U.N.T.S. 331 [hereinafter *VCLT*].

⁹⁹ “A treaty does not create either obligations or rights for a third State without its consent.” *Id.* at art. 34. There are exceptions to this doctrine based upon the applicability of relevant customary international law standards. *Id.* at art. 38. See *infra* Part V.

¹⁰⁰ David Scheffer, Briefing at the Foreign Press Center (Jul. 31, 1998), available at www.amicc.org/docs/Scheffer7_31_98.pdf [hereinafter *Scheffer Briefing*].

¹⁰¹ See States Parties to the Rome Statute, <http://www.icc-cpi.int/asp/statesparties.html>. The statute became effective upon the entrance of the sixtieth state party. *ICC*, *supra* note 1.

¹⁰² *Rome Statute*, *supra* note 1, art. 120. Under the VCLT, states may typically enter into reservations unless the reservation is prohibited by the treaty itself, which is the case here. *VCLT*, *supra* note 98, art. 19.

¹⁰³ *VCLT*, *supra* note 98, § 2.

¹⁰⁴ The United States is not alone in its refusal. Three of the rotating members of the Security Council -- Algeria, Japan, Philippines -- have not signed the treaty, nor have two other permanent members -- China and Russia. Like the United States, Israel first signed the treaty, and then removed its signature. International Criminal Court, <http://www.answers.com/topic/international-criminal-court> [hereinafter “*International Criminal Court*”].

Rome Statute, but noted “concerns about the significant flaws in the treaty.”¹⁰⁵ These concerns persisted throughout the next eighteen months; ultimately forcing President Bush to withdraw U.S. approval on May 6, 2002.¹⁰⁶ Israel also withdrew, fearing its settlers’ actions could be viewed as war crimes under the Statute.¹⁰⁷ China seems to have taken a more general view that the mere presence of the ICC impermissibly intrudes on the principle of sovereignty.¹⁰⁸ However, the fact that these countries have refused to sign the treaty does not necessarily preclude the ICC from enforcing the treaty against non-signatories.

Article 34 of the VCLT expressly states that a treaty does not create obligations for a third party without its consent.¹⁰⁹ This requirement may be relaxed, allowing third parties to be bound by treaty provisions to which they are not a party, but only if the third party has consented to be bound, or accepted a right based on the treaty.¹¹⁰

There are those who argue that the VCLT is not implicated because the *Rome Statute* does not actually impose any obligations on non-signatory states.¹¹¹ Perhaps the *Rome Statute* does not impose actual obligations on non-signatory parties, but instead requires said parties to relinquish prosecutorial power.¹¹² Such actions by the states will potentially adversely affect the legal rights of its citizens without the consent of either the state or the defendant. Even if the only result is an alteration of citizens’ rights, current doctrine supports the premise that non-signatory states should not be affected by treaties to which they are not parties.¹¹³ Forcing a state to allow its own citizens to be

¹⁰⁵ Mark Grossman, Under Secretary for Political Affairs, American Foreign Policy and the International Criminal Court (May 6, 2002) (quoting President Clinton).

¹⁰⁶ *Id.*

¹⁰⁷ *International Criminal Court*, *supra* note 104. The government feared the possibility that either government officials or settlers could be prosecuted under the provision prohibiting an occupying nation from inserting its own citizens into an occupied territory. *Id.*; *See Rome Statute*, *supra* note 1, at art. 8(b)(viii.)

¹⁰⁸ *International Criminal Court*, *supra* note 104.

¹⁰⁹ *VCLT*, *supra* note 98, art. 34.

¹¹⁰ *Id.* at arts. 35, 36. If a third party does accept a right established by a treaty, it must agree to comply with the treaty while asserting the right.

¹¹¹ Scharf, *supra* note 68, at 98 (quoting Phillippe Kirsch -- Chairman of the Rome Diplomatic Conference -- “it [the treaty] simply confirms the recognized principle that individuals are subject to the substantive and procedural criminal laws applicable in the territories to which they travel.”); Paust, *supra* note 87, at 14.

¹¹² Morris, *supra* note 70, at 27.

¹¹³ *Id.* Professor Morris refers to the VCLT Commentaries, quoting “international tribunals have been firm in laying down that in principle treaties, whether bilateral or multilateral, neither impose obligations on States which are not parties nor modify in any way their legal rights without consent.”

tried by an international tribunal certainly imposes an obligation to refrain from pursuing prosecution; ultimately binding states to obligations they had not accepted, which is precluded under the VCLT.

The VCLT does permit one final doctrine by which a treaty may bind non-parties. Nothing in the aforementioned articles precludes the binding of states as a result of customary international law, which will be discussed below.¹¹⁴

V. The Doctrine of Customary International Law does not support ICC jurisdiction over non-signatory states, especially in light of developments over the past three years.

A. From Lotus to TOPCO: the standards by which international customs are established are high, and have not been met concerning ICC jurisdiction.

Along with the VCLT, the Statute of The International Court of Justice (“ICJ Statute”) recognizes the impact customary international law may have regarding relationships between states.¹¹⁵ In assessing these relationships courts will first look to the treaty itself, and apply the terms of the treaty if clear.¹¹⁶ Assuming the treaty is not clear -- as is the case with the ICC in that it does not expressly state that non-signatory states are held to ICC jurisdiction absent Security Council action -- the international tribunal must review accepted international law to determine the outcome.¹¹⁷ Courts will look to state practice along with *opinio juris*, as well as other evidence of customary law. Courts will look to preemptory norms in treaties, relevant regional norms, non-binding resolutions by international organizations, as well as decisions by international tribunals. U.S. courts also tend to consider relevant academic writings such as treatises to determine the state of the law.

In *The Lotus Case*, the Permanent Court of International Justice (“PCIJ”) considered a case in which a French ship collided with a Turkish ship on the high seas, resulting in the death of eight Turkish citizens.¹¹⁸ Turkish police arrested the French captain along with the lieutenant serving as officer of the deck at the time of the collision. Both men were found guilty of

¹¹⁴ VCLT, *supra* note 98, art. 38.

¹¹⁵ Statute of The International Court of Justice, June 26, 1945, 59 Stat. 1055, T.S. No. 993, S. Bevans 1179, art. 38.

¹¹⁶ The Lotus Case, 1927 P.C.I.J., Ser. A, No. 10, at 9 [hereinafter *Lotus*].

¹¹⁷ See generally *id.*; Texaco/Libya Arbitration, 53 I.L.R. 389 (1977) [hereinafter *TOPCO*].

¹¹⁸ *Lotus*, 1927 P.C.I.J. at 5.

manslaughter.¹¹⁹ The French argued that because no explicit provision existed in international law awarding jurisdiction to Turkey, the prosecution should be stopped.¹²⁰ The PCIJ disagreed, and placed the burden on France to cite any law invalidating Turkey's actions, as opposed to requiring Turkey to demonstrate a rule that allowed its actions.¹²¹

Suggestions that *Lotus* either established or adhered to an existing customary norm may be quickly dismissed.¹²² The PCIJ stated that no applicable customary international law principle existed at the time because states were not conscious of a duty to abstain from instituting criminal proceedings.¹²³ Modern international reluctance to apply universal jurisdiction coupled with international acceptance of the VCLT and the premise that third parties are not generally bound by the agreements of other states, today provide the express prohibitions found to be lacking in *Lotus*.¹²⁴ Had the VCLT been in force at the time, *Lotus* would have likely been resolved differently, precluding modern-day ICC prosecution.

The ICJ addressed the issue of potentially binding customary law again in the *North Sea Continental Shelf Cases* in 1969.¹²⁵ The issue involved a determination of whether Germany was bound by Article 6 of the 1958 Geneva Convention on the Continental Shelf, which established continental shelf boundaries between adjacent states.¹²⁶ Germany had not signed the Convention, but Denmark and the Netherlands claimed Germany was bound under customary international law principles.¹²⁷ The ICJ held that no customary norm existed, focusing, at least in part, on the fact that the Convention allowed reservations to Article VI.¹²⁸ If reservations were allowed, the ICJ reasoned, than a customary norm could not exist because states did not feel compelled to comply.¹²⁹ Without an existing customary

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *Id.* at 19.

¹²² Scharf, *supra* note 68, at 9872-73.

¹²³ *Lotus*, 1927 P.C.I.J. at 17.

¹²⁴ VCLT, *supra* note 98, art. 38.

¹²⁵ *North Sea Continental Shelf (Federal Republic of Germany v. Denmark; Federal Republic of Germany v. Netherlands)*, 1969 ICJ 4, ¶ 1-17, 78, available at <http://www.icj-cij.org/icjwww/iddecisions/isummaries/icssummary690220.htm> (providing a summary of the case via the ICJ website) [hereinafter *North Sea Continental Shelf*].

¹²⁶ The boundaries were to be based on an "equidistant line" principle in determining the continental shelf lines, a position with which Germany disagreed. *Id.*, at ¶ 1-17.

¹²⁷ *Id.*, at ¶ 63.

¹²⁸ *Id.*, at ¶ 63, 64, 78.

¹²⁹ *Id.*, at ¶ 63, 72.

norm, Germany merely chose to abstain from the Convention, incurring no obligations under the Convention.¹³⁰

Though the *Rome Statute* does not allow reservations, Article 98 bars the ICC from requesting the surrender of a person which “would require the requested State to act inconsistently with its obligations under international agreements.”¹³¹ As of May 7, 2005, the U.S. has entered into 100 “Article 98” agreements with foreign governments, suggesting that these states do not feel “legally compelled” to grant the ICC jurisdiction over non-signatory states.¹³² Just as the reservations signaled a lack of self-imposed legal obligations in *North Sea Continental Shelf*, these Article 98 agreements signal a similar lack of international consensus regarding the legal obligation to cede jurisdiction to the ICC.

In *Texaco/Libya Arbitration* (“TOPCO”), the arbitrator reviewed outside evidence to determine the applicable law in a contract dispute initiated by Libya’s appropriation of funds from a U.S. oil company.¹³³ Specifically, the arbiter declined to treat applicable U.N. resolutions as binding documents, but merely as evidence of international custom.¹³⁴ The arbiter then compared two resolutions so as to determine which was most accepted internationally.¹³⁵ The arbiter looked to voting records and legislative histories prior to ruling that the latter of the two provisions applied, ruling for the U.S. and ordering Libya to pay just compensation.¹³⁶ The arbiter noted that the approved resolution -- Resolution 1803 -- had been approved by the vast majority of countries, suggesting a customary norm.¹³⁷

At first glance, *TOPCO* would seem to support the fact that the ICC treaty has also been accepted as a customary norm. Of the 127 countries

¹³⁰ *Id.*, at ¶ 78.

¹³¹ *Rome Statute*, *supra* note 1, at art. 98.

¹³² Richard Boucher, State Department Daily Press Briefing (Apr. 1, 2005), available at <http://www.state.gov/r/pa/prs/dpb/2005/44132.htm>. As of September 2003, 29 of these agreements were with ICC signatory states. Boucher, Press Statement (Sep. 23, 2003), available at <http://www.state.gov/r/pa/prs/ps/2003/24331.htm>; see also *North Sea Continental Shelf Cases*, 1969 ICJ at ¶ 78.

¹³³ *TOPCO*, 53 I.L.R. at 418.

¹³⁴ *Id.* at 483-97; U.N. Charter art. 10.

¹³⁵ *TOPCO*, 53 I.L.R. at 483-97.

¹³⁶ *Id.* at 511.

¹³⁷ The vote passed in the General Assembly by an 87-2 margin with only 12 abstentions, including several states from the Western world, along with numerous Third World states, suggesting a consensus. *Id.* at 487. In contrast, Resolution 3171 -- the other resolution in question -- had passed by a vote of 86-11 with 28 abstentions; it did not gain the consent of the majority of the “most important Western countries.” *Id.*

present at the Rome Convention, 120 voted in favor of the statute.¹³⁸ The ICC came into effect in 2002, and now boasts 98 members; suggesting that it must now constitute a customary norm. However, the *TOPCO* arbiter noted not only how many countries had signed on to the various resolutions, but which countries had signed.¹³⁹ Regarding the ICC, three of the ten non-permanent members and three of the five permanent members of the Security Council have yet to agree to the treaty.¹⁴⁰

The *TOPCO* arbiter was impressed by the fact that a majority of the free-market economy states had signed on, “including the most important one, the United States.”¹⁴¹ The specific mention of the U.S. as the “most important state” implies that absent U.S. signature, the holding may have been different. Considering the apparent importance allotted to the U.S. free market economy in a contract case, the overwhelming expectations placed on the U.S. military undoubtedly make it the “most important” nation when assessing whether the ICC has been accepted as a customary norm. The U.S. sent approximately 140,000 troops to Iraq, compared to roughly 22,000 troops from all other coalition members (including The United Kingdom), accounting for roughly 86% of the troops.¹⁴² According to recent news reports, despite the success of the Iraqi elections, violence is once again on the rise, placing American men and women at risk, a risk increasingly borne by American soldiers.¹⁴³ The U.S. also financially supports the participation of its international partners in military operations world-wide. As of July 2004, the U.S. paid approximately 27.7% of the bill for U.N. peacekeeping missions.¹⁴⁴

Following the *TOPCO* reasoning, the refusal of the U.S. to join the ICC may be enough to preclude the conclusion that ICC jurisdiction has been accepted as a customary norm; when considered in conjunction with the refusal

¹³⁸ Only the U.S., Israel, China, Iraq, Qatar, Libya and Yemen voted against the treaty. *ICC*, *supra* note 1. *But see* Lori Sinanyan, *The International Criminal Court: Why the United States Should Sign the Statute (But Perhaps Wait to Ratify)*, 73 S. CAL. L. R. 1171, 1218, note 4 (suggesting that the seventh “no” vote could have been either Algeria or India instead of Iraq).

¹³⁹ *TOPCO*, 53 I.L.R. at 487-95; *see also* note 133 and accompanying text.

¹⁴⁰ *See supra* note 104 and accompanying text.

¹⁴¹ *TOPCO*, 53 I.L.R. at 487.

¹⁴² Eric S. Margolis, *Coalition of the Cursed*, THE AMERICAN CONSERVATIVE (Aug. 30, 2004) available at http://www.amconmag.com/2004_8_30/print/articleprint.html. Many of the coalition troops have either been withdrawn already, or will be soon. *Id.*

¹⁴³ Jim Garamone, *Abizaid Says Percentage of Foreigners Increasing in Iraq*, AMERICAN FOREIGN PRESS SERVICE (Mar. 27, 2005), available at http://www.defenselink.mil/news/Mar2005/20050327_316.html; Gerry Gilmore, *Number of Anti-Coalition Attacks Goes Up in Afghanistan*, AMERICAN FOREIGN PRESS SERVICE (Apr. 2, 2005), available at http://www.defenselink.mil/news/Apr2005/20050402_427.html.

¹⁴⁴ U.S. Participation in U.N. Peacekeeping Fact Sheet (July 2004), <http://www.un.int/usa/iofact3.htm>.

of Japan, China, and Israel, among others, to join, it certainly demonstrates the lack of an “international quorum” on this issue.¹⁴⁵ Based on the extent of the military interests of these countries, and the fact that they have yet to concede to ICC jurisdiction, it would be overreaching to apply the *TOPCO* analysis in support of ICC jurisdiction.

B. Despite its participation in the negotiations leading up to the final drafting of the *Rome Statute*, the United States’ actions have certified its role as a persistent objector.

Even if customary international law applied to ICC jurisdiction over non-signatory nations, the United States would be excepted as a persistent objector. Two cases have established the ability of “persistent objector” states to “opt out” of an existing customary international norm. In 1951 the ICJ heard the *Fisheries Case*, in which British fishermen wanted to fish in waters Norway claimed as territorial waters.¹⁴⁶ The United Kingdom complained, alleging that Norway had extended its territorial waters beyond the customary international norm.¹⁴⁷ The ICJ held that even if Norway had improperly extended its territorial waters, The United Kingdom’s previous capitulation precluded a finding against Norway.¹⁴⁸

In 1962, the ICJ confirmed its position on persistent objectors in its *Temple of Preah Vihear* decision¹⁴⁹ while deciding whether an ancient temple belonged to either Cambodia -- a newly established country formerly under French control -- or Thailand, where the temple was allegedly located.¹⁵⁰ There had been maps drawn throughout the late 19th and early 20th centuries depicting Cambodian territory as including the temple.¹⁵¹ As in the *Fisheries Case*, the ICJ noted Thailand’s silence with respect to the maps, ruling that the silence indicated Thailand’s acquiescence.¹⁵²

¹⁴⁵ China has the world’s biggest army, and Japan is the fourth-largest military spender; India has not yet ratified the treaty either, while boasting the world’s fourth-largest army. Geoff Thompson, *China and India Take Steps to Resolve Border Dispute* (Apr. 12, 2005), available at <http://www.abc.net.au/worldtoday/content/2005/s1343542.htm>; see also *Japan Self-Defence Forces* at http://encyclopedia.laborlawtalk.com/Japan_Self-Defence_Forces.

¹⁴⁶ Both parties recognized that the breadth of territorial water was four miles, however, the issue was how to determine the correct baseline from which the breadth was to be judged. *Fisheries case (UK v. Norway)* 1951 I.C.J. 116. (hereinafter *Fisheries Case*)

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ *Temple of Preah Vihear*, 33 I.L.R. 47 (ICJ 1962).

¹⁵⁰ The ICJ recognized the issue, stating “[t]his is a dispute about state sovereignty.” *Id.* at 56.

¹⁵¹ *Id.* at 59.

¹⁵² *Id.* at 64.

Since *Temple of Preah Vihear*, persistent objectors have been able to avoid being held to certain treaties, especially when the objections are met with silence from the international community. In both cases, the ICJ seemed impressed by the fact that Norway and Cambodia had been objecting for an extended period of time, with little to no objection from the international community.¹⁵³ When the international community is reluctant to respond, there are only two possible explanations. First, the international community is content to allow one country to remain exempt from certain obligations; or second, the alleged customary norm has shifted, or no longer exists. Had either of these countries been subsequent objectors, the results would have been different.¹⁵⁴ A state cannot accept a norm initially, only to object later when the norm is in direct opposition to that state's interest. However, such conduct would almost certainly signal a shift in a specific customary norm, especially if a newfound objection were accepted by the international community as a whole.

Despite extolling the virtues of an international criminal court, the U.S. has been dead-set against ratification of the *Rome Statute* as is from the start.¹⁵⁵ Even as Ambassador Scheffer recently "advocated" for U.S. participation in the ICC, he stopped short of accepting the *Rome Statute* as it stood in 2002 notwithstanding the improvements that had been made post President Clinton's signature.¹⁵⁶ Though many believe that the opposition has been strengthened under the Bush administration, further alienating the U.S. from the global community, it is important to remember that President Clinton opposed the *Rome Statute* when he signed it in 2000, advising President-Elect Bush to refrain from submitting the treaty to the Senate for ratification.¹⁵⁷

On May 6, 2002, Under Secretary of State Grossman and Secretary of Defense Rumsfeld reiterated the concerns that the Bush administration had regarding the *Rome Statute* in separate addresses.¹⁵⁸ In 1999, Congress passed 22 U.S.C. 7401 restricting U.S. access to the ICC unless pursuant to a treaty.¹⁵⁹ In 2002, Congress amended the law to include 22 U.S.C. 7421 et seq., which was entitled the American Service-Members' Protection Act.¹⁶⁰

¹⁵³ *Id.*; *Fisheries Case*, 1951 I.C.J. 116.

¹⁵⁴ *Fisheries Case*, 1951 I.C.J. 116.

¹⁵⁵ 1998 Scheffer Senate testimony, *supra* note 4; Scheffer, *Staying the Course with the International Criminal Court*, *supra* note 18, at 65; Scheffer, *The United States and the International Criminal Court*, *supra* note 36, at 18; Scheffer Briefing, *supra* note 100.

¹⁵⁶ Scheffer, *Staying the Course with the International Criminal Court*, *supra* note 18, at 56.

¹⁵⁷ *Id.* at 64.

¹⁵⁸ Rumsfeld, *supra* note 18; Grossman, *supra* note 105.

¹⁵⁹ 22 U.S.C.A. § 7401 (1999).

¹⁶⁰ 22 U.S.C.A. §§ 7421-33 (2002).

Congress clearly demonstrated its willingness to protect American servicemen and women.¹⁶¹ There can be no question that the U.S. has been persistent in its objections.

C. If U.S. soldiers have committed war crimes during its invasions of either Afghanistan or Iraq, it could be argued that the international community has acquiesced in its silence with respect to the crimes.

As discussed earlier, some of the actions taken by U.S. soldiers during the War on Terror may have satisfied the war crimes definition under the *Rome Statute*.¹⁶² Assuming *arguendo* that U.S. soldiers did commit war crimes, the failure of the ICC to attempt to prosecute U.S. soldiers demonstrates the acquiescence of the international community, endorsing the ability of the U.S. to opt-out of the Rome Statute. Despite international concern with the aforementioned conduct of some U.S. soldiers, the ICC has yet to act against any U.S. soldiers.

Regarding Iraq, the answer may be very simple, neither Iraq nor the U.S. is a signatory of the *Rome Statute*, nor has either country accepted ICC jurisdiction under Article 12(3).¹⁶³ Consequently, neither party has standing to raise a claim with the ICC. The crimes did not take place on the soil of a signatory nation, the U.S. is not a party -- precluding jurisdiction under Article 12(2)(b).¹⁶⁴ The Security Council has neglected to refer this to the prosecutor.¹⁶⁵ While the lack of prosecution under Article 12 is not surprising, there are other potential sources of jurisdiction -- at least according to the *Rome Statute* -- that have not been exercised. Under Article 14 -- assuming the ICC has jurisdiction as some commentators contend -- a State party could refer the crime to the ICC prosecutor, requesting an investigation of the situation, assuming the referral is accompanied by supporting documentation.¹⁶⁶ Additionally, the ICC Prosecutor has not initiated an investigation *proprio motu* pursuant to Article 15.¹⁶⁷

¹⁶¹ See *id.* For example, § 2006 advises the President to seek exemptions for U.S. soldiers from potential ICC jurisdiction when serving as U.N. peacekeepers. The President must certify to Congress that the servicemen and women will not be subject to prosecution, or that the interests of the U.S. are so important as to potentially relinquish jurisdiction before U.S. Armed Forces may participate in peacekeeping missions. § 2006.

¹⁶² See Part II (B).

¹⁶³ *Rome Statute*, *supra* note 1, art. 12(3).

¹⁶⁴ *Id.*, at art. 12(2)(b).

¹⁶⁵ *Id.*, at art. 13(b). Thus far, the Security Council has only referred the Darfu situation to the ICC prosecutor. U.N. S.C. Res. 1593, U.N. SCOR, 60th Sess., U.N. Doc. S/Res/1593 (2005).

¹⁶⁶ *Rome Statute*, *supra* note 1, at art. 14(1),(2). As of this writing, only the Republic of Uganda, the Democratic Republic of Congo, and the Central African Republic have referred a case to the

The international community has also been silent with respect to the deportation of the Taliban soldiers. Afghanistan is a party to the ICC, but its new government is unlikely to refer any cases regarding the deposed Taliban soldiers to the ICC. The international community is unlikely to interfere without complaint from Afghanistan, as the ICC is most likely reluctant to extend its reach at such an early time in its existence, especially when it would involve prosecuting U.S. soldiers. Lack of international action regarding U.S. action has, perhaps, already established the U.S. as a valid persistent objector, which has been allowed to opt out of the ICC jurisdiction through the acquiescence of the ICC signatory states.¹⁶⁸

The obvious shortcoming with the argument that the U.S. has established itself as a persistent objector rises from the fact that the ICC has been in existence for less than three years, making it difficult to conclude that any alleged acquiescence has reached the level endorsed by the ICJ in *Temple of Preah Vihear* or the *Fisheries Case*.¹⁶⁹ In *North Sea Continental Shelf*, the ICJ seemed to suggest that a norm could develop quickly, but only if the resulting state practice and *opinio juris* was practically universally accepted.¹⁷⁰ Proponents of ICC jurisdiction over non-signatories focus on a “quick forming” norm regarding ICC jurisdiction. If ICC proponents are correct, and the customary norm has developed, then they must also accept the fact that the U.S. has sufficiently established itself as a persistent objector.

VI. CONCLUSION

Crimes such as those witnessed in Iraq cannot be tolerated within the international community and the ICC was developed to prosecute such crimes, especially those crimes that have gone unchecked. While the purpose behind the ICC is laudable, its means of implementation have troubled the U.S. and other non-signatory states from the beginning.¹⁷¹ Consequently, the U.S. continues to refuse to ratify the *Rome Statute*. The U.S. has prosecuted its

ICC prosecutor. See ICC, Situations and Cases, *supra* note 1, available at <http://www.icc-cpi.int/cases.html>.

¹⁶⁷ *Rome Statute*, *supra* note 1, at art. 15.

¹⁶⁸ See *Temple of Preah Vihear*, 33 I.L.R. at 47; *Fisheries Case*, 1951 I.C.J. 116.

¹⁶⁹ In *Temple of Preah Vihear*, Thailand had accepted a 1908 map placing the temple in Cambodian territory, and consequently could not lay claim to the temple after 50 years of acceptance. 33 I.L.R. at 74. In the *Fisheries Case*, the United Kingdom had not objected to Norway's baseline over a 60 year period. 1951 I.C.J. 116.

¹⁷⁰ See generally *North Sea Continental Shelf*, 1969 ICJ, at ¶ 73.

¹⁷¹ 1998 Scheffer Senate testimony, *supra* note 4; Scheffer, *Staying the Course with the International Criminal Court*, *supra* note 18, at 65; Scheffer, *The United States and the International Criminal Court*, *supra* note, 36 at 18; Scheffer Briefing, *supra* note 100.

offenders,¹⁷² which would preclude ICC jurisdiction under the complementarity principle.¹⁷³ Not a single one of the previous four criminal tribunals based its jurisdiction on universal jurisdiction. Application of obligations against non-signatory parties like the U.S. violates the principles of the VCLT. While there are certain crimes subject to universal customary norms, no customary norm yet exists allowing signatory states to delegate jurisdictional rights to an international criminal authority. Assuming that a customary norm does exist, the U.S. has cemented its role as a persistent objector, a position to which the international community has acquiesced.

The lack of jurisdiction today does not preclude the U.S. from joining the ICC in the future. As Ambassador Scheffer has said, “the world needs a permanent International Criminal Court and the United States needs to keep working diligently as a faithful negotiator to ensure that the best possible court is established.”¹⁷⁴ There have been recent signs that the Bush Administration may be relaxing its opposition.¹⁷⁵ However, until the U.S. chooses to enter the ICC, its nationals should not be subject to prosecution by the court.

¹⁷² See Press Release, Department of State, Soldier Sentenced to One-Year Confinement for Prison Actions (May 19, 2004), available at <http://usinfo.state.gov/dhr/Archive/2004/May/21-911660.html>.

¹⁷³ *Rome Statute*, *supra* note 1, at art. 1.

¹⁷⁴ David Scheffer, *Staying the Course with the International Criminal Court*, *supra* note 18, at 54, 55.

¹⁷⁵ Secretary of State Rice apparently counseled President Bush to refrain from vetoing a U.N. Security Council provision establishing a role for the ICC in Darfu; marking the first sign of civility towards the ICC during the Bush Administration. Richard Holbrooke, *New Course for Kosovo*, WASH. POST, Apr. 20, 2005, at A25.

THE RE-EMERGENCE OF NUCLEAR WEAPONS AS “THE COIN OF THE REALM” AND THE RETURN OF NUCLEAR BRINKMANSHIP IN SOUTH ASIA: THE NUCLEAR SWORD OF DAMOCLES STILL HANGS BY A THREAD

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“Every man, woman, and child lives under a nuclear sword of Damocles, hanging by the slenderest of threads, capable of being cut at any moment by accident or by miscalculation or by madness. The weapons of war must be abolished before they abolish us.”

President John F. Kennedy¹

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¹ Address in New York City before the General Assembly of the United Nations, PUB. PAPERS 618, 620 (Sept. 25, 1961), available at <http://www.jfklibrary.org/j092561.htm> (emphasis added). “‘Sword of Damocles:’ A legend of a sword hanging over the courtier Damocles in the palace of Dionysius II, a tyrant, in Syracuse, 4th Century B.C. as recounted by Cicero in Tusculan Disputations, Book V, part XXI. The Sword of Damocles is a frequently used symbolic allusion to this tale, epitomizing the insecurity of those with great power due to the possibility of that power being taken away suddenly, or, more generally, any feeling of impending doom. . . . *The Sword of Damocles* is [also] the title of a song in the film *The Rocky Horror Picture Show*, first released in 1975.” *Damocles*, in WIKIPEDIA: THE FREE ENCYCLOPEDIA, <http://en.wikipedia.org/wiki/Damocles> (last visited Dec. 20, 2005); see *THE ROCKY HORROR PICTURE SHOW* (20th Century Fox 1975). The reference here is in the context of impending doom of nuclear war.

I. Introduction

Nuclear war became a horrible reality in August 1945 when the United States, arguably, became the first nation to use weapons of mass destruction (clearly the first use of nuclear weapons of mass destruction) against military targets that were located in civilian population centers:

On August 6, 1945 the United States exploded an untested uranium-235 gun-assembly bomb, nicknamed “Little Boy,” 1,900 feet above Hiroshima. The city was home to an estimated 350,000 people; about 140,000 died by the end of the year. Three days later, at 11:02 a.m., the United States exploded a plutonium implosion bomb nicknamed “Fat Man” 1,650 feet above Nagasaki. About 70,000 of the estimated 270,000 residents died by the end of the year.²

Thus, in 1945 the United States, at the time the only nation with nuclear weapons, in an attempt to end World War II and avoid more allied casualties, killed approximately 210,000 (mostly civilian) people. How far have we come since August 1945? How far have we come in the forty-four years since Kennedy’s warning of nuclear Armageddon and his call for disarmament? In addition to the United States, Russia, China, the United Kingdom, and France (Nuclear Weapons States) India, Pakistan, and North Korea admit possession of nuclear weapons. Israel is suspected of having nuclear weapons. Iran is allegedly progressing toward development of nuclear weapons. Why do nations, including those not in the so-called “axis of evil” (indeed democratic nations, *e.g.*, India), resort to nuclear weapons as a “lawful” use of force? Why do they aggressively move forward with their nuclear weapons programs as keystones to national security policy?

South Asia, my focus in this paper, has developed into a crisis region at the crossroads of international terrorism:

[T]he India-Pakistan conflict is now especially alarming because it has implications for the international system itself. The region is the site and the source of some of the world’s major terrorist groups. Aside from Al Qaeda, these include a number of groups in or tolerated by Pakistan, and India itself has tolerated or encouraged various terrorist groups operating in nearby states, and has its own internal terrorist

² Natural Resources Defense Council, *The Consequences of Nuclear Conflict Between India and Pakistan*, NRDC.ORG, June 4, 2002, www.nrdc.org/nuclear/southasia.asp.

problem quite apart from Kashmir. India and Pakistan have fought three wars in Kashmir and their conflict now contains the seeds of a nuclear holocaust.³

The carnage in the event of nuclear war in South Asia shows the madness. A study calculated that a “limited” nuclear war using 10 Hiroshima-sized devices between India and Pakistan “would kill as many as three to four times more people per bomb than in Japan because of the higher urban densities in Indian and Pakistani cities.”⁴ The study estimated the weapons would kill 2,862,581 people (mostly civilians); severely injure 1,506,859, and slightly injure 3,382,978.⁵ Moreover, the same study showed that use of 24 nuclear weapons in or near 15 Pakistani and Indian cities would result in higher yields and extensive fallout—exposing approximately 30 million people to lethal doses of radiation in addition to the blast and fire destruction.⁶

What has happened to nuclear weapons in South Asia since 1945? First, they have proliferated in the most densely populated and most dangerous regions of the world. Further, there has been an increase in the number and power of these weapons. Finally, there has been a massive increase in the number of dead and injured that would likely result from a nuclear detonation.

Are the potential level of death and destruction the only things that have changed? No. In addition, nuclear weapons have become the “coin of the realm”—the instruments of power, national security, and deterrence for certain nations. Why? First, The Treaty on the Non-Proliferation of Nuclear Weapons⁷ (NPT) was a qualified success, but, in the long run, the Nuclear Weapons States have not disarmed and several key states have acquired nuclear weapons. The NPT created a bifurcated world. Some would say that the result is “nuclear apartheid”:

(1) the World War II victor “nuclear weapon states” (the Nuclear Club or Big Five⁸), committed to refraining from

³ Stephen Philip Cohen, Senior Fellow, Foreign Policy Studies, The Brookings Institute, India, Pakistan, and Kashmir, Presented at The University of Texas 16–17 (Dec. 2001) (transcript available at <http://www.brookings.edu/views/speeches/cohens20011201.pdf>), revised version in 25 J. STRATEGIC STUD., Dec. 2002, at 32.

⁴ Natural Resources Defense Council, *supra* note 2.

⁵ *Id.* at 2–3.

⁶ *Id.* at 3–4 (emphasis added).

⁷ Treaty on the Non-Proliferation of Nuclear Weapons, July 1, 1968, 21 U.S.T. 483, 729 U.N.T.S. 161.

⁸ Not to be confused with the Big Five in African safari/animal watching circles: lion, leopard, elephant, rhino, and water buffalo. See FAQ, SA Quickguide, Official South African Tourism Website, available at <http://www.southafrica.net/index.cfm?sitepageID=13541#Will>. I will leave

assisting other nations in development of nuclear weapons, ridding themselves of nuclear weapons in the long run, and sharing nuclear technology for peaceful uses; and

(2) the “non-nuclear weapon states” committed to refraining from nuclear weapons development in exchange for shared nuclear technology from the nuclear weapons states.⁹

But did the bargain work? Are the Big Five seriously engaged in disarmament and sharing of nuclear technology? No. Has the NPT stopped proliferation of nuclear weapons, in South Asia? No.

Entering the twenty-first century, do we, the components of the global community, find ourselves at a greater risk of use of nuclear weapons with the development and proliferation of nuclear weapons by India, Pakistan, and North Korea and the alleged covert programs of Iran and Israel? Is the danger of nuclear war greater today than ever before? I suggest the answer is, unfortunately, yes.

In this paper, I will address these questions as they relate to India and Pakistan and the threat of nuclear war in South Asia. First, I will highlight the history of the nuclear weapons programs in Pakistan and India and the apparent motivations for the same. I will then survey various studies and war-games of the causes, effects, and consequences of nuclear war in South Asia. Next, I will discuss the current changing relationships between the United States and both Pakistan and India, the role China plays in those relationships, and the role conventional weapons play in the nuclear proliferation equation. Finally, I will touch on the recent “cricket diplomacy,” the new hope for peace over Kashmir, and the prospects for a nuclear weapons free zone in South Asia.

II. Analysis

A. India and Pakistan: A Basic Statistical Comparison

The modern states of India and Pakistan were politically sliced from the same landmass and born in 1947 amidst the blood of partition and the first war between the nations. A quick comparison of the basic facts of the two

it to the reader to match the animal with the nuclear weapon states (U.S., Russia, China, France, and U.K.).

⁹ Treaty on the Non-Proliferation of Nuclear Weapons, *supra* note 7.

nations, set out below in Table 1, demonstrates the inequity and the clear dominance of India over Pakistan.

TABLE 1	Republic of India¹⁰	Islamic Republic of Pakistan¹¹
Population	Est. 1.065 billion	Est. 160 million
Land Area¹²	3.3 million sq km	803, 940 sq km
Defense Spending	\$13.8 billion	\$2.7 billion
Army Personnel	1.3 million	620,000
Air Force Personnel	120,000	65,000
Combat Aircraft	744	Est. 232–430 ¹³
Naval Craft	1 aircraft carrier 29 surface ships	8 surface ships

¹⁰ CIA—THE WORLD FACTBOOK, available at <http://www.odci.gov/cia/publications/factbook/geos/in.html> (last visited Dec. 21, 2005); Indian Embassy to the United States Website, <http://www.indianembassy.org/> (last visited Dec. 21, 2005); Government of India Website <http://goirectory.nic.in/> (last visited Dec. 21, 2005); Indian Armed Forces Website, <http://armedforces.nic.in/> (last visited Dec. 21, 2005).

¹¹ CIA—THE WORLD FACTBOOK, available at <http://www.odci.gov/cia/publications/factbook/geos/pk.html> (last visited Dec. 21, 2005); Embassy of Pakistan in the United States Website, <http://www.embassyofpakistan.org/> (last visited Dec. 21, 2005); Islamic Republic of Pakistan Official Government Website <http://www.infopak.gov.pk/> (last visited Dec. 21, 2005).

¹² One author believes that land and geography “more than any other factor, lies at the heart of all past conflicts and hostilities within and between the two [actual] nuclear powers in the region, Pakistan and India. Created artificially from the same subcontinental land mass . . . these two countries are destined to be irrevocably interlinked and intertwined with one another in social, cultural, economic, military-strategic and political arenas.” Arun P. Elhance, *A Geographical Perspective*, in *NUCLEAR PROLIFERATION IN SOUTH ASIA* 178 (Stephen Cohen ed., Westview Press 1991).

¹³ Fighter aircraft may act as a delivery platform—thus the announced sale of F-16s to Pakistan raises nuclear issues.

	19 submarines	10 submarines
Nuclear Warheads	Est. 30–60	Est. 25–48
Warhead Type	Agni II 2,500 km range	Ghauri II ¹⁴ 2,000 km range

Numbers do not lie. India has the marked advantage in every category: from population and military force numbers, to geographic size and positioning,¹⁵ to defense monetary investment. This reality fuels the inferiority and insecurity complexes intertwined in Pakistan's foreign and national security policies. As we will see, nuclear weapons level the playing field from Pakistan's perspective, as do the 2005 announced plans for acquisition by Pakistan of additional, advanced, U.S. fighter aircraft, which could be used as nuclear weapons delivery platforms. South Asia is clearly now a hotbed of weapons proliferation—nuclear and conventional.

B. Nuclear Weapons—The New Coin of the Realm in South Asia

Why would India and Pakistan spend so much time, money, and resources on such a devastating program and national security option? One point is that: "India and Pakistan have demonstrated the value of nuclear weapons for enhancing international stature and solidifying domestic political base."¹⁶ Indeed, if India rightfully gains a permanent seat on the UN Security Council (UNSC), some will point to its nuclear weapons as the main factor, ignoring the fact it is soon to be the most populated nation in the world, a key economic power in Asia, if not the world, and, to date, the largest democracy. The impression of nuclear weapons as the "coin of the realm" will be enhanced by rewarding India for nuclear weapons development, unless there is "delinkage." If India truly wants a UNSC seat, then the UN must demand that she disarm in coordination with Pakistan. In any event: "India and Pakistan have established a new class of weapon states outside the Nonproliferation

¹⁴ Pakistan recently "successfully carried out the maiden test fire of . . . long-range, surface-to-surface ballistic missile"—the Shaheen II capable of carrying nuclear warheads and with a range of up to 2,000 km (1200 miles). *Pakistan Tests Long-Range Missile*, CNN.COM, Mar. 9, 2004, <http://www.cnn.com/2004/WORLD/asiapcf/03/09/pakistan.missile/>.

¹⁵ India is wide and deep, while Pakistan is narrow and more vulnerable to incursions, strikes, and invasion.

¹⁶See *Pakistan Tests Long-Range Missile*, *supra* note 14.

Treaty—a club that others can join by withdrawing from the NPT and the CTBT after giving the proper ‘supreme interests’ notification.”¹⁷

The Nuclear Weapons States, by their failure to disarm and continued retention of nuclear weapons as a national security option, are in large part to blame for the proliferation of nuclear weapons as symbols of power and prestige:

The nuclear weapons states recognized under the NPT have long tried to maintain exclusivity in their possession of nuclear weapons, which over time has only enhanced the perception that nuclear weapons are sources of power and prestige. . . . The link between prestige and power and the possession of nuclear weapons is evidenced by the fact that the five recognized nuclear weapons states are also permanent members of the [UNSC]. Furthermore, the nuclear weapons states’ defiance in fulfilling their nuclear disarmament obligations has demonstrated to the world that even the most economically and militarily powerful nations rely upon nuclear weapons for security.¹⁸ Additionally, the possession of nuclear weapons provides the nuclear weapons states with a psychological advantage by tacitly threatening to use nuclear weapons in a worst case conflict scenario.¹⁹

As Canadian Foreign Minister Bill Graham remarked on March 16, 2004: “Without progress toward nuclear disarmament, it will be very difficult to keep non-nuclear countries from seeking nuclear weapons as [a means of] deterrence or even to obtain political prestige.”²⁰

India is doing exactly that—using a nuclear weapons program to advance its prestige, status, and national security. One commentator identifies India’s two major *global objectives* in advancing its nuclear capabilities:

¹⁷ Paul Leventhal, President, Nuclear Control Inst., An End to Nuclear Proliferation, or to Nuclear Non-Proliferation? at the Carnegie Endowment for International Peace Conference on the Impact of the South Asian Nuclear Crisis on the Non-Proliferation Regime (July 16, 1998), (outline available at <http://www.nci.org/s/sp71698.htm>). Was he not predicting North Korea’s recent withdrawal from the NPT?

¹⁸ Of course the NWS will argue they are disarming, but it takes time.

¹⁹ DAVID KRIEGER & CARAH ONG, DISARMAMENT: THE MISSING LINK TO AN EFFECTIVE NON-PROLIFERATION REGIME 11 (2004), available at http://www.wagingpeace.org/articles/2004/04/28_npt-book.pdf (last visited Dec. 21, 2005).

²⁰ *Id.*

1. *India seeks to achieve preeminent international status. Developing a nuclear-weapon capability is the means for the Indians to receive the official recognition of this status characterized in a permanent UNSC seat.* The Indians feel they do not enjoy international recognition and prestige commensurate with their global importance. In practice, major powers disregard their qualifying characteristics, including their large size in land and population, their historical significance as one of the few surviving ancient civilizations, their industrial and technological achievements, and their large conventional military forces. A permanent UNSC seat is what the Indians consider as clear recognition of their power, capabilities, achievements, and global significance

As far as the Indians are concerned, permanent membership on the UNSC would give them the ability to act as a global player with recognized “rights,” who should be taken seriously in regional and international affairs by other players, particularly the five UNSC permanent members. Yet they believe that no degree of industrialization will qualify them for such preeminent status, as even highly achieved industrialized countries such as Japan and Germany have not achieved it. However, China’s development of a nuclear capability forced the other nuclear states to recognize it as one of their own and treat it accordingly. . . . A credible nuclear capability should therefore qualify the Indians for a status equal to those of other nuclear powers, as manifested in a permanent UNSC seat. For this reason, India, an original promoter of the nuclear nonproliferation regime, refused to sign the NPT in 1968 and has since opposed nonproliferation proposals for South Asia and the [CTBT]. India rejected the NPT on the grounds it was a discriminatory treaty seeking to perpetuate the status of the five nuclear powers by creating nuclear “haves” and “have-nots.” The president of the ruling [party BJP] expressed the Indian feeling about the NPT and CTBT when he referred to them as a means for creating “nuclear apartheid” as they are “unjust, unequal” treaties and meant to perpetuate the preeminence of certain states.

2. *The Indians believe that they need a nuclear capability as a prerequisite for assuming a global role, a feasible and required role for India. . . . In the words of an Indian political analyst, the international system will develop into a multi-polar system in the twenty-first century in which India can claim its rightful place as a major power. . . .*²¹

The same author identifies two *regional objectives* for India's nuclear weapons program:

First, India seeks to keep Pakistan in check by developing a formidable nuclear capability. Concern about Pakistan creates both political and psychological incentives for their nuclear program. Since the partition of India, the Indians have seen Pakistan as their archenemy . . . India has viewed nuclear capability as a deterrent against and a means for stopping any major Pakistani attack on India—an unlikely scenario in the foreseeable future. The more important objective is to force Pakistan to accept the superiority and leadership of India in South Asia. . . .

Second, India sees a nuclear capability as a necessity for dealing with its large nuclear neighbor, China, which the Indians perceive as a long-term threat to their national security. . . . So far military confrontations between [India and China] have been confined to a short border war in 1962, which resulted in a humiliating defeat for India. According to Indian estimates, China occupied about 12,000 [square] km of India's border areas before and during the war.

. . . . China's first nuclear test of October 1964 and its membership in the nuclear club raised serious concerns among the Indians. . . . In the aftermath of the Chinese test, the head of the Indian Atomic Energy Commission, Homi Bhabha, announced India's readiness to produce a nuclear bomb within 18 months to deal with the Chinese nuclear threat. In May 1998, India repeated the Chinese threat as a justification for it developing a nuclear capability.

²¹ HOOMAN PEIMANI, NUCLEAR PROLIFERATION IN THE INDIAN SUBCONTINENT: THE SELF-EXHAUSTING "SUPERPOWERS" AND EMERGING ALLIANCES 25-27 (2000) (emphasis added).

China's support of Pakistan in the Indian-Pakistani war of 1965 increased India's concerns about China which was now actively supporting its enemy. . . . A few days prior to its May 1998 tests, the Indian Defense Minister described China as a nuclear threat and the Number One enemy of India. . . . India's development of medium-range missiles, which are of no use in its dealing with Pakistan [short-range missile are sufficient in light of Pakistan's proximity and elongated vulnerability to Indian attack], partly aims at creating a nuclear arsenal capable of deterring China, a declared objective of India.

Developments in South Asia created additional fear and suspicion among the Indians. . . . The growing closeness of the United States with its Cold War ally, Pakistan, which was facing a Soviet ally, India, took the form of a pro-Pakistani policy of the United States during the 1971 war between India and Pakistan. To deter the widening of the conflict, the [US] dispatched an aircraft carrier to the region. . . .²²

The author goes on to detail the concern of India in the Cold War and early post-Cold War era of an anti-Indian triangle of US-Pakistan-China. I submit such an alliance is unlikely today. Nonetheless, concerns for such led, at least in part, to development of India's nuclear weapons program.

Pakistan has at least three major motivations to develop a nuclear-weapon capability:

1. *Concern about India, the main source of threat to its national security since its independence, is the main motivation.* . . . The mutual sense of hostility [planted at the time of partition] instigated three wars, in 1947, 1965, and 1971. As the defeated side in all these wars, Pakistan has every reason to see India as the main source of threat to its national security. A major source of conflict between the two states has been the status of the predominantly Muslim Kashmir, which India refused to accept as part of Pakistan at the time of independence. Kashmir was the instigating reason for the first two wars between the two countries. India's refusal to implement two UNSC resolutions calling

²² *Id.* at 22–23.

for a plebiscite in Kashmir as a peaceful means for settling the dispute between the two neighbors has prevented its settlement to this date.

Pakistan's concern for India threat was developed into a strong sense of insecurity in 1971. The third war between the two countries led to the partition of its eastern part, separated from the rest of the country by India. . . . The humiliating loss of territory further strengthened the Pakistanis' hostility toward India, now seen by them as the major source of threat to their territorial integrity. To deal with any future Indian threat, Pakistan seriously began its nuclear-weapon program after its third war with India [and efforts were increased after Indian nuclear testing in 1974].

2. *Upgrading the international status of Pakistan is another major motivation for the Pakistanis to develop a nuclear-weapon capability.* . . . Like the Indians, they also wish to put distance between themselves and their unpleasant past and enjoy an eminent international status by restoring their glorious pre-colonization period. . . . Because of its military importance and political significance, developing a nuclear-weapon capability becomes a prerequisite for restoring their glorious past.

3. *Finally, regional rivalry and hegemony is yet another factor behind the Pakistani nuclear-weapon program.* Especially since the late 1970s, Pakistan has been trying to establish a sphere of influence in its surrounding regions to turn itself into a leading force in the Islamic world [and in the Central Asian and South Asian regions.] The expected utility of a nuclear-weapon capability [in regional power enhancement] has created a very strong incentive for the Pakistanis to develop a nuclear arsenal.²³

And so we see why India and Pakistan were motivated to embark on the path to nuclear weapons. Apart from the national security elements of nuclear weapons, they also provide international prestige, status, respect, and power. Unfortunately, the weapons also provide the basis for a nuclear holocaust.

²³ *Id.* at 27-32 (emphasis added).

C. The Creation of Nuclear Weapons Programs in South Asia

“India is now a nuclear weapon state. . . . We have a capacity for a big bomb now. Ours will never be weapons of aggression.”

Indian Prime Minister Atai Behari Vajpayee, 14 May 1998²⁴

“Pakistan today successfully conducted five nuclear tests They have demonstrated Pakistan’s ability to deter aggression. Pakistan has been obliged to exercise the nuclear option due to weaponization of India’s nuclear program.”

Pakistani Prime Minister Muhammad Nawaz Sharif, 28 May 1998²⁵

And build nuclear weapons they did. On two days in May 1998, U.S. nonproliferation policy was shattered by Indian and Pakistani nuclear weapons tests:

On May 11, 1998, the Indian government conducted three nuclear test explosions at its Pokhran test site 330 miles southwest of New Delhi. Two more low-yield nuclear explosions came on 13 May. Pakistan responded with several nuclear tests of its own, the first in its history, on 28 and 30 May. The tests, which alter the former status of India and Pakistan as “threshold” nuclear states, have been widely condemned by the international community but applauded by public opinion within the two South Asian nations.²⁶

Neither India nor Pakistan is a signatory of the NPT or the Comprehensive Test Ban Treaty (CTBT). The nuclear explosions were the first since China conducted its final test in 1996 and since the CTBT was opened for signature on September 24, 1996.²⁷ To some, the 1998 Indian and Pakistani nuclear tests “represent[ed] a colossal U.S. foreign policy failure; U.S. non-

²⁴ *India’s Nuclear Weapons Program—Operation Shakti: 1998*, THE NUCLEAR WEAPONS ARCHIVE: A GUIDE TO NUCLEAR WEAPONS, Mar. 30, 2001, <http://www.nuclearweaponarchive.org/India/IndiaShakti.html>.

²⁵ Oliver Meier, *Involving Indian and Pakistan: Nuclear Arms Control and Non-proliferation After the Nuclear Tests*, BERLIN INFORMATION-CENTER FOR TRANSATLANTIC SECURITY, Sept. 1999, <http://www.bits.de/public/pdf/rr99-2.pdf>.

²⁶ Ann Lakhdir, *Background: India/Pakistan—Kahmir*, NGO COMM. ON DISARMAMENT, PEACE & SEC., <http://disarm.igc.org/indtest.html> (last visited May 2, 2005).

²⁷ *Id.*

proliferation policy [was rendered] in disarray.”²⁸ Why did U.S. non-proliferation policy fail? Did we ignore the warnings? Why did previous sanctions not work?

The President of the Nuclear Control Institute (NCI) charges that both India and Pakistan violated agreements with the U.S. and Canada regarding “peaceful purposes” and Pakistan simply stole technology:

Half of India’s military plutonium was produced in an Atoms for Peace reactor (CIRUS) supplied by Canada with heavy water supplied by the United States—a blatant violation of the “peaceful purposes” commitment India made in written contracts with both suppliers. . . . Pakistan stole European civilian uranium enrichment technology, got away with it, and based its weapons program on it. More recently, Pakistan started producing weapons plutonium in a research reactor at Khushab, built with Chinese assistance and probably operated with Chinese heavy water diverted by Pakistan from its safeguarded Kanupp power reactor.²⁹

A detailed review of Pakistan’s nuclear weapons development shows a combination of Pakistani misuse/diversion of nuclear technology, theft, and inaction by the U.S. that ultimately led to the creation of a nuclear “black-market.” Pakistan’s path to *nuclear power* started in 1953 when it joined the Atoms for Peace program and received money from the U.S. in 1955 to build a research reactor. Pakistan then received sensitive aid and material from Canadian, Belgian, French, West German, and Dutch concerns to build reactors, a nuclear material reprocessing facility, components for centrifuges, high-vacuum valves, gas purification equipment, and other sensitive material and technology.³⁰ But the impetus for a *nuclear weapon* arose from another humiliating defeat at the hands of India on a conventional battlefield in 1971. The United States turned a blind eye and, some assert, lent a helping hand to Pakistani nuclear weapons development in light of Cold War *Realpolitik*, as Pakistan was a steadfast U.S. ally against the Soviet Union:

²⁸ See Leventhal, *supra* note 17.

²⁹ *Id.* See also generally Victor Gilinsky and Paul Leventhal, Op-Ed., *India Cheated*, WASH. POST, June 15, 1998, at A23 (stating that most of the military plutonium stocks India used for its 1998 nuclear tests came from a research project provided by the U.S. and Canada despite assurances to both countries not to use the plutonium for nuclear weapons).

³⁰ John Wilson, *Much Noise Over Full Drums*, PIONEER (New Delhi), Feb. 4, 2004, available at <http://www.worldpress.org/Asia/1826.cfm>.

Within weeks of the surrender at Dhaka, Prime Minister Zulfikar Ali Bhutto called a secret meeting (Jan. 24, 1972, at Multan) of nuclear and military officials, and he said he wanted the Bomb. A 125-megawatt heavy-water reactor became operational near Karachi the same year. It was built with Canadian assistance. The United States was not in the dark about those developments.

Three years after Bhutto's secret meeting, the U.S. State Department prepared a background paper on Pakistan and the nonproliferation issue (Jan. 22, 1975), which said Pakistan was not only building more power reactors, it was also negotiating with the Belgians for a heavy-water facility, with the Canadians for a fuel-fabrication plant, and with the French for a chemical separation plant.

"These facilities," the note (since declassified) said, "together with the heavy reactor, will give Pakistan a virtually independent nuclear fuel cycle and the opportunity to separate a sufficient amount of plutonium to build a nuclear weapon . . . [T]he earliest the Pakistanis are likely to be able to produce a weapon would be 1980. . . ."

There is more evidence gathered from U.S. sources to show how the United States blinks when it wants to. . . .

What the CIA would never report is the involvement of the U.S. administration in helping Pakistan acquire nuclear weapons technology at a time it was forcing the world to sign the [CTBT]

The only conclusion one can draw from these findings is the United States was not only aware of Pakistan's nuclear weapons development program from the beginning but was willingly assisting the latter to develop the capability³¹

And so India and Pakistan became *de facto* nuclear weapons states but not members of "The Nuclear Club." India and Pakistan developed the weapons covertly and, as we will see regarding A.Q. Khan and Pakistan, they

³¹ *Id.* at 9-10.

remain outside the NPT regime and, therefore, there remains a serious risk of illicit proliferation.

D. A.Q. Khan: The Failure of Non-Proliferation, the Danger of Illicit Proliferation, and Nuclear Terrorism

Of course the danger of development of nuclear weapons—apart from the unacceptable collateral damage they will cause in a nuclear war—is safeguarding the technology, plans, and the weapons from other nations and, more importantly, terrorists. Any article on South Asia and nuclear weapons is incomplete without at minimum a limited treatment regarding Abdul Qadeer (A.Q.) Khan and the A.Q. Khan network. Khan has entered the nuclear proliferation lexicon—he is symbolic of the world’s concern for illicit, black market, terrorist nuclear proliferation.

The defeat of Pakistan by India and the 1972 decision to seek nuclear weapons coincided with the return from the Netherlands in December 1975 of the man who would become a national hero in Pakistan and known as “father of the Islamic bomb,”³² A.Q. Khan or, in Pakistan, A.Q.³³ Khan had spent years studying in Europe where he received a doctorate in metallurgy. In 1972 he was employed by “an engineering firm in Amsterdam that was a major subcontractor for Urenco, a British-Dutch-German consortium founded two years earlier to develop advanced centrifuges to enrich uranium for civilian power plants.”³⁴ From 1972 to 1975 Khan “got access to top-secret dossiers on every aspect of the enrichment process.”³⁵ Khan, traveling ostensibly on holiday with his Dutch wife and two daughters, smuggled into Pakistan centrifuge blueprints and design documents that he illegally obtained from his European employer.

Khan never returned to Amsterdam and instead “assumed a primary role in the Pakistani government’s nuclear program.” He was able to convince the Prime Minister he needed autonomy and an unlimited budget and, thus, started Khan Research Laboratories (KRL). In 1976 Khan immediately

³² Homi Jehangir Bhabha is known as the father of the Indian bomb. See Kenneth N. Waltz, *Nuclear Stability in South Asia*, in *THE USE OF FORCE: MILITARY POWER AND INTERNATIONAL POLITICS* 382 (Robert J. Art & Kenneth N. Waltz eds., 6th ed., Rowman & Littlefield 2003) [hereinafter *USE OF FORCE*].

³³ Greg Bearup, *Inside the Shady Nuclear Family of Abdul Qadeer Khan*, *S. CHINA MORNING POST* (Hong Kong), Feb. 11, 2004, at 14, available at <http://www.worldpress.org/Asia/1825.cfm>.

³⁴ Douglas Frantz, *A High-Risk Nuclear Stakeout*, *L.A. TIMES*, Feb. 27, 2005, at A1 (reporting that some experts say that the United States took too long to act, letting Pakistani scientist sell illicit technology well after it knew of his operation).

³⁵ *Id.*

embarked on a “clandestine procurement network,” using Urenco-affiliated companies and the cover of Pakistani embassies in Europe, which became known as the “Pakistani Pipeline.” From 1976 until his forced removal from KRL in 2001 by President Musharraf (under U.S. pressure), the clandestine efforts of A.Q. Khan led to the May 1998 nuclear weapons testing in the mountains of Baluchistan and were the foundation for the notorious A.Q. Khan black-market network that would proliferate technology to Iran, North Korea, and Libya and have sources from Europe to South Africa to Malaysia.³⁶ The network’s “accomplishments” were highlighted by a 1998 exchange of Pakistani enrichment technology for North Korean missiles capable of carrying nuclear warheads into India and a 1997 deal based on meetings in Casablanca and Istanbul to sell Libya a “complete bomb-making factory for approximately \$100 million.”³⁷

As the current “nuclear crisis” with North Korea ebbs and flows, we see reports from a senior U.S. nuclear negotiator that “North Korea . . . exported dangerous nuclear material through the international black-market network of the Pakistani scientist Abdul Qadeer Khan, knowing that it would end up in Libya. . . .”³⁸ Khan was the “broker” of uranium hexafluoride, “a sensitive material that can be enriched to make fissile material for nuclear weapons.”³⁹

A review of the Libyan nuclear weapons program by “western nuclear weapons specialists” highlighted the concern that A.Q. Khan was operating a “nuclear smuggling ring” and that over a 20-year period, Khan “went from a secretive procurer of technology for Pakistan’s atomic weapons program . . . to history’s biggest independent seller of nuclear weapons equipment and expertise,” with Iran and North Korea as primary customers.⁴⁰ Some are highly critical of U.S. intelligence agencies and U.S. policy (“watch and wait”), pointing out that a proper damage assessment will never occur due to Pakistan’s protection of Khan, who is under “house arrest” in Islamabad, Pakistani refusal to allow outside investigators to question him, his network’s systematic shredding of papers and deleting of e-mails, beginning in the summer of 2002 after realizing it was under surveillance,” and his possible regeneration of his ring by its remnants.⁴¹ Ironically, from a U.S. perspective,

³⁶ *Id.*

³⁷ *Id.*

³⁸ Choe Sang-Hun, *Envoy Cites ‘Evidence’ of a Nuclear Network*, INT’L HERALD TRIB., Apr. 7, 2005, at 1.

³⁹ *Id.*

⁴⁰ Frantz, *supra* note 34.

⁴¹ *Id.* (containing an excellent and detailed analysis of the rise and fall of A.Q. Khan).

Khan is still a hero to some in his homeland and abroad.⁴² A.Q Khan remains to many “the great son of the nation . . . who made Pakistan a nuclear power.”⁴³ Islamicists simply see the evil hand of the United States as it tries to dismantle the nuclear might of “an ideological Islamic state possessing nuclear weapons.”⁴⁴ The point is Pakistanis are conflicted in condemning a national hero who accomplished what the government wanted and whose deeds the Pakistani government and military probably knew all about:

How can you accuse a person who had been fully authorized for 29 years by the government of “theft and borrow” to give the nation the gift of the bomb? Which is the country in the world that acquired nuclear capability without the cooperation of the nuclear black market?⁴⁵

Thus, we have the pardon of A.Q. Khan by President Musharraf.

Now, what is the international community doing to stem the flow created by Khan and his network? Slowly emerging from a stage of denial, it is in the midst of placing a band-aid on a “sucking chest wound.” A 2004 UN High-Level Report, citing the A.Q. Khan network, advocated that all nations join the Proliferation Security Initiative⁴⁶ as a valid measure to “interdict the illicit and clandestine trade in components for nuclear programmes.”⁴⁷ On April 13, 2005, the U.N. General Assembly, *after seven years of negotiations*, passed by consensus the International Convention for the Suppression of Acts of Nuclear Terrorism.⁴⁸

The Convention was contained in the April 1, 2005 Report of the Ad Hoc Committee.⁴⁹ The Convention was sponsored in 1998 by Russia due to

⁴² Farah Stockman & Victoria Burnett, *To many Pakistanis, Disgraced Scientist Still a Hero*, BOSTON GLOBE, Feb. 15, 2004, at A6.

⁴³ Ataur Rahman, *Qadeer, May Allah Protect You*, NAWA-I-WAQT (Rawalpindi, Pakistan), Feb. 2, 2004, reprinted in WORLD PRESS REV., Apr. 2004, at 11.

⁴⁴ *Id.*

⁴⁵ *Id.* (quoting a private conversation with unnamed Pakistani military official).

⁴⁶ On May 31, 2003, at a speech in Krakow, Poland, President Bush made his first public comments about the Proliferation Security Initiative. Remarks to the People of Poland in Krakow, Poland, 39 WEEKLY COMP. PRES. DOC. 700 (May 31, 2003).

⁴⁷ U.N. Sec’y Gen.’s High-level Panel on Threats, Challenges and Changes, *A More Secure World: Our Shared Responsibility*, ¶ 132, U.N. Doc. A/59/565 (Dec. 2, 2004) [hereinafter *A More Secure World*].

⁴⁸ Press Release, General Assembly, General Assembly Adopts Convention on Nuclear Terrorism: Will Open for Signature at Headquarters 14 September, U.N. Doc. GA/10340 (Apr. 13, 2005).

⁴⁹ U.N.G.A., Ad Hoc Committee Established by General Assembly Resolution 51/210 of 17 December 1996, *International Convention for the Suppression of Acts of Nuclear Terrorism*, U.N. Doc. A/59/766 (Apr. 4, 2005).

its concern for “loose nukes” and their possible acquisition by terrorists.⁵⁰ In summary, Article 2 of the Convention criminalizes possession, construction, or use of a nuclear device or radioactive material to cause death, serious bodily injury, or substantial property or environmental damage, or to blackmail persons, states, or institutions to do or refrain from doing something. Article 7 of the Convention requires state parties to pass implementing, national legislation to prevent and criminalize the assistance, instigation, encouragement, organization, financing, provision of technical assistance, or information to nuclear terrorists and the actual perpetration of the offense of nuclear terrorism. In addition, article 7 requires the exchange of information, with a national security confidentiality exemption, between state parties to ensure criminal investigation and prosecution of those suspected of nuclear terrorism. Article 8 requires states, in order to prevent offenses under the Convention, to “make every effort to adopt appropriate measures to ensure the protection of radioactive material. . . .” I applaud these overdue efforts at international cooperation to stop nuclear terrorism; specifically, the criminalization of the provision of financing, technical assistance, and information to the terrorists. But is it too late? Damage has already been done by A.Q. Khan and the like. In addition, the case of A.Q. Khan shows the danger of illicit proliferation by persons inside Pakistan or other nuclear states to terrorists. This inability to control nuclear warheads, devices, technology creates a risk of nuclear terrorism in South Asia (e.g., the detonation of a nuclear device by Pakistani terrorists in India) or elsewhere.

The damage to non-proliferation, the danger to the world, and the fueling of the nuclear black-market caused by the A.Q. Khan network may never be truly measured. Each day we read new reports of possible, past proliferation of nuclear devices throughout the world by his network.⁵¹ Moreover, the damage done by Khan is yet to be realized. In the event of a terrorist nuclear attack, will anyone be surprised if the device is traced back to the Khan network?

E. A Note on the Impotence of Sanctions—*Realpolitik* Wins Out

In April 1979, President Carter cut-off assistance to Pakistan—including \$600 million per year in military and economic aid—after it was

⁵⁰ Maggie Farley, *Nuclear Terror Pact Advances*, L.A. TIMES, Apr. 2, 2005, at A4.

⁵¹ See, e.g., Uncovering Abdul Qadeer Khan’s Nuclear Underworld, SUNFLOWER (Nuclear Age Peace Found., Washington, D.C.), May, 2004, at 6, available at http://www.wagingpeace.org/menu/resources/sunflower/2004/05_sunflower.htm (last visited Dec. 21, 2005) (discussing A.Q. Khan journeys to numerous uranium-rich African nations dating back to 1998).

discovered A.Q. Khan had stolen the Urenco plans and Pakistan was engaged in development of a nuclear weapon.⁵² These sanctions were short-lived in light of the December 1979 invasion of Afghanistan and the prominent role Pakistan would play in the U.S. Cold War proxy conflict with the Soviets in Afghanistan.⁵³

In India, some argue sanctions were working. Former Indian President Shri Venkataraman stated: “All preparations for an underground nuclear test at Pokran had been completed by 1983 when I was defense minister. It was shelved because of international pressure, and the same thing happened in 1995. . . .”⁵⁴ Additionally, Former Prime Minister Inder Kumar Gujral recalled:

[T]he Americans got in touch with Mr. (Prime Minister Rao) and for some reason it was felt expedient to postpone the tests. . . . It was a major decision where all dimensions and aspects had to be calculated. No decision could be taken in a hurry ignoring all the political, economic and international relations dimensions.⁵⁵

The U.S. Government, however, moved away from sanctions and U.S. officials sent the “same, wrong message: nuclear differences will not be allowed to stand in the way of vastly improving American relations with India.”⁵⁶ Mr. Paul Leventhal, the President of the Nuclear Control Institute, issued a scathing condemnation of the failure of U.S. foreign policy in lifting sanctions against India that resulted in a calculation by India that it could proceed with nuclear weapons testing:

[The] present chaotic situation is largely of our own making. We offered India substantially improved commercial and political relations without adequately or convincingly spelling out the consequences if India tested or deployed nuclear weapons. . . . U.S. signaled weakness, naiveté, self-deception; India took our measure, lied to us about its nuclear intentions, and correctly judged it could test and get away with it. Indian tests came as a surprise—a sneak attack on U.S. non-proliferation policy and global norms.

⁵² Frantz, *supra* note 34.

⁵³ *Id.*

⁵⁴ Leventhal, *supra* note 17.

⁵⁵ *Id.*

⁵⁶ *Id.*

According to Congressional testimony by Assistant Secretary of State Inderfuth, “We were told privately and publicly that India would continue to show restraint in the non-proliferation field, and would do nothing to surprise us.”⁵⁷

Moreover, the limited reaction sent signals to other aspiring nuclear weapons tests:

Muted international response to the [1998] tests sent signals to other nations they can test and get away with it. Middle East and East Asia are regions of particular concern. Both India and Pakistan used the cover of civilian nuclear equipment and material . . . and “confirm[ed] the weakness of the bars to nuclear proliferation.”⁵⁸

In 2005, the United States does not even criticize either nation regarding their programs and is on the verge of a new stage of conventional weapons proliferation with both nations. Indeed, on March 17, 2005, it was reported the United States may help India build one or more nuclear power plants in recognition of India’s increasing political and economic power and to balance the Bush Administration’s closer alliance with Pakistan, a key ally in America’s Global War on Terrorism. The report also recognized ongoing talks for the sale of U.S. fighter aircraft to both India and Pakistan—even though “[b]oth India and Pakistan have nuclear weapons, but the [Bush] administration does not chastise either for that.”⁵⁹ In sum, sanctions do not and did not work. U.S. *Realpolitik* during the Cold War in the 1980s and again today⁶⁰ wins out.

F. “*Aadhdi Raat Ke Baad*”⁶¹—Thinking the Unthinkable: Nuclear War in South Asia

The Death Toll: *38 million* if twenty-four ground-detonations of nuclear weapons near fifteen India-Pakistan cities; *thirty million people*

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ Joel Brinkley, *U.S. May Give Help to India on Atom Site*, N.Y. TIMES, Mar. 17, 2005, at A8.

⁶⁰ As stated earlier, Pakistan is a close American ally in the global war on terror. A strong American relationship with India serves as a counterbalance to China in the region.

⁶¹ S. Rashid Naim, *Aadhdi Raat Ke Baad “After Midnight”*, in NUCLEAR PROLIFERATION IN SOUTH ASIA 23 (Stephen Philip Cohen ed., Westview Press 1991), available at <http://www.acdis.uiuc.edu/Research/OPs/Naim/AftMNit.pdf> (“The Bulletin of Nuclear Scientists has a clock on which midnight would signal the outbreak of nuclear war between the [Cold War] superpowers. Tensions between the superpowers is reflected by the minutes left to midnight.”).

*exposed to lethal radiation doses (600 rem)*⁶² plus 8.1 million deaths from blast/fire destruction w/n 1.5-mile radius from the bomb craters.

A Natural Resources Defense Council (NRDC) report published the results of an analysis, using “nuclear war simulation software,” of two nuclear scenarios. The first assumes 10 Hiroshima-sized air-burst nuclear explosions with no fallout, while the second assumes twenty-four ground-detonation nuclear explosions with significant radioactive fallout.⁶³ NRDC estimated that Pakistan has forty-eight nuclear warheads and India has between thirty and thirty-five⁶⁴ with explosive yields of five to twenty-five kilotons (1 kiloton = 1,000 tons of TNT).⁶⁵

Under the NRDC study’s first scenario, ten nuclear weapons are exploded in the air (to maximize blast damage and fire) over five cities in India (Bangalore, Bombay, Calcutta, Madras, New Delhi—total estimated population of 14,642,937 persons within 5 kilometers from ground zero) and over five cities in Pakistan (Faisalabad, Islamabad, Karachi, Lahore, and Rawalpindi—population of 9,409,439 within 5 km from ground zero). Total population impacted in both nations: over 24,000,000. Estimated casualties are set out below in Table 2.

⁶² “The rem was devised as a unit to measure the additive effects of different types of radiation, especially low-level radiation, for those who work with radioactive materials. The rem, or radiation equivalent in man, is the dose of any type of radiation which in man has the same health effect as one roentgen of X-ray or gamma radiation. The rem is the most common unit used to measure health effects of radiation.” James A. Plambeck, *Doses of Nuclear Radiation to Humans*, CHEMISTRY GATEWAY, June 19, 1996, <http://www.psigate.ac.uk/newsite/reference/plambeck/chem1/p05015.htm> (last visited Dec. 21, 2005). The effects associated with various radiation exposure levels are as follows: *0 to 25 rem*: No detectable clinical effect in humans; *25 to 100 rem*: Slight short-term reduction in number of some types of blood cells, and disabling sickness not common; *100 to 200 rem*: Nausea and fatigue, vomiting if dose is greater than 125 rem, and longer-term reduction in number of some types of blood cells; *200 to 300 rem*: Nausea and vomiting first day of exposure, then up to a two-week latent period followed by appetite loss, general malaise, sore throat, pallor, diarrhea, and moderate emaciation, and recovery in about three months unless complicated by infection or injury; *300 to 600 rem*: Nausea, vomiting, and diarrhea in first few hours, then up to a one-week latent period followed by loss of appetite, fever, and general malaise in the second week, followed by bleeding, inflammation of mouth and throat, diarrhea, and emaciation, some deaths in two to six weeks, eventual death for 50% if exposure is above 450 rem, and others recover in about six months; and *Over 600 rem*: Nausea, vomiting, and diarrhea in the first few hours, followed by rapid emaciation and death as early as the second week, and eventual death of nearly 100%. *Id.*

⁶³ Natural Resources Defense Council, *supra* note 2.

⁶⁴ *Id.*; but see HOOMAN PEIMANI, *supra* note 21.

⁶⁵ For reference, the atomic weapon that exploded over Hiroshima was 15 kilotons, and the weapon exploded over Nagasaki was 21 kilotons. Natural Resources Defense Council, *supra* note 2.

TABLE 2	India	Pakistan	Total
Killed	1,690,702	1,171,879	2,862, 581
Severely Injured	892,459	614,400	1,506,859
Slightly Injured	2,021,106	1,361,872	3,382,978

However the first scenario is the lesser of the evils.

The second scenario is predicated on twenty-four nuclear explosions detonated *on the ground*, vice an air-burst, resulting in “significant amounts of lethal radioactive fallout.” The NRDC report discusses the distinction as follows:

Exploding a nuclear bomb above the ground does not produce fallout. For example, the United States detonated “Little Boy” above Hiroshima at an altitude of 1,900 feet. At this height, the radioactive particles produced in the explosion were small and light enough to rise into the upper atmosphere, where they were carried by the prevailing winds. Days to weeks later, after the radioactive bomb debris became less “hot,” these tiny particles descended to earth as a measurable radioactive residue, but not at levels of contamination that would cause immediate radiation sickness or death.

Unfortunately, it is easier to fuse a nuclear weapon to detonate on impact than it is to detonate it in the air - and that means fallout. If the nuclear weapons explosion takes place at sea or near the surface of the earth, the nuclear fireball would gouge out material and mix it with the radioactive bomb debris, producing heavier radioactive particles. These heavier particles would begin to drift back to earth within minutes or hours after the explosion, producing potentially lethal levels of nuclear fallout out to tens or hundreds of kilometers from the ground zero. The precise levels depend

on the explosive yield of the weapon and the prevailing winds.⁶⁶

The results of the second scenario of ground-detonation with consequent fallout of twelve 25-kiloton warheads targeted at major cities in Pakistan (Islamabad, Karachi, Lahore, Peshawar, Quetta, Faisalabad, Hyderabad and Rawalpindi) and northwestern India (New Delhi, Bombay, Delhi, Jaipur, Bhopal, Ahmadabad, and Pune), including the national capitals, are horrifying:

NRDC calculated that 22.1 million people in India and Pakistan would be exposed to lethal radiation doses of 600 rem or more in the first two days after the attack. Another 8 million people would receive a radiation dose of 100 to 600 rem, causing severe radiation sickness and potentially death, especially for the very young, old or infirm. NRDC calculates that as many as 30 million people would be threatened by fallout from the attack, roughly divided between the two countries.

Besides fallout, blast and fire would cause substantial destruction within roughly a mile-and-a-half of the bomb craters. NRDC estimates that 8.1 million people live within the radius of destruction.⁶⁷

Finally, and alarming as well, despite the nuclear carnage and millions of casualties, most of the population (93% in Pakistan and 99% in India) would survive the second scenario and the respective military forces would be intact to continue and escalate the conflict. Calls for revenge would ensure that conventional and nuclear deaths would continue—or hopefully stop.⁶⁸

G. The Cause(s) of a Nuclear Conflict in South Asia

“The most dangerous place in the world today, I think you could argue, is the Indian subcontinent and the line of control in Kashmir.”

⁶⁶ Natural Resources Defense Council, *supra* note 2.

⁶⁷ *Id.*

⁶⁸ The above scenarios do not even take into account the heightened risk today of nuclear terrorism or accidents. See Kishore Kuchibhotla & Matthew McKinzie, *Nuclear Terrorism and Nuclear Accidents in South Asia*, REDUCING NUCLEAR DANGERS IN SOUTH ASIA (The Henry L. Stimson Center, Report No. 50), Jan. 2004, at 17, available at <http://www.stimson.org/southasia/pdf/reducingnukes-section1.pdf> (containing a detailed treatment of those possibilities); see also Naim, *supra* note 61.

President William J. Clinton⁶⁹

What will cause nuclear war in South Asia? The answer is, most probably, Kashmir.

As discussed above India and Pakistan are “mortal enemies” and have fought three wars—four if we count the Kargil Conflict of 1999—since their partition and independence in 1947. Part of the crisis is Hindu nationalism versus Muslim fundamentalism. But the seeds of the current conflict were planted at the time of the 1947 partition when reconciliation after partition was prevented by the “. . . two great post-partition traumas. For India, it was the humiliating defeat by China in 1962; for Pakistan, the vivisection of their country [loss of East Pakistan] by Indian forces in 1971.”⁷⁰ The events are branded into the collective national psyche:

[E]ach trauma led directly to the consideration of nuclear weapons and the further militarization of the respective countries. In India’s case, the lesson of 1962 was that only military power counts and that Nehru’s faith in diplomacy that was not backed up by firepower was disastrously naive. The linkage between the trauma of 1971 and the nuclear option is even tighter in Pakistan—and for Zulfikar Ali Bhutto a nuclear weapon had the added attraction of enabling him to reduce the power of the army. Ironically, Pakistan has wound up with both a nuclear program and a politically powerful army.⁷¹

But the crisis would no doubt relate to Kashmir⁷²—and even if started as a conflict with conventional weapons/military forces, recourse to “tactical

⁶⁹ Jonathan Marcus, *Analysis: The World’s Most Dangerous Place?*, BBC NEWS, Mar. 23, 2000, http://news.bbc.co.uk/1/hi/world/south_asia/687021.stm. Perhaps Kashmir has lost that notorious badge of infamy. We shall see.

⁷⁰ Cohen, *supra* note 3, at 4; see also P.R. Chari, *Nuclear Crisis, Escalation Control, and Deterrence in South Asia* (The Henry L. Stimson Center, Working Paper Version 1.0, 2003), available at http://www.stimson.org/southasia/pdf/escalation_chari.pdf.

⁷¹ Cohen, *supra* note 3, at 5.

⁷² In reality, I speak to the larger state of Jammu & Kashmir, since 1947 partitioned and controlled by India, Pakistan, and China; but will use the term Kashmir for brevity and in accordance with general usage to refer to the troubled region. See Jammu & Kashmir Basic Facts, <http://www.jammu-kashmir.com/basicfacts/basics.html> (last visited Jan. 3, 2006) (containing a summary of the region and facts). The region of which I speak should not to be confused with the song. LED ZEPPELIN, *Kashmir*, on PHYSICAL GRAFFITI (Atlantic Records 1975) (lyrics available at <http://www.lyricsandsongs.com/song/19153.html>).

use” of nuclear weapons would occur within two weeks.⁷³ This paper cannot do justice to the complexities and emotions intertwined in the India-Pakistan conflict nor the Kashmir problem. A recent study summarizes the Kashmir issue:

Kashmir is both a cause and the consequence of the India-Pakistan conundrum. It is primarily a dispute about justice and people, although its strategic and territorial dimensions are complicated enough. As in many other intractable paired-minority conflicts, it is hard to tell where domestic politics ends and foreign policy begins.

There are two Kashmirs. Besides the physical territory, another Kashmir is found in the minds of politicians, strategists, soldiers, and ideologues. This is a place where national and sub-national identities are ranged against each other. The conflict in this Kashmir is as much a clash between identities, imagination, and history, as it is a conflict over territory, resources, and people. . . .

Pakistanis have long argued that the Kashmir problem stems from India’s denial of justice to the Kashmiri people (by not allowing them to join Pakistan), and by not accepting Pakistan’s own legitimacy. . . . For the Pakistanis, Kashmir remains the “unfinished business” of the 1947 partition. Pakistan, the self-professed homeland for an oppressed and threatened Muslim minority in the subcontinent, finds it difficult to leave a Muslim majority region to a Hindu-majority state.

Indians, however, argue that Pakistan, a state defined and driven by religion, is given to irredentist aspirations in Kashmir because it is unwilling to accept the fact of a secular India. India, nominally a secular state, finds it difficult to turn over a Muslim majority region to a Muslim neighbor *just because* it is Muslim. . . . In contrast, India’s secularism, strengthened by the presence of a Muslim-majority state of Kashmir within India, proves that religion alone does not make a nation. India maintains that Kashmir cannot be resolved until Pakistanis alter their views on

⁷³ Thomas E. Rickas, *India-Pakistan Nuclear Rivalry Conjures Up Wargame Scenarios*, *Worrying U.S. Military*, WALL ST. J., June 24, 1998, at A2.

secularism. Of course, this would also mean a change in the identity of Pakistan, a contentious subject in both states.⁷⁴

A 1998 article identified the usual scenario for new clash:

. . . a new India-Pakistan clash begins with the two nations at a crisis point over Kashmir. India, worried that Pakistan could move tanks and armoured personnel carriers east from the border city of Lahore and cut off the Indian-held part of Kashmir, pre-emptively attacks to secure its corridor to that disputed region, pushing deep into Pakistani territory. The Pakistanis, driven backward and fearful of losing their nuclear arsenal, launch a nuclear strike against the Indian force. . . . Usually . . . the escalation to nuclear weapons happens within the first 12 days of the war game.⁷⁵

The article focuses on Pentagon war-games that are run in two rounds:

After the first game ends with a nuclear exchange, [the moderator will] reset the game clock. Using the same players he asks them to consider what they should do differently. The war again begins with a crisis in Kashmir, and again the Indians move first. But in this round they are encouraged to recognize that in the last game they had boxed in Pakistan and forced it to resort to nuclear weapons. In round two, the Indian side generally tries to launch a lightning strike to destroy the Pakistani nuclear stockpile, using some combination of commandos and air strikes. Could the Indians really carry that off? “Probably not,”

⁷⁴ Cohen, *supra* note 3, at 16–17 (emphasis added). There is an alternative Indian view of the ongoing conflict between India and Pakistan as not arising from Kashmir but instead arises from a deeper religious-based (Pakistan as the Islamic Republic of Pakistan) cultural difference: “the ‘Kashmir issue’ is itself the result of a deeper root cause, which is a clash of two worldviews: pluralism [India] versus exclusivism [Pakistan].” Posting of Rajiv Malhotra to Sulekha Blogs, <http://www.sulekha.com/blogs/blogdisplay.aspx?cid=4407> (Feb. 11, 2002, 00:00). Malhotra blames the Pakistanis for a call for a religion/race-based partition: “[t]he name ‘Pakistan’ originated in 1933, when some Muslim students in Cambridge (UK) issued a pamphlet titled *Now or Never*. *Id.* The pamphlet denied that India was a single country, and demanded partition. *Id.* It explained the term ‘Pakistan’ as follows: “Pakistan . . . is . . . composed of letters taken from the names of our homelands: that is, Punjab, Afghania [North-West Frontier Province], Kashmir, Iran, Sindh, Tukharistan, Afghanistan, and Balochistan. It means the land of the Paks, the spiritually pure and clean.” *Id.*

⁷⁵ Rickas, *supra* note 73.

[says the war-game developer/moderator] “but they believe they could.”⁷⁶

What would the U.S do under these war-games? The U.S has played a diplomatic role in prior Indian-Pakistan conflicts usually, until recently, siding with Pakistan—at least during the Cold War. In the 1971 war after India imposed a naval blockade on East Pakistan, now Bangladesh, and was quickly defeating Pakistan on the ground, the United States even sent into the Bay of Bengal a naval task force led by the nuclear-powered aircraft carrier *Enterprise* (reportedly armed with nuclear weapons).⁷⁷ Indian naval warships were sent to “investigate” the approaching U.S. Navy task force. A confrontation was averted in part due to the fact by the time the U.S. warships got on station, the war was over.⁷⁸ Today the United States is actively engaged in the region with Pakistan considered a major non-NATO ally and a new relationship with India. The United States no doubt would apply diplomatic pressure on both nations as it did in 2002 (but particularly on Pakistan) to de-escalate tensions during India’s Operation Parakram (the ten month long mobilization and standoff after terrorists attacked the Indian Parliament).⁷⁹ But once the nuclear threshold is crossed, the use of nuclear weapons in an India-Pakistan conflict would place the U.S. in an extremely difficult situation that may require military intervention (“largely a nightmare for the U.S. military”) and an illustration of the law of unintended consequences:

The problem is that such intervention inevitably enmeshes the US in the dispute. To stop an Indian attack is effectively to side with Pakistan. Alternatively, if the US seeks to neutralize both nations’ nuclear weapons, then it [has] sided with India, which enjoys superiority in conventional military power. Many veterans of subcontinent war games conclude that the only workable US intervention would be one that comes before hostilities begin, such as a threat that the US

⁷⁶ *Id.*

⁷⁷ Admiral L. Ramdas (Ret.), Former Chief of the Indian Navy, Nuclear Disarmament and South Asia, Press Briefing at the National Press Club (May 8, 2000) (transcript available at <http://www.ieer.org/latest/ramdas.html>).

⁷⁸ *Id.*

⁷⁹ Pravin Sawhney, *The Indian Tale of the War That was Never Fought*, S. ASIAN TRIB., December 22–29, 2002, http://www.satribune.com/archives/dec23_29_02/opinion_wartale.htm.

will use air strikes to stop any military force that tries to cross the border.⁸⁰

Moreover, another variant of the war-game was for the United States to deploy “sufficient” non-nuclear forces into the region to control the crisis—but “the results shocked US military officers” as transport and lift of U.S. heavy divisions was lacking to move the forces to South Asia to make a difference.⁸¹ Since Fall/Winter 2001 the United States has deployed forces into Afghanistan as part of Operation Enduring Freedom. Recent reports indicate discussions in Kabul by Senator John McCain of permanent basing of U.S. forces in Afghanistan, presumably to continue the hunt for al Qaeda.⁸² Although the creation of a permanent U.S. base in Afghanistan is questionable (vice “temporary access”) any number of forces in Afghanistan would be insufficient to make a difference in an Indian-Pakistani conflict. Nevertheless, the presence of United States ground forces in the area is clearly an assumption not taken into account in the 1998 war-games. U.S. forces in Afghanistan and the Indian Ocean (*e.g.*, aircraft carrier strike groups) and the current U.S. operations in the Afghanistan-Pakistan region, in my opinion, make U.S. intervention into a Kashmir crisis more likely than that envisioned in 1998.⁸³

⁸⁰ *Id.* at 2. But would the U.S. launch strikes in the current political-security environment against Pakistani or Indian forces? Unless the Musharraf government was about to fall to Islamicists or a threatened intervention by China, I find it highly unlikely that the U.S. would forcibly intervene and take sides. Instead once the initial onslaughts had occurred the U.S. would push for a ceasefire and imposition of a peacekeeping force. The article continues to describe deployment of U.S. peace-keepers into Kashmir who then become targets of Pakistani “guerillas”—or I would submit today targets of al Qaeda and other terrorists—and the U.S. deploys more forces in alliance with India to relieve the beleaguered and isolated U.S. peacekeeping force. Pakistan seeks assistance from Iran who ends up launching a nuclear weapon at U.S. forces that are landed in southwestern Pakistan.

⁸¹ Rickas, *supra* note 73.

⁸² Ron Synovitz, *US Seeks Permanent Presence in Afghanistan*, INT’L REL. & SEC. NETWORKED, Feb. 24, 2005, <http://www.isn.ch/news/sw/details.cfm?ID=10833>; but see *U.S. Senator Calls for Permanent Afghan Bases*, PAK. TRIB., Feb. 23, 2005, <http://paktribune.com/news/index.php?id=95003>.

⁸³ Rickas also points out that many wargames no matter how imaginative are in fact narrow as they do not focus sufficiently on the risk of unintentional nuclear detonations. Rickas, *supra* note 73. For example if an accidental nuclear warhead detonation occurs on a nation’s military base, the subject nation may believe it has been pre-emptively attacked and therefore retaliate based upon an erroneous assumption. *Id.* (citing comments of Scott Sagan, Co-Director of Stanford’s Center for International Security and Arms Control). Nor does it take into account a lack of safe custody of nuclear arsenals and/or a *Seven Days in May* scenario of a plot against the government in Pakistan by hawkish military elements. See P.R. Chari et al., *Limited War Under the Nuclear Shadow in South Asia*, Seminar Presenting the Findings of the U.S. Institute of Peace Report Regarding the Kargil War and ‘Operation Parakram’ (Jan. 19, 2005) (summary available at <http://www.ipcs.org/newKashmirLevel2.jsp?action=showView&kValue=1636&subCatID=null&mod=null>). *Seven Days in May* is a 1964 movie starring Burt Lancaster as rogue U.S. Army General James Mattoon Scott, the Chairman of the Joint Chiefs (and expected presidential

From the U.S. perspective, any war between India and Pakistan would be a distraction and a step back in the final defeat of al Qaida in the Pakistan-Afghanistan region. Indeed a loss by Pakistan that resulted in a “regime change” of the Musharraf government for an Islamicist government would be a strategic failure for the United States.

The tinderbox of South Asia does not need academic exercises and war-games to envision how nuclear war might start. The specter of nuclear war in South Asia was almost triggered a few months after the September 11, 2001 terrorist attacks in the United States.

On December 13, 2001, around lunchtime, terrorists launched a deadly attack on India’s Parliament:

Terrorists on December 13, 2001 attacked the Parliament of India resulting in a 45-minute gun battle in which 9 policemen and a parliament staffer were killed. All the five terrorists were also killed by the security forces and were identified as Pakistani nationals. The attack took place around 11:40 am (IST), minutes after both Houses of Parliament had adjourned for the day.

The suspected terrorists dressed in commando fatigues entered Parliament in a car through the VIP gate of the building. Displaying Parliament and Home Ministry security stickers, the vehicle entered the Parliament premises. The terrorists set off massive blasts and have used AK-47 rifles, explosives and grenades for the attack. Senior Ministers and over 200 Members of Parliament were inside the Central Hall of Parliament when the attack took place. Security personnel sealed the entire premises which saved many lives.⁸⁴

Although not rising to the level of the scope of the September 11 attacks in the United States or rising to the level of the 2004 Madrid subway terrorist attacks on the eve of Spanish national elections that left 202 people

candidate), who stages a military coup centered on seizing power and key nuclear weapons and bases after unpopular President Lyman (Frederic March) gets a non-proliferation treaty through the Senate. *SEVEN DAYS IN MAY* (Paramount 1964). The timely actions of Marine Colonel Jiggs Casey (Kirk Douglas) thwarts the coup, saves the President, and the nation. *Id.*

⁸⁴ *Terrorist Attack on the Parliament of India*, Embassy of India, Recent Events, available at http://www.indianembassy.org/new/parliament_dec_13_01.htm (last visited Dec. 22, 2005).

dead and 1,400 injured,⁸⁵ the attack on the Parliament house in India had a similar psychological impact (particularly as it followed the October 1 terrorist attacks on the Indian Kashmir legislature that left 38 dead) and many in India called for a “9/11 response.” It almost led to another full-scale India-Pakistan war:

The border skirmishes and the largest military buildup between India and Pakistan since their last war in 1971 could escalate to a full-blown confrontation unless Pakistan is willing to go beyond symbolic steps against the terror groups its military and intelligence service have nurtured and directed for years.

The Dec. 13 attack by Pakistan-based Islamic terrorists on the Indian Parliament was a signal of how deadly and audacious these forces have become. It was an attempt to wipe out India's political leadership and to bring about chaos in the world's largest democracy.

In terms of what the terrorists sought to achieve, Dec. 13 was comparable to Sept. 11. It is thus understandable that India's resolve to respond to these terrorists is as firm as America's resolve to defeat terrorism after Sept. 11.⁸⁶

One author compared December 2001/January 2002 to the “missiles of October”:

It is not since the Cuban missile crisis that the world has come so close to nuclear war. Rising tensions between India and Pakistan following the terrorist attack on the Indian parliament have created a scary scenario. Defusing South Asian tensions has, therefore, become an American priority. However, these tensions can be defused and the world saved from the horrors of nuclear confrontation if the Bush

⁸⁵ James Dunnigan, *Patterns of Islamic Terror*, STRATEGY PAGE, Oct. 28, 2004, <http://www.strategypage.com/dls/articles/2004102822.asp> (“[March 10–11, 2004], simultaneous bombings of busiest rush hour commuter trains in Madrid, Spain kills 202 people and injures more than 1,400.”).

⁸⁶ Brahma Chellaney, *India Is Ready to Defend Itself*, N.Y. TIMES (ONLINE), Dec. 28, 2001, *available at* http://www.indianembassy.org/US_Media/2001/dec/India%20Is%20Ready%20to%20Defend%20Itself.htm (last visited Dec 20, 2005).

administration fully comprehends the political and nuclear issues involved in the crisis.⁸⁷

Events moved quickly. India recalled its envoy to Pakistan, alerted its forces, and demanded the handing over of other terrorists (an investigation showed some of the terrorists had been involved in the hijacking of an Indian commercial airplane in 1999). Local media were convinced the attack was sponsored by Pakistan's intelligence service:

The December 13 terrorist attack on Parliament House was carried out by five Pakistanis whose objective appeared to be to get inside the Parliament and kill as many politicians as possible, *and the entire operation was under the guidance of Pakistan's Inter Services Intelligence (ISI)*. . . .

Meanwhile, the Jammu and Kashmir police told UNI that one of the terrorists killed in the attack on Parliament was among the six who hijacked Indian Airlines Kathmandu-New Delhi Flight IC-814 in 1999. Afzal identified the hijacker as Mohammad, alias Baba. Baba was the man who killed Rupin Katyal, the lone casualty in the hijacking, he revealed.⁸⁸

India acted swiftly. Shortly after the attacks, India mobilized its forces and on December 19, 2001 launched Operation Parakram.⁸⁹ The nations came dangerously close to war as Pakistan prepared to "counter-attack" or preemptively attack based on the mobilization of Indian forces along the border; but the United States played a role in de-escalation of this crisis:

[U]nlike previous India-Pakistan crises when it "tilted" towards one of the parties, the US was able to sustain strong relations with both countries. During "Operation Parakram", in fact, many people in the US believe, like former Secretary of State, Colin Powell, that it was American pressure that prevented a war in the sub-continent. . . .

⁸⁷ Mohammed Ayoob, Commentary, *South Asia's Nuclear Dangers*, WASH. TIMES, Jan. 4, 2002, at A17.

⁸⁸ J.T. Vishnu, *ISI Supervised Parliament Attack*, TRIB. (India), Dec. 16, 2001, available at <http://www.tribuneindia.com/2001/20011217/main1.htm> (emphasis added).

⁸⁹ Shweta Moorthy, *Operation Parakram*, INST. PEACE & CONFLICT STUD. (Article No. 1654), Feb. 22, 2005, http://www.ipcs.org/India_seminars2.jsp?action=showView&kValue=1667.

Major General Ashok Mehta described “Operation Parakram” as the military component of a national strategy, which also had a diplomatic and a political element. He agreed with Lavoy that *India and Pakistan came extremely close to war but Pakistan did not deter India; India deterred itself*. . . .

General Musharraf admitted in July 2002 to being extremely close to war. Plans were made for immediate counter-attack on the Pakistani side and both sides were indulging in risky and dangerous signaling.⁹⁰

The above excerpt is from a report of an Indian think-tank in New Delhi and demonstrates the belief by certain Indian senior officers that the 11-month confrontation was always controllable—and are reluctant to admit how close they were to a full-scale war perhaps with nuclear weapons. But more importantly for our purposes, the Indian military officers are correct in that Pakistan did not deter India (or rather Pakistan’s nuclear weapons did not deter India). In other words, India is ready to accept the risk of use of Pakistani nuclear weapons—unless India can take them out first. Ironically, some Indian writers applaud the nuclear brinkmanship implicit in Operation Parakram as a demonstration of Indian’s resolve:

Operation Parakram demonstrated that if pushed beyond a point, India is prepared in its national interest to go to brink of war despite attendant nuclear risks to deter Pakistan from following its policy of jihad. Twice in January and June 2002, India came within a whisker of war, especially in June after a second terrorist attack in Kaluchak on 14 May. *The travel advisories and the evacuation of several embassies in Delhi and high octane political rhetoric shifted the focus from Cross Border Terrorism (CBT) to nuclear war*. The Musharraf speeches of 12 January and 27 May, hours and days before India’s D-Day, were specifically designed at US prompting to reassure India that Pakistan would indeed stop and prevent CBT from its territory. That was the time the US was pleading with India to give Pakistan “more time”, a euphemism for giving the US more time.⁹¹

⁹⁰ *Id.* (emphasis added).

⁹¹ Ashok Mehta, *From Parakram to Peace*, PIONEER (New Delhi), Jan. 28, 2004, available at http://www.southasianmedia.net/index_opinion4.cfm?id=20218. (emphasis added).

Operation Parakram has moved into the realm of urban legend or myth and some argue it is an example of valid nuclear deterrence. But in fact India was not deterred by Pakistan nuclear weapons (despite Pakistan “test-firing” two missiles in the midst of the crisis) and was prepared to engage in full-scale and untested warfare. The following excerpt shows the danger inherent in Indian military doctrine (assumed Pakistan will not use its nuclear weapons at least early on):

Prime Minister Vajpayee has already informed the nation that India was close to war with Pakistan on two occasions, in January and later in June. What he did not say is that the Army's offensive plans in June were so audacious that they had never been war-gamed before. *The importance of revealing these plans is that the Army top brass was not deterred by Pakistani nukes.*

With war clouds hovering on the horizon after the May 14 [2001] terrorist attack in Kaluchak in Jammu, leading analysts spoke of a "salami-slicing" of Pakistan Occupied Kashmir (POK) by Indian Armed forces. It was suggested that the Army would seek a shallow penetration all along the Line of Control to capture known terrorist infiltration routes in POK. The military action would be limited to POK with a shallow ingress to ensure that Pakistan's nuclear threshold is not crossed.

Both the US and Pakistan got wind that India had moved its 1 corps between its 2 and 21 corps in Rajasthan. This explains why unlike in January, the US in May issued advisory to its nationals to leave India and Pakistan immediately. *It has been the US thinking that a full scale war between India and Pakistan would easily escalate into a nuclear exchange. Pakistan, meanwhile, test-fired two nuclear capable ballistic missiles in May. This was meant as a warning to India to apply brakes to its most ambitious military plans ever made.*

In hindsight, three observations can be made about India's June plans: One, the Army does not believe in the concept of a limited conventional war. Two, the Army believes that Pakistan will not use its nukes early in a war, and most

importantly, it appears that the Indian political leadership was deterred by Pakistan's nukes more than Pakistan was by India's putative nuclear second strike capability.⁹²

Once India walked back from the brink and ended the 10-month long nuclear standoff in late 2002, India's military went to work on crafting a new military doctrine—some would say a hawkish doctrine—called *Cold Start*. The title says it all: immediate start-up of the military machine (from a cold start) by way of “integrated battle groups” with lightning military strikes in response to threats or attacks from Pakistan vice a slow build-up that would warm the engine.⁹³ *Cold Start* is designed to get India out of its “strategic box” and avoid a ponderous build-up of the massive Indian conventional military might—that is neutralized by the Pakistani nuclear threat as witnessed by Operation Parakram—and some would say to avoid international diplomatic interference:

The spring and autumn peace initiatives of 2003 led to the subcontinent being treated to an Indo-Pak cricketing spectacle early this year [2004]. But with a fresh military menu being served up in the form of the new army doctrine countenancing “Cold Start”, the hawks may be back. “Cold start” is a euphemism for mobilizing military forces faster than international diplomacy can defuse an Indo-Pak crisis. . . .

“Integrated Battle Groups” (*Cold Start*) is the Indian Army's cryptic answer to the nuclear standoff witnessed between India and Pakistan during the ten month long Operation Parakram in 2002. Presently only the Army Commanders appear to have endorsed it at their early summer meet, the first of their biannual meetings. That the Army would take the initiative is understandable in that it was the Army that had been found wanting off the blocks during both Operation Parakram and the Kargil-induced Operation Vijay earlier.

During Operation Vijay it had taken the Army up to one and half months to get its act together in giving what eventuated in a fitting reply to Pakistan's adventurism. In Operation Parakram, launched in the wake of India's very own 9/11,

⁹² Sawhney, *supra* note 79 (emphasis added).

⁹³ Firdaus Ahmed, *The Calculus of 'Cold Start'*, INDIA TOGETHER, May 2004, <http://www.indiatogether.org/2004/may/fah-coldstart.htm>.

the dastardly terrorist attack on parliament in Dec 2001, the Army is reported to have taken three weeks to mobilize its armoured might. . . .

It has been conjectured that the interim between India's slow mobilizing in 2002 and being ready on the blocks was exploited skillfully by Pakistani diplomacy, seized as it already was then with its role of "frontline" state for the second time round, this time against its own former surrogate, the Taliban. As a result the pressure mounted by the US was such that India prevaricated, with the mobilization being termed by its spin doctors as "coercive diplomacy" worthy of India's Chanakyan tradition. . . .

[The Army's answer, small "integrated battle groups," are] quicker off the blocks in what is being termed as "Cold Start", thereby positioning India better at the political level in the diplomatic game.

Second, and more pertinently, these would be *able to undercut Pakistan's yet unstated nuclear doctrine of "first use" by striking at shallow objectives that do not necessarily compel Pakistan to cross its nuclear threshold.* These groups would lack the punch to go for Pakistan's innards, the erstwhile role of the [larger] "strike corps". Therefore "military necessity" would not be of the order to permit Pakistan morally and legally to "go nuclear".

Smaller battle groups would also be more survivable, presenting smaller fast moving targets even if Pakistan were to contemplate the nuclear option against them. Several of these moving into Pakistan would also pose Pakistan the problem as to which one to tackle and with what. The idea is to paralyse Pakistani leadership with this decision dilemma while making quick territorial gains to be bartered post conflict on the negotiation table in return for Pakistan's promise of good behaviour with regard to Kashmir. *It is expected that the next round will be swiftly over since the US led international community would not want to grapple with the nuclearised aftermath of any future subcontinental conflict.*

[I]n keeping with its mandate of furnishing the political leadership military options, the Army has tried to work around the problem posed by Chagai and revealed during Operation Parakram. The danger is that in doing so it is attempting to bring war back as an option into political calculus. *If it takes as little as a bunch of fanatics with automatic weapons to spark off a subcontinental crisis with nuclear overtones, then to make “war”, howsoever restrained, appear as a viable option to address similar crisis in the future is itself a danger.*⁹⁴

Thus, the Cold Start doctrine (a work in progress) is the answer to Parakram and would launch rapid, lightning strikes, rapid shallow invasions into Pakistan, and conduct surgical military strikes using air and special operations forces to destroy select targets including terrorist infrastructures. India is willing to use these smaller forces and thus dance with Pakistan’s “nuclear threshold.” Of course Pakistan may see preemptive strikes on Pakistan WMD as part of the Cold Start doctrine and this would result in a shortening of the timeline and cause Pakistan to be extremely sensitive to any Indian military movement. In essence, Cold Start turns the nuclear trigger into a hair trigger. Cold Start is premised on brinkmanship, preemptive self-defense, speed, and the ability to avoid, preempt or survive a nuclear attack. It is a recipe for nuclear war. Pakistan will have no choice in its mind but to pull the nuclear trigger faster.

H. South Asia and the Myth of Nuclear Deterrence—It Will Not Work

*“We are close to actual war. . . . A lot of viable options (beginning from a strike on the camps to full conventional war) are available. We can do it. . . . If we go to war, jolly good.”*⁹⁵

Nuclear deterrence in the long run will not work in South Asia, is flawed, and, in fact, will cause a conflict to move from a conventional war into a nuclear war. First, it is noteworthy that ongoing conflict and crisis between India and Pakistan including the Kargil conflict of 1999 and Operation Parakram—the mass mobilizations of a million troops in 2001–2002 along the Pakistan-Indian border—“challenged the conventional wisdom that

⁹⁴ *Id.* (emphasis added).

⁹⁵ *Army Ready for War, Says Chief*, THE STATESMAN (India), Jan. 12, 2002 (quoting General S. Padmanabhan, Chief of Staff of the Indian Army). The bellicose statement of the Indian Chief of Staff in the midst of Operation Parakram stalled Pakistan from “backing down.” Scott D. Sagan, *Nuclear Instability in South Asia*, in USE OF FORCE *supra* note 32, at 370.

democracies do not wage war on each other, and that nuclear powers do not engage in direct conflict.”⁹⁶ In addition, the debate of whether the presence of nuclear weapons in South Asia contributes to stability rages on. The NRDC points out the fallacy of analogy to the U.S.-U.S.S.R. Cold War as an example of nuclear deterrence and military restraint. The long-standing hatred built up over fifty-eight years of four actual “hot” conflicts (vice a Cold War) and the fact the India-Pakistan conflict is one premised upon religious fundamentalism (Pakistan) and nationalism (India) makes the situation distinct from the Cold War.⁹⁷ Moreover:

A second difference is India and Pakistan’s nuclear arsenals are much smaller than those of the United States and Russia. The American and Russian arsenals truly represent the capability to destroy each other’s society beyond recovery. While the two South Asia scenarios [discussed *supra*] produce unimaginable loss of life and destruction, they do not reach the level of “mutual assured destruction” that stood as the ultimate deterrent during the Cold War.⁹⁸

Some would say this is simply an issue of not enough nuclear weapons—build more. Even if we assume that is correct, the time and capability of the two nations (both lacking) to achieve the required level of nuclear weapons creates a high-risk unstable period.⁹⁹ The presence of nuclear weapons not only fails to prevent conventional or sub-conventional conflict, it “may even exacerbate those tensions. This is the stability-instability paradox.”¹⁰⁰ Pakistan may have believed it had “cover” due to its nuclear deterrence to prosecute the conventional Kargil conflict of 1999—an apparent “belief in South Asia (unlike that held in the West during the Cold War) that conventional and nuclear conflicts are disconnected and conventional wars can be waged without direct bearing on the stability of nuclear deterrence.”¹⁰¹ I would submit the United States and Soviet Union ultimately recognized the need to avoid direct confrontation and conflict due to the nuclear option and thus prosecuted the Cold War via proxy wars. That luxury, by virtue of simple geography and the

⁹⁶ See Chari, *supra* note 83. The labeling of Pakistan as a democracy is controversial—although I believe at times Pakistan has been governed by elected representatives.

⁹⁷ Natural Resources Defense Council, *supra* note 2.

⁹⁸ *Id.*

⁹⁹ As we will see the number of nuclear weapons does not impact on the divergent and incompatible first use (Pakistan) and second use/retaliation (India) nuclear policies. Regardless of the numbers their policies do not complement each other—another requirement for M.A.D. (“Mutually Assured Destruction”).

¹⁰⁰ Chari, *supra* note 83.

¹⁰¹ *Id.*

Kashmir insurgent/terrorist conflict, is not available to India and Pakistan. All efforts must be made to demonstrate this distinction to those who advocate nuclear deterrence for South Asia.

The ten conclusions of the United States Institute for Peace (USIP) report opined first, in contrast to the NRDC report, the Kargil conflict and Operation Parakram crises showed Mutually Assured Destruction (MAD) deterrence is operating in South Asia, but it was not nuclear deterrence as much as lack of political will and/or external intervention (U.S.) that caused the crises to end.

Second, . . . *both sides are prepared to engage in dangerous brinkmanship.* The leadership of both countries are more aware of the utility of nuclear weapons as a political tool rather than their military implications. So provocative statements are easily made, often for domestic or third-party (chiefly US) audiences, which may send mixed signals to the adversary. Stability is also undermined by a lack of substantive progress on confidence-building measures, and by the role of China, which has been benignly uninvolved in recent crises, but retains the potential to complicate future crises.¹⁰²

Third, each side's leadership has apparently learned little from past crises

Fourth, the role of the US continues to enlarge, since its intervention in the Kargil war or even earlier. But certain paradoxes complicate its role. It urges restraint in Indian and Pakistani nuclear programs while continuing to develop its own capabilities, especially with smaller weapons (such as "bunker busters") designed for use in war rather than strategic deterrent. . . . And while the US insists that its relations with India and Pakistan are not a zero-sum game, it remains difficult to exercise a fine balance, especially when it maintains a physical presence in Pakistan and Afghanistan. Overall, the US has a growing interest in the region and can play a stabilizing role in crises.

¹⁰² The report identified two strategic triangles in the region: India-Pakistan-US and India-Pakistan-China. *Id.*

Fifth, the issue of Kashmir remains central to India-Pakistan relations

Sixth, maintaining the status quo is easier than revising it. Put another way . . . deterrence is more effective than coercion

Seventh, successive India-Pakistan crises have resulted in renewed attempts to develop confidence-building measures. But the centralised nature of national security leadership on each side makes it difficult to consolidate these initiatives into a more enduring peace process.

Eighth, despite some growing interdependence, there are few signs of long-term accommodative policies in either country. The search for new doctrines, and strategies like Cold Start,¹⁰³ are potentially very stabilising.

Ninth, on the other hand, the recent crises have shown three potentially stabilising trends: a growing restraint in each state's crisis management behaviour, growing transparency in their strategies, and growing US involvement in crisis resolution.

Finally, in assessing the effects of the 1998 nuclearisation of the region, the jury is still out. *It is unclear whether the nuclear tests had a positive or negative effect on regional strategic stability.*¹⁰⁴

The above studies demonstrate the continuing debate over whether the presence of nuclear weapons increases stability and is effective nuclear deterrence. Moreover, it points out the volatile situation with domestic terrorist concerns and the role of a looming China. Of course, as stated earlier, the point is that the threat of a Kashmir crisis leading to nuclear war in South Asia with U.S. or Chinese intervention is not just an academic exercise,

¹⁰³ I disagree that Cold Start stabilizes the situation. In my opinion, time for international diplomatic intervention is one of the best hopes to forestall a nuclear war in the event a crisis erupts. "Cold Start" will allow India to strike quickly before international pressure can come to bear. Furthermore, once India mobilizes, Pakistan will not wait. Time for crisis resolution is now shorter due to Cold Start.

¹⁰⁴ Chari, *supra* note 83 (emphasis added).

but a potential outcome of an ongoing international crisis.¹⁰⁵ Nevertheless, to some the presence of nuclear weapons in South Asia is actually a calming force in a volatile region and therefore the risk of nuclear Armageddon is an acceptable one. As stated by one nuclear deterrence optimist the logic goes: “There is no more ironclad law in international relations theory than this . . . nuclear states do not fight each other.”¹⁰⁶

I disagree to the extent India and Pakistan (nuclear states) have in fact fought each other since they have acquired nuclear weapons and nuclear deterrence with the implicit risk of nuclear war is simply not acceptable. In a world of labels, label me a nuclear deterrence pessimist.

Nuclear Instability in South Asia is the name of an article published in a recent book on military power and international relations. The author (Sagan) pessimistically concludes “stable nuclear deterrence” is problematic in South Asia. In the same book, another author (Waltz), in his article *Nuclear Stability in South Asia*, argues that South Asia is “the ‘acid test’ for deterrence optimists” and finds that the presence of nuclear weapons in South Asia acts as a limiting force on conflicts—and a preserver of peace.¹⁰⁷ Their articles succinctly grasp the opposing views in the debate over nuclear deterrence in South Asia.

Sagan directly points out the differences between the U.S.-U.S.S.R. Cold War system and the nuclear relationship between India and Pakistan: the nuclear arsenals in South Asia are “much smaller and less sophisticated,” and thus, both India and Pakistan are “more vulnerable to a counterforce attack (an attack on the adversary’s own nuclear forces) and less capable of mounting counterforce attacks, and thus the net effect is uncertain.”¹⁰⁸ Moreover, Sagan summarizes the distinct civil-military relationships:

The Soviets and the Americans both eventually developed an “assertive” command system with tight high-level civilian control of the military, with (at least until recently) very little direct military influence on any aspect of nuclear weapons policy. Pakistan, however, is at the other end of the

¹⁰⁵The NRDC case study, the USIP/ICPS reports, and the reported Pentagon war-games did not discuss in detail the actions of the UN Security Council to act, impose sanctions, or authorize use of force under Chapter VII of the UN Charter to end the crisis and restore international peace and security—a sad commentary on the role of the UNSC in this issue. Nor is there a detailed discussion of Chinese reactions/actions.

¹⁰⁶DEVIN T. HAGERTY, *THE CONSEQUENCES OF NUCLEAR PROLIFERATION* 92, 106 (1998).

¹⁰⁷Waltz, *supra* note 32, at 382.

¹⁰⁸Sagan, *supra* note 95, at 370.

spectrum, with the military in complete control of the nuclear arsenal, and with only marginal influence from civilian political leaders, even during the periods when there was a civilian-led government in Islamabad. There are finally, important differences in mutual understanding, proximity, and hostility. India and Pakistan share a common colonial and pre-colonial history, have some cultural roots, and share a common border; they have also engaged in four wars against each other, and are involved in a violent fifty-year dispute about the status of Kashmir. In contrast, the Americans and Soviets were on opposite sides of the globe and viewed each other as mysterious, often unpredictable adversaries. The cold-war superpowers were involved in a deep-seated ideological rivalry, but held no disputed territory between them and had no enduring history of armed violence against each other.¹⁰⁹

Sagan then opines that all are fortunate that India developed nuclear weapons first, and emphasizes the military influence and control in Pakistan vice the civilian control in India:

In India the military has traditionally not been involved in decisions concerning nuclear testing, design, or even command and control. In Pakistan, the military largely runs the nuclear weapons program; *even during the periods when civilian prime ministers have held the reins of government, they have neither been told the full details of the nuclear weapons program nor been given direct control over the operational arsenal.*¹¹⁰

Yet despite the seeming “civilian control” in place in India, Sagan goes on to demonstrate the instability in the theater and how the Indian military did not change their belief in a more aggressive counter proliferation policy against Pakistan: “Instead the beliefs went underground, only to resurface later in a potentially more dangerous form in the ‘Brasstacks’ crisis of 1986–1987.”¹¹¹ Brasstacks was ostensibly an Indian military exercise—involving 250,000 troops, 1500 tanks, live ammunition, and a simulated counter-offensive attack, including air-strikes into Pakistan. The Pakistanis fearing the exercise could be in reality a full-scale attack alerted military forces and

¹⁰⁹ *Id.* at 370–71.

¹¹⁰ *Id.* at 371 (emphasis added).

¹¹¹ *Id.* at 372.

conducted their own exercises on the border. These actions led to Indian “counter-movements” near the border and “an operational Indian Air Force alert.” Only after intervention at the highest levels was the crisis resolved.¹¹² The crisis has been labeled an accident “caused by Pakistan’s misinterpretation of an inadvertently provocative Indian Army exercise.” But Sagan refutes this characterization and instead focuses on the then-Indian Chief of Army Staff, General Sundarj and alleges he constructed Brasstacks to provoke a response from Pakistan to allow development of a military conventional conflict before—and to forestall—Pakistani nuclear weapons development. Sagan quotes Lieutenant General Hoon, commander in chief of the Indian Western Army forces during Brasstacks: Brasstacks was no military exercise. It was a plan to build up a situation for a fourth war with Pakistan. *And what is even more shocking is that Prime Minister, Mr. Rajav Gandhi was not aware of these plans for war.*¹¹³ Sagan claims this view is buttressed by the fact the Indians did not provide full notification of the exercise to the Pakistanis and failed to use “the special hotline to explain their operations when information was requested by Pakistan during the crisis.” Finally, the plan almost worked as India, sensing an attack now by Pakistan, considered the need for preemptive strike on Pakistan nuclear facilities—General Sundarji advocated the strikes to Prime Minister Gandhi. Ultimately, the argument of a senior MoD official that “India and Pakistan have already fought their last war, and there is too much to lose in contemplating another one” prevailed.¹¹⁴ Brasstacks clearly demonstrates the instability of nuclear weapons and conflict in South Asia.

Sagan moves on to discuss the Kargil Conflict and that “optimists”—those in favor of nuclear deterrence—see nuclear weapons as a positive development and as a means of deterrence and limiting of conflict in South Asia. Sagan correctly highlights that the 1999 Kargil Conflict, when Pakistani forces moved across the Line of Control into Kashmir, demonstrates first that “nuclear-armed states can fight wars” and second, the Pakistani military’s dangerous reliance and miscalculation on the “stability/instability paradox”¹¹⁵ actually led all parties to the brink of nuclear war. The conflict ended after at least 1,000 deaths and only after Pakistani Prime Minister Sharif flew to Washington, D.C. and received assurances from President Clinton that he would take a “personal interest” in the Kashmir problem.¹¹⁶ The subsequent

¹¹² *Id.*

¹¹³ *Id.* (emphasis added).

¹¹⁴ *Id.* at 372–73. Of course since 1987, India and Pakistan have had several conflicts, most notably the Kargil Conflict and Operation Parakram, and tensions remain high.

¹¹⁵ A belief that a “stable nuclear balance” between India and Pakistan permitted more offensive operations “to take place with impunity” into Kashmir.

¹¹⁶ Sagan, *supra* note 95, at 373.

withdrawal of Pakistani forces led directly to the coup that removed Prime Minister Sharif in October 1999.

True nuclear deterrence is premised on the assumption that regardless of the crisis, the nations will not resort to nuclear weapons. Both India and Pakistan, although cautious due to the nuclear option, demonstrated a willingness to escalate the conventional conflict if necessary and the Pakistanis threatened use of nuclear weapons (and actually alerted their nuclear forces *without the Prime Minister's knowledge*).¹¹⁷ Another interesting point is that Pakistan is convinced that India intends to strike Pakistani nuclear weapon sites at the outset of a conflict. To preempt such a strike, Pakistan alerted its nuclear forces in both the Kargil and Parakram crises and mobilized those forces whereby the weapons were taken from secure locations and deployed into the field to disperse them from Indian attack. Of course this “makes the weapons more vulnerable to theft or internal attacks by terrorist organizations.”¹¹⁸

Sagan also points out that “fear of retaliation is central to successful deterrence, and the second requirement for stability with nuclear weapons is therefore the development of secure, second-strike forces.”¹¹⁹ Unfortunately, neither nation is prepared to maintain “survivable forces.” Lack of operational security by Pakistani military forces as to the location of its “secret” nuclear forces was clearly demonstrated in past conflicts. In other words, India may think it need not fear a second strike from Pakistan.

Finally, Sagan points out the real risk of nuclear war is “organizationally-based”—in other words nuclear deterrence is fatally flawed due to human error. A nuclear accident or a missile test launch during a crisis could produce a false warning of an imminent nuclear attack. “[Indian and Pakistani] leaders seek security through nuclear deterrence, but imperfect humans inside imperfect organizations control their nuclear weapons. . . . [T]hese organizations will someday fail to produce secure nuclear deterrence.”¹²⁰

Now Kenneth Waltz’s article under a slightly different title, *Nuclear Stability in South Asia*, advocates the nuclear deterrence optimist argument.¹²¹ Waltz believes that India and Pakistan can engage in effective nuclear

¹¹⁷ *Id.* at 374–75 (emphasis added).

¹¹⁸ *Id.* at 376.

¹¹⁹ *Id.* at 377.

¹²⁰ *Id.* at 380.

¹²¹ Waltz, *supra* note 32.

deterrence, learn from the Cold War, and not engage in an arms race to MAD levels, and that building large nuclear forces would be “wasteful and foolish.”

Yet nuclear states need race only to the second strike level, which is easy to achieve and maintain. Indian and Pakistani leaders have learned from our folly. A minimal deterrent deters as well as a maximal one. Homi Jehangar Bhabha, father of the Indian bomb, called this “absolute deterrence.” . . . An arsenal of about sixty weapons [one Indian strategist believes] will deter either Pakistan or China; and Pakistan might need, say, twenty to deter India. Some have claimed that no nuclear country has been satisfied with having only a minimum deterrent. Yet China, with even today, only about twenty ICBMs, has been content with small numbers¹²²

Waltz’s article is a point-by-point rebuttal of Sagan; he believes that India and Pakistan can control their nuclear forces and that deterrence works in South Asia notwithstanding the criticisms:

Except to alarmist observers, mainly American, neither side [during the 10-month standoff in Operation Parakram] looked as though it would cross or even approach the nuclear threshold. The proposition that nuclear weapons limit the extent of fighting and ultimately preserve peace again found vindication.¹²³

I disagree with Waltz as stated in this paper. I believe the facts show that India was prepared to launch full-scale conventional war, was prepared to strike nuclear sites of Pakistan, and respond with nuclear weapons as a second strike. I believe Pakistan having mobilized its nuclear forces and intimated their use, was prepared to launch a nuclear weapon as the first strike in the event of an Indian cross-border attack. The nations were clearly at the nuclear threshold. The intervention by the international community at a time when the U.S. was in the midst of Operation Enduring Freedom in Afghanistan ended the crisis before the threshold was crossed.

A final area of discussion as to why MAD will not work in South Asia is the nations’ nuclear strike policies do not match. Military doctrine (*e.g.*, Cold Start) that contribute to instability in the South Asia are

¹²² *Id.* at 383.

¹²³ *Id.*

exacerbated by the divergent nuclear weapons strike policies of Pakistan and India, and thus undermine a claim of nuclear deterrence:

[T]he nuclear postures of India and Pakistan are very different. *India is committed to a no first-use policy.* An authoritative study by RAND [Corporation] published last year corroborated that India's policy of no first-use is confirmed by its current nuclear posture. RAND's Ashley Tellis, currently senior adviser to the U.S. ambassador in New Delhi, defined this posture as one of a "force-in-being" which stops well short of the actual deployment of nuclear weapons. Moreover, India does not need to use its nuclear capability in a war with Pakistan except in retaliation to a Pakistani nuclear attack.

*Pakistan, on the other hand, is unwilling to subscribe to a no-first-use doctrine.*¹²⁴

India's announced nuclear policy is premised on deterrence, self-defense, no first-use, survivability of nuclear forces, and a punitive retaliation:

Objectives

1. In the absence of global nuclear disarmament India's strategic interests require effective, credible *nuclear deterrence and adequate retaliatory capability* should deterrence fail. This is consistent with the UN Charter, which sanctions the right of self-defence. . . .

2.3. *India shall pursue a doctrine of credible minimum nuclear deterrence. In this policy of "retaliation only", the survivability of our arsenal is critical.* . . . India's peacetime posture aims at convincing any potential aggressor that:

(a) any threat of use of nuclear weapons against India shall invoke measures to counter the threat: and

(b) any nuclear attack on India and its forces *shall result in punitive retaliation with nuclear weapons to inflict damage unacceptable to the aggressor.*

¹²⁴ Ayob, *supra* note 87 (emphasis added).

2.4. The fundamental purpose of Indian nuclear weapons is to deter the use and threat of use of nuclear weapons by any State or entity against India and its forces. *India will not be the first to initiate a nuclear strike, but will respond with punitive retaliation should deterrence fail.*

2.5. India will not resort to the use or threat of use of nuclear weapons against States which do not possess nuclear weapons, or are not aligned with nuclear weapon powers. . . .

2.7. Highly effective conventional military capabilities shall be *maintained to raise the threshold* of outbreak both of conventional military conflict as well as that of threat or use of nuclear weapons.¹²⁵

On the other hand, Pakistan will not reject first-use in an attempt to keep India guessing:

While India has a stated policy of not using nuclear weapons first, *Pakistan has deliberately maintained an opaque nuclear posture for a long time, which in essence seeks to keep India off balance and confused* with regard to when and under what conditions Pakistan might choose to use nuclear weapons.

In January 2002, General Khalid Kidwai, the head of the Pakistani army's Strategic Plans Division, which oversees nuclear-weapons development and deployment, gave an interview Among other things, Kidwai gave the possible conditions under which Pakistan could use nuclear weapons against an adversary. Stating that Pakistan would use atomic weapons only "if the very existence of Pakistan as a state is at stake," Kidwai [gave] details. *Pakistan's nuclear weapons are aimed solely at India. In case that deterrence fails, they will be used if: India attacks Pakistan and conquers a large part of its territory (space threshold)[;] India destroys a large part either of its land or air forces (military threshold)[;] India proceeds to the economic strangling of Pakistan (economic strangling)[; or] India pushes Pakistan*

¹²⁵ *Draft Report of National Security Advisory Board on Indian Nuclear Doctrine*, Aug. 17, 1999, available at www.indianembassy.org/policy/CTBT/nuclear_doctrine_aug_17_1999.html (emphasis added).

into political destabilization or creates a large-scale internal subversion in Pakistan (domestic destabilization).¹²⁶

Consequently, India operates on the assumption that Pakistan may use nuclear weapons first, but is unclear when, and Pakistan—if it believes Indian published policy—can operate knowing it may choose the time to launch the first nuclear weapon strike. India's Cold Start doctrine shortens the trigger if Pakistan perceives an imminent attack by India (particularly if assess a surgical strike to take out Pakistani nuclear assets). But the nuclear policies do not complement each other and are instead based on confusion, brinkmanship, and mistrust. The Pakistan unclassified Foreign Policy information paper posted on its Embassy webpage demonstrates the volatility and provocative rhetoric over Kashmir and Pakistani nuclear weapons policy:

Our nuclear and missile program, coupled with effective conventional defensive capability, successfully deterred Indian aggression. Pakistan also proved itself to be a peace-loving and responsible nuclear state. *In response to the disingenuous Indian offer of a "no first strike" agreement, Pakistan countered with its more comprehensive proposal of a "no war pact."*

Pakistan effectively checked Indian machinations to brand the indigenous Kashmir's struggle for independence as an issue of "cross-border terrorism," in an attempt to exploit the prevailing anti-terrorism sentiment in the world. Pakistan asserted that there was no cross terrorism in Kashmir *but only the indigenous struggle of the Kashmiri people against the illegal Indian occupation for the past 53 years was being brutally crushed by the Indians*. The Kashmir dispute cannot be brushed aside as a case of separatism or terrorism¹²⁷

The point becomes clear that the nations are on a collision course. In my opinion a conventional war will lead to a nuclear war. Recently a senior Pakistani admitted exactly that point:

¹²⁶ Kaushik Kapisthalam, *Pakistan Leaves Arms Calling Card*, ASIA TIMES ONLINE, Feb. 10, 2005, available at http://www.atimes.com/atimes/South_Asia/GB10Df06.html (emphasis added).

¹²⁷ Embassy of the Islamic Republic of Pakistan, Washington, D.C., Foreign Policy of Pakistan, Embassy of the Islamic Republic of Pakistan, Washington, D.C., <http://www.embassyofpakistan.org/pb1.php> (last visited May 5, 2005) (emphasis added).

[A] senior Pakistani military official made a presentation to a Washington-based think-tank on this very topic a few days ago. The audience included some influential US government officials and prominent academics. The study by the official, who wished to remain anonymous, in essence made a case *that there is no scenario in South Asia where a conventional war would not turn nuclear*.¹²⁸

So where is the nuclear deterrence? I submit there is none. The two nuclear weapons policies—Pakistan’s premised on first strike and India prepared for a punitive nuclear retaliation (but with a new preemptive conventional war posture that may lead Pakistan to “anticipatory self-defense”) —are the perfect recipe for a nuclear war. The nations are playing Russian Roulette.

I. The Proliferation of Conventional Weapons in South Asia by the United States—“Keep Your Friends Close and Your Enemies Closer

As I researched material and began writing this paper in early 2005, the issue of United States proliferation of *conventional* weapons in South Asia came onto the stage. In March 2005, the new U.S. Secretary of State Condoleezza Rice, in one of her first trips abroad, journeyed to New Delhi. Secretary Rice ushered in a new chapter in closer Indian-U.S. relations and the recognition of India as the emerging regional power; however, she stopped short of endorsement of a permanent seat on the UNSC for India.¹²⁹ The U.S. Ambassador to India, writing in the *Times of India*, heralded the new policy of the United States as a commitment to “help India become a major world power in the 21st century” and transforming the relationship into a “true strategic partnership.”¹³⁰ Ambassador Mulford’s optimism was matched by the cautious optimism of the *Hindustan Times*: Secretary Rice’s call for a “balance of power in favour of freedom” creates a two to three-year window for the U.S to “prove its love” with big ticket items such as space and civilian nuclear

¹²⁸ Kapisthalam, *supra* note 126 (emphasis added).

¹²⁹ David Gollust, *Rice Hail India’s Growing Influence, but Defers on Its Bid For UN Security Council*, VOICES OF AMERICA, Apr. 15, 2005, <http://www.voanews.com/burmese/2005-04-15-voa1.cfm>; see also Robert Blackwill, *A New Deal for New Delhi*, WALL ST. J., Mar. 21, 2005, A16.

¹³⁰ David C. Mulford, U.S. Ambassador to India, *U.S.-India Relationship to Reach New Heights*, TIMES OF INDIA Mar. 31, 2005, available at http://www.indianembassy.org/India_media/Mar_05/TOI.htm.

technology and support for a UNSC permanent seat in exchange for India signing on to PSI.¹³¹

Shortly after Secretary Rice left India, the U.S announced its decision to sell advanced fighter aircraft (F-16s) to Pakistan (purchased in part with U.S. security assistance funds). A 1990 sale of 28 F-16s had been canceled due to sanctions imposed by the United States (via the 1985 Pressler Amendment) in light of Pakistan's covert nuclear weapons program.¹³² The proposed sale was immediately met with protests from India who had warned Secretary Rice not to go through with such a sale:

Washington's decision on 25 March to provide 26 multi-role F-16 aircraft to Pakistan was a foreign policy embarrassment for the Indian government.

Speaking in New Delhi on 16 March, Natwar Singh, Indian Minister for External Affairs, reminded US Secretary of State Condoleezza Rice that providing combat aircraft to Pakistan "would have a negative impact on the goodwill the US enjoys in India". But in spite of India's energetic lobbying, the US went ahead with its decision.¹³³

President Bush contacted the Prime Minister of India and matched the Pakistani sale with intimations of a promise to sell U.S. manufactured aircraft to India, if India was so inclined to purchase:

Pakistan initially wants to buy about two dozen aircraft, but Bush administration officials said there would be no limits on how many it could eventually purchase. The administration tried to balance the sale by announcing simultaneously that it would allow U.S. firms the right to provide India the next generation of sophisticated, multi-role combat aircraft, including upgraded F-16 and F-18 warplanes, as well as

¹³¹ Pramit Pal Chaudhuri, *American Indian Century, Why Should the US Want to Make India a Major Power in the 21st Century?*, HINDUSTAN TIMES, Apr. 8, 2005, available at http://www.indianembassy.org/India_media/Apr_05/HT.htm.

¹³² Peter Baker, *Bush: U.S. to Sell F-16s to Pakistan*, WASH. POST., Mar. 26, 2005, at A1; see also Larry Pressler, Editorial Desk, *Dissing Democracy in Asia*, N.Y. TIMES, Mar. 21, 2005, at A17 (Former Senator Pressler, author of the Pressler Amendment and now on the board of directors of an Indian software company, was scathing in his criticism of the Bush Administration in rewarding Pakistan "a corrupt, absolute dictatorship" vice democratic India).

¹³³ *Turbulence arises in US-India relations*, JANE'S FOREIGN REPORT, Apr. 1, 2005, available at http://www.janes.com/defence/news/fr/fr050401_1_n.shtml.

develop broader cooperation in military command and control, early-warning detection, and missile defense systems.¹³⁴

The U.S. insisted the sale of the F-16s to Pakistan will not affect the balance of power, will increase stability in Pakistan, and envisions Indian acquisition of a large number of aircraft and general discussions of Patriot anti-missile systems to India:

“[W]e don’t see any impact of this sale on relevant military balances.” [Senior Bush Administration] officials drew notice to large scales of combat aircraft India was contemplating to purchase.

“Look, at the size of the number of combat aircraft that India is contemplating buying from somebody—I mean, the scales are very large.” [“]Now, we haven’t set any fixed limit on how many aircraft Pakistan can buy from us, but obviously the Indians are contemplating a very large purchase.” “And we don’t think that this sale threatens to change the military balance in any material way.” “We think that an objective, serious military analysis really couldn’t come to that conclusion.” “It is in both India’s interest and Pakistan’s interest and in America’s interest that Pakistan feel secure . . . just as it’s important that the Indian government has to feel secure.” “Because if those two governments don’t feel secure, then all the thaw we’re seeing in Indo-Pakistani relations and all the opportunities we’re seeing for diplomatic improvement are going to vanish as those mutual insecurities feed a spiral of hostility and suspicion.”

"It’s up to India to decide which country they want to buy their jet fighters from. What we’ve decided is that the United States will compete, is allowed to compete for that sale." . . .

About the sale of Patriot anti-missile systems to India, the officials said, "The discussions are at the general — conceptual level."¹³⁵

¹³⁴ Baker, *supra* note 132.

¹³⁵ *Sale of F-16s to Pakistan Not to Affect Balance of Power: US*, NEWS INT’L PAK., Mar. 27, 2005, available at <http://jang.com.pk/thenews/mar2005-daily/27-03-2005/national/n5.htm>.

So despite recent peace overtures between India and Pakistan (*see infra*), an arms build-up continues in South Asia with “the blessing” of the United States. What is the U.S. to gain in this proliferation?

The motives of the Bush administration (in the sale of the fighter aircraft to both nations) are hardly surprising, said George Perkovich, a nuclear expert at the Carnegie Endowment for International Peace in Washington. The United States wants India to be a global power, he said, perhaps with an eye toward balancing the rise of China. The administration needs Pakistan, meanwhile, for the help with its campaign against terrorism.

“The theory is that the arms buildup will give both sides incentives to be on good behavior and avoid conflict, or else risk U.S. cooperation,” Mr. Perkovich noted. “It’s a risky proposition on its face.”¹³⁶

Stephen P. Cohen, a South Asia expert at the Brookings Institution, also recognizes the hoped for influence in Pakistan by virtue of the F-16 sale. “This gives us leverage on Musharraf in pushing him in the direction of accommodation over Kashmir and other disputes,” Cohen said. Pakistan, he added, remained a top priority for Washington: “It’s got nuclear weapons, it’s in a critical part of the world, and we can’t afford to let it go down the drain.”¹³⁷

The arms race did not take long to continue and it appears the U.S. sale of the F-16s to Pakistan may assist *China* in development and sale of a new missile. A recent Jane’s report states that China is developing a new missile (“a second beyond-visual-range (BVR) air-to-air missile (AAM) to the export market” known as the FD-60) that may end up being sold to Pakistan for use on the F-16 fighter aircraft:

As the FD-60 is based largely on the Aspide/Sparrow design, integrating it with US-built aircraft should be relatively straightforward. Such a missile would be of great interest to existing customers of Chinese equipment, such as Pakistan and Iran, that have inventories of US fighters for which they cannot obtain advanced weapons—chiefly BVR

¹³⁶ Somini Sengupta, *Cricket Match Ends With Hope for South Asia*, N.Y. TIMES, Apr. 18, 2005, at A6.

¹³⁷ Baker, *supra* note 132.

missiles. The Pakistan Air Force (PAF) is already working on acquiring a BVR combat capability through the SD-10 and JF-17 Thunder (CATIC FC-1 fighter) combination. However, the opportunity to add a BVR AAM to its inventory much sooner (via the F-16) would surely be seized by the PAF command, which has already identified such weapons as one of its highest acquisition priorities.¹³⁸

Communist Chinese missiles on U.S.-manufactured fighter aircraft—possibly carrying nuclear weapons that could be targeted at Indian cities, the largest democratic cities in the world—who would have thought? And so nuclear weapons as a means of deterrence is now matched by conventional weapons as a means of deterrence. Nevertheless, this unfortunate proliferation of advanced U.S. defense weaponry has several critical impacts on the region:

(1) it shows that the United States in a nod to *Realpolitik* is willing to proliferate conventional weapons in the critical region as a means of staying engaged in the region and with the two new allies (to advance the GWOT in the Northwest Frontier Province terrorist havens in Pakistan and keep Pakistan from closer ties with Iran, and regarding India to ensure development of a relationship with the regional power and emerging world power and to counterbalance an ever stronger China);

(2) such U.S. weaponry in both Pakistani and Indian armed forces will result in closer ties between the U.S. and the respective nations' militaries as sale of such aircraft will require training by U.S. pilots and training of maintenance crews and a long and expensive supply line of U.S. replacement parts;

(3) most importantly for our purposes, the proposed sales show there is no penalty for development of nuclear weapons—again *Realpolitik* as the United States has gone silent on any condemnation of the Indian and Pakistani programs; nor regarding Pakistan is there any a penalty for nuclear weapons technology proliferation by A.Q. Khan (further proof of the impotence of sanctions); and

(4) I do in a glint of guarded optimism see however that closer ties with India and Pakistan through military contacts, relationships, and bilateral exercises, may lead to a common, integrated defense policy for the region and with the United States perhaps even brokering multilateral exercises that

¹³⁸ Robert Hewson, *Chinese Missile May Be for Pakistan's F-16s*, JANE'S DEFENCE WKLY., Apr. 23, 2004, available at <http://www.worldaffairsboard.com/archive/index.php/t-3872.html>.

include *both* India and Pakistan. An evolving relationship may lead to United States influence in assisting the two nations toward a resolution of the Kashmir issue—or at least a reduction in the related insurgency and terrorist activity.

J. Cricket Diplomacy and Bus Rides: False Hope for Peace Between India & Pakistan regarding Kashmir?

*“After more than 55 years, [Pakistan and India] have decided that the Line of Control is not a line carved on stone but drawn on sand.”*¹³⁹

On the heels of the announced closer ties between the United States and India and the United States and Pakistan, and the proliferation of U.S. advanced fighter weaponry into the region, we also saw diplomatic movement between India and Pakistan in the form of a much-heralded visit by the Pakistani President to India, the first since a failed summit in 2001.¹⁴⁰ The trip dubbed “Cricket Diplomacy” (reminiscent of the “Ping-Pong diplomacy” between the U.S. and China in 1971) included President Musharraf’s attendance at a critical cricket match on April 17 between the “cricket-mad” nations at Delhi’s Ferozeshah Kotla grounds.¹⁴¹ Pakistan crushed India by 159

¹³⁹ Sanjoy Majumder, *Analysis: Breaking Diplomatic Ice*, BBC NEWS, Apr. 18, 2005, available at http://news.bbc.co.uk/1/hi/world/south_asia/4456439.stm (quoting M.J. Abkar, an Indian newspaper editor).

¹⁴⁰ Like many Pakistanis born before the partition of India and Pakistan in 1947 and due to the cross-migration between the new India and Pakistan of its Muslims and Hindus (and Sikhs), President Musharraf was born in 1942 in Delhi, India. During his visit in April 2005, Musharraf was presented with an Indian birth certificate and one for his older brother by Premier Singh of India; Singh in fact had been born in Pakistan. See *India's Gift to Musharraf—His Birth Certificate*, REDIFF.COM, Apr. 15, 2005, <http://www.rediff.com/news/2005/apr/15mush2.htm>; Sengupta, *supra* note 136. (A.Q. Khan also was born in India, in 1936, and entered Pakistan sometime after the 1947 partition.) The Muslim and Indian communities were an historical, integral, and intertwined part of the fabric of a larger India that included current Pakistan, India, and Bangladesh. We need only remember that India’s most notable building and one of the world’s architectural masterpieces, the 350 year old Taj Mahal at Agra, India, was built by a Muslim emperor, Mughal Shah Jahan in memory of his wife Mumtaz Mahal, during the time when the Muslim Mughals ruled India. See *TM Celebrating 350 Years of Splendour*, INDIA REVIEW, Apr. 1, 2005, www.indianembassy.org/India_Review/2005/April2005.pdf. The forced religious cross-migration of Muslims, Hindus, and Sikhs after the partition of the British Raj into the new nations of Pakistan and India led to immediate warfare and a long memory of heartache and permanent loss of many a family’s ancestral “home.”

¹⁴¹ *Pakistanis Rejoice over Team’s ODI Triumph over India*, ONLYPUNJAB.COM, Apr. 18, 2005, <http://onlypunjab.com/fullstory2k5-insight-news-status-26-newsID-1939.html>. Let us not forget the “ping-pong diplomacy” and the impromptu matches between the U.S and PRC teams in Beijing:

April 6, 1971, when the American Ping-Pong team, in Japan for the 31st World Table Tennis Championship, received a surprise invitation from their Chinese colleagues for an all-expense paid visit to the People's Republic.

runs (prompting crowd control problems—but after Musharraf had left the game—requiring riot police and stoppage of play for 15 minutes) and Pakistan clinched the six-game series 4-2.¹⁴² Indian Prime Minister Singh and Pakistan President Musharraf sat side by side at the cricket match in the Indian capital. Later on the leaders met for 2 ½ hours “longer than expected . . . in an attempt to negotiate a solution to the conflict in the disputed region of Kashmir.”¹⁴³ Topics of conversation ranged from more cross-border contacts in Kashmir (but India insisted no redrawing of the border), creation of a bilateral trade commission, and a gas pipeline from Iran across Pakistan to India. Premier Singh also accepted an invitation to visit Pakistan in the near future.¹⁴⁴

Moreover, on April 7 2005, the first bus in over five decades to cross the Line of Control between Indian-controlled Kashmir and Pakistan-controlled Kashmir arrived in Muzaffarabad, the capital of Pakistan-administered Kashmir to much fanfare and hope.¹⁴⁵ Of course not all want peace, as the Kashmir Herald reported: “Islamic Terrorists attacked the Tourist Reception Center in the heart of Srinagar, Jammu & Kashmir, a day before the Srinagar-

Time magazine called it “The ping heard round the world.” On April 10, nine players, four officials, and two spouses stepped across a bridge from Hong Kong to the Chinese mainland, ushering in an era of “Ping-Pong diplomacy.” They were the first group of Americans allowed into China since the Communist takeover in 1949.

Pub. Broad. Station, Ping-Pong Diplomacy (April 6–17, 1971), <http://www.pbs.org/wgbh/amex/china/peopleevents/pande07.html>. Thus began an exchange along sports and trade lines and opening of doors of China that ultimately led to President Nixon’s historic visit to China. Sports at times is diplomacy. In 1995, it was the historic and healing gesture of the new President Nelson Mandela on the podium handing the Rugby World Cup trophy to the Springbok captain of the mostly all-white South African team in a stadium full of delirious white Afrikaners that was Mandela’s personal step toward reconciliation with a white South Africa that had imposed apartheid and imprisoned him for 27 years. “Nelson Mandela donned the No 6 shirt of the team’s captain—Francois Pienaar, a white Afrikaner—and the two embraced in a spontaneous gesture of racial reconciliation that melted hearts around the country.” It has been known for all time as the Rainbow World Cup. Brad Morgan, South African Rugby, http://www.southafrica.info/ess_info/sa_glance/sports/rugby.htm (last visited Jan. 4, 2005).

¹⁴² Morgan, *supra* note 141.

¹⁴³ Satinder Bindra, Contributing, *Pakistan, India Meet on Kashmir*, CNN.COM, Apr. 18, 2005, <http://www.cnn.com/2005/WORLD/asiapcf/04/17/pakistan.india.talks/index.html> (reporting that Premier Singh presented President Musharraf with an Indian birth certificate and a painting of Musharraf’s Indian ancestral home.)

¹⁴⁴ Sengupta, *supra* note 136.

¹⁴⁵ Aamer Ahmed Khan, *What Difference Will Kashmir Bus Make?*, BBC NEWS, Apr. 8, 2005, http://news.bbc.co.uk/2/hi/south_asia/4423821.stm.

Muzaffrabad bus service was scheduled to start from there.”¹⁴⁶ But despite the terrorist attacks, the buses did cross the Line of Control.

In any event, what is to be made of President Musharaff’s visit and the immediate attempt to exploit this opportunity and the resurgence of the Kashmir bus routes? The Kashmir bus routes, if opened up to all Pakistanis and Indians vice just Kashmiris, as it is now, may open up transit, trade, and a road to peace:

Many analysts now feel that if the bus service continues, more and more Kashmiris may find themselves willing to trade a bloody history for a peaceful future—irrespective of whether their constitutional status defines them as living in India, Pakistan, an independent Kashmir or whatever other solution the politicians may come up with.¹⁴⁷

What impact will closer ties, if realized, between India and Pakistan have for the future of nuclear weapons in the subcontinent? Kashmir and terrorism are first and foremost. The nuclear weapons programs appear to be a secondary issue—at least based on unclassified sources and reporting of the meetings. But we must remember that all treaties and agreements start with a meeting—even at a cricket game.

I also point out it appears “peace may have broken out” all over South Asia. In the same month as Pakistan and India made some progress, India, the world’s largest democracy, and its other archenemy China, the world’s largest communist nation, took steps of peace as well. On April 11, 2005, Chinese Prime Minister Wen Jiabao, visited India and the nations *appear* to be on a path of constructive dialogue.¹⁴⁸ Prime Minister Wen spoke of a Chinese-Indian “Bridge of Friendship” as the nations signed a three-tier process or “guiding principles” for settlement of the India-China Himalayan boundary dispute and a pending five-year plan for comprehensive economic cooperation and trade between the nations.¹⁴⁹ In addition, the Chinese Prime Minister told

¹⁴⁶ *Islamic Terrorists’ Welcome Srinagar-Muzaffrabad Bus Service*, 4 KASHMIR HERALD ON THE WEB, May 2005, <http://www.kashmirherald.com/may05/trcattack.html>.

¹⁴⁷ Khan, *supra* note 145.

¹⁴⁸ See Press Release, Press Information Bureau, Government of India, Joint Statement of the Republic of India and the People’s Republic of China (Apr. 11, 2005), *available at* <http://pib.nic.in/release/release.asp?relid=8509>; see also *China Terms Wen’s India Visit As ‘Very Successful’*, INDIANINFO.COM, Apr. 12 2005, <http://news.indiainfo.com/2005/04/12/1204china-india.html>.

¹⁴⁹ *Indo-China ‘Bridge of friendship’ Being Laid: Wen*, INDIANINFO.COM, Apr. 11 2005, <http://news.indiainfo.com/2005/04/11/1104wen-india.html>.

the Indian Prime Minister that “China will be pleased to see India” as a member of the UNSC.¹⁵⁰ China is wisely aligning itself with India’s cause, vice of course support to Japan, who is also seeking a permanent seat. But lest we read too much into all the diplomatic visits and pronouncements, a dose of reality is in order. The following excerpt from an article by a professor of strategic studies at the Center for Policy Research in New Delhi demonstrates the emerging geo-political reality in South Asia and the Pakistan-India-China competitive triad and an alleged Chinese “string of pearls” poised on the vital oil flow sea lanes. Prime Minister Wen had ventured to Pakistan to open a:

Chinese-built port and naval base at Gwadar, close to Pakistan’s border with Iran. Gwadar, one of the world’s largest deep-sea ports, will not only *provide Pakistan with more strategic depth against a 1971-style Indian attempt to bottle up its navy, but it will open the way to the arrival of Chinese submarines in India’s back yard, completing India’s strategic encirclement by Beijing.* Gwadar, at the entrance to the Strait of Hormuz, is part of China’s strategy to fashion a “string of pearls” along sea lanes between the Indian and Pacific oceans, by securing naval or eavesdropping access from regional states.¹⁵¹

Thus, despite China’s overtures to India, she continues to advance Chinese interests in the Persian Gulf and South Asia via Pakistan. Nevertheless, I will close this section on an optimistic note—the understated, simple comment of President Musharraf of Pakistan on his 2005 visit to India in response to a question why now might be the right time for peace over Kashmir: *“The world has changed.”*¹⁵²

K. The NPT—An Instrument of Nuclear Apartheid?

On July 1, 1968 the Treaty on Non-Proliferation of Nuclear Weapons was signed in triplicate in London, Moscow, and Washington, D.C. It entered into force on March 5, 1970. In May 2005 another NPT Review Conference occurred in New York. The NPT is at a crossroads. I believe a brief

¹⁵⁰ ‘China will be pleased to see India as UNSC member,’ INDIAINFO.COM, Apr. 11, 2005, <http://news.indiainfo.com/2005/04/11/1104wen-unscc.html>.

¹⁵¹ Brahma Chellaney, *India, China Mend Fences*, WASH. TIMES, Apr. 2, 2005, at A8 (discussing China, India, and Russia as players in the “new ‘Great Game’ on energy” as China begins to think and act more like a sea power to protect vital sea lanes and the flow of oil from the Persian Gulf to China to lubricate the dynamic Chinese economy) (emphasis added).

¹⁵² Majumder, *supra* note 139 (“President Musharraf summed it up in a breakfast meeting with Indian media editors on Monday when he said quite simply: ‘The world has changed.’”).

treatment is in order to demonstrate the almost total rejection and irrelevance of the NPT regime to South Asia.

To some the NPT seemed to be the high-water mark of efforts to heed President Kennedy's warning of the nuclear *sword of Damocles*. To others, however, particularly in the non-aligned world, it was simply "nuclear apartheid" designed to maintain the nuclear club and their powers. India, however, refused to be a victim again of what it perceived to be Western-imposed racial discrimination—this time in the realm of national security and weapons.¹⁵³

In 1998, shortly after the Indian and Pakistan nuclear weapons tests, Jaswant Singh, Senior Adviser on Defense and Foreign Affairs to then-Indian Prime Minister Atal Bihari Vajpayee and a Member of Parliament for the Bharatiya Janata Party (BJP), wrote an article defending India's need for nuclear weapons. The article, *Against Nuclear Apartheid*, was published in Foreign Affairs and is proudly posted today on the Indian Embassy webpage. The article provides insight into India's disdain for the NPT, mistrust of the CTBT, and the refusal of the Big Five to disarm:

WHILE THE end of the Cold War transformed the political landscape of Europe, it did little to ameliorate India's security concerns. The rise of China and continued strains with Pakistan made the 1980s and 1990s a greatly troubling period for India. *At the global level, the nuclear weapons states showed no signs of moving decisively toward a world free of atomic danger.* Instead, the nuclear nonproliferation treaty (NPT) was extended indefinitely and unconditionally in 1995, *perpetuating the existence of nuclear weapons in the hands of five countries busily modernizing their nuclear arsenals.* . . . [The CTBT], alas, was neither comprehensive nor related to disarmament *but rather devoted to ratifying the nuclear status quo.* India's options had narrowed critically.

India had to ensure that its nuclear option, developed and safe-guarded over decades, was not eroded by self-imposed restraint. Such a loss would place the country at risk. Faced

¹⁵³ Mohamed Sid-Ahmed, *Out of Control?*, 453 AL-AHRAM WKLY. ONLINE, 28 Oct.–3 Nov. 1999, <http://weekly.ahram.org.eg/1999/453/op3.htm> ("To begin with, there was the lopsided international set-up in which only the five permanent members of the Security Council were allowed to maintain nuclear arsenals, while all other states were barred from membership in this exclusive club. This resulted in a form of 'nuclear apartheid'") (emphasis added).

with a difficult decision, New Delhi realized that its lone touchstone remained national security. The nuclear tests it conducted on May 11 and 13 were by then not only inevitable but a continuation of policies from almost the earliest years of independence. *India's nuclear policy remains firmly committed to a basic tenet: that the country's national security in a world of nuclear proliferation lies either in global disarmament or in exercise of the principle of equal and legitimate security for all.*¹⁵⁴

What impact, if any, did development of nuclear weapons in South Asia have on the NPT or vice versa? One author correctly characterizes the “achievement of a nuclear status by India and Pakistan [as] a long-lasting disgrace, if not a defeat, for the NPT:”

[T]he nuclear status of India and Pakistan is a clear sign of the Big Five's failure to prevent the development of nuclear weapons by other states. [Further,] nuclear proliferation in the Indian subcontinent is sure to reduce the global influence and prestige of the Big Five. . . . *The defiance of India and Pakistan and their challenge to the main nuclear states have shown to every state, with or without a nuclear ambition, the vulnerability and the growing weakness of the latter and their institutions, such as the NPT.*¹⁵⁵

Thus India and Pakistan must not be allowed to gain by their development of nuclear weapons programs—yet India in my opinion should realize a permanent seat on the UNSC, but apart from any reliance on its nuclear weapons program.¹⁵⁶ The challenge will be to delink that permanent UNSC seat from such status.¹⁵⁷ Perhaps the UNSC seat should be set as a reward for signing the NPT and disarming, along with Pakistan, combined with the U.S. sharing of nuclear technology for peaceful purposes (as required by the NPT). India would still benefit from having had nuclear weapons in the first place; but better to disarm India and Pakistan.

¹⁵⁴ Jaswant Singh, *Against Nuclear Apartheid*, 77 FOREIGN AFFAIRS, Sept./Oct. 1998, at 41 (emphasis added).

¹⁵⁵ PEIMANI, *supra* note 21 (emphasis added).

¹⁵⁶ See *A More Secure World*, *supra* note 47, ¶¶ 244–59 (containing a review of the proposals to enlarge the UNSC).

¹⁵⁷ India is intensely lobbying for a UNSC permanent seat. Although I support it, in my opinion there must be a price. We cannot allow India a permanent seat unless she disarms. If not, we would ignore her covert development of nuclear weapons—regardless of India's intentions, and set a dangerous precedent.

A UN report makes the following overly optimistic recommendation regarding South Asia:

124. States not party to the [NPT] should pledge a commitment to non-proliferation and disarmament, demonstrating their commitment by ratifying the [CTBT] and supporting negotiations for a fissile material cut-off treaty, both of which are open to nuclear-weapon and non-nuclear-weapon States alike. *We recommend that peace efforts in the Middle East and South Asia launch disarmament talks that could lead to the establishment of nuclear-weapon-free-zones in those regions* similar to those established for Latin America and the Caribbean, Africa, the South Pacific and South-East Asia.¹⁵⁸

Why would India and Pakistan enter into the NPT or disarm or agree to a nuclear-weapon-free-zone? In my opinion, they will not, until the Big Five adhere to their NPT commitment to begin disarmament. Any movement on disarmament and acceptance of the NPT by India or Pakistan must start with the Big Five, particularly the United States. A consensus does appear to be building regarding pressure and criticism of the Nuclear Weapons States for their failure to disarm or move toward disarmament, thus undermining the “Treaty regime:”

118. Lacklustre disarmament by the [NWS] weakens the diplomatic force of the non-proliferation regime and thus its ability to constrain proliferation. Despite Security Council commitment to the contrary (resolution 984 (1995)), these [NWS] are increasingly unwilling to pledge assurances of non-use (negative security assurances) and they maintain the right to retaliate with nuclear weapons against chemical or biological attack [and presumably any nuclear weapon attack as well].

¹⁵⁸ *A More Secure World*, *supra* note 47, ¶ 124 (emphasis added). The Nuclear Age Peace Foundation’s report mirrors many of the same recommendations regarding the NPT Treaty regime—including specifically disarmament efforts by the Big Five, and most importantly advocacy of a Nuclear Weapons Convention prompted by the ICJ 1996 unanimous conclusion that Article VI of the NPT and international law requires that the “era of nuclear arms control must give way to an era of complete nuclear disarmament.” Negotiations led by the NWS toward a Nuclear Weapons Convention would move toward disarmament in accordance with their NPT treaty obligations and send the right signal to the non-NWS. KRIEGER & ONG, *supra* note 19, at 18.

119. Despite the end of the cold war, [NWS] earn only a mixed grade in fulfilling their disarmament commitments. . . . In 2000, the [NSW] committed to 13 practical steps toward nuclear disarmament, which were all renounced by them at the 2004 meeting of the [Prep Committee for the 2005 Review of the NPT].¹⁵⁹

The Nuclear Age Peace Foundation (NAPF) also recommends that the Big Five “unconditionally declare policies of No first use of nuclear weapons” thus providing security guarantees to both NWS and non-NWS. In addition, the report calls for action compelling *India, Pakistan, North Korea, and Israel* to be brought into the NPT Treaty regime and made accountable for controlling and safeguarding their weapons; ceasing all efforts to improve existing nuclear arsenals; entry into force of the CTBT; criminalizing of all forms of nuclear proliferation; creation of a global inventory; control of weapons-grade fissile materials; universal and equal application of the IAEA Additional Protocol; and a phased elimination of nuclear power.¹⁶⁰ The NAPF report also recommends placing spent nuclear fuel under international control and strict controls of transport of all nuclear materials.¹⁶¹ The road to nuclear disarmament is long and steep.

Finally, former President Carter eloquently points out the need for the NWS, specifically the United States, to reverse course, take the lead to disarm, and cease development of new nuclear weapons:

The United States is the major culprit in this erosion of the NPT. While claiming to be protecting the world from proliferation threats in Iraq, Libya, Iran and North Korea, American leaders not only have abandoned existing treaty restraints but also have asserted plans to test and develop new weapons, including anti-ballistic missiles, the earth-penetrating "bunker buster" and perhaps some new "small" bombs. They also have abandoned past pledges and now

¹⁵⁹ *A More Secure World*, *supra* note 47, ¶¶ 118–19; KRIEGER & ONG, *supra* note 19, at 23 app. I (containing a list and description of the “Thirteen Practical Steps” referred to in *A More Secure World*, *supra* note 47, ¶¶ 119).

¹⁶⁰ KRIEGER & ONG, *supra* note 19, at 18–22. The current record price levels for oil, in part due the increased demand from the emerging economic powers of India and China and the continued lack of alternative energy sources renders the last recommendation dead on arrival, in my opinion.

¹⁶¹ *Id.*

threaten first use of nuclear weapons against non-nuclear states.¹⁶²

I submit the way ahead for South Asian non-proliferation starts with the Big Five's renewed commitment to disarmament. Until then disarmament and the NPT is "dead in the water."

III. Conclusion

As the UN High-Level Report recognized, the international community is at a crossroads on nuclear proliferation—"a point at which the erosion of the non-proliferation regime could become irreversible and result in a cascade of proliferation."¹⁶³ South Asia is at a crossroads of proliferation as well—both nuclear *and* conventional. On the one hand, it is one of the most dangerous places on the face of the Earth with perhaps the greatest potential for a nuclear disaster and Armageddon. On the other hand, South Asia provides the best chance for a resurgence of non-proliferation efforts and control of the nuclear threat. India and Pakistan are talking.¹⁶⁴ The United States has the opportunity to play the peacemaker in the region as it draws closer to both nations. The United States must embrace the opportunity, move toward disarmament, and change its current nuclear weapons policy, including refraining from development of new nuclear weapons.¹⁶⁵ Secretary Rice's recent visit and the optimistic announcement of a new, closer relationship between India and the U.S. bode well. Diplomatic intervention now—vice military intervention later—in the form of assistance for peaceful uses of nuclear power, movement toward a peaceful solution of the Kashmir problem, endorsement of a UNSC permanent seat for India is the answer. But the UNSC seat must be premised upon Indian nuclear disarmament (linked to Pakistani disarmament) and negotiations for a nuclear weapons freeze zone in South Asia. In exchange, the United States must take the lead in an enhanced disarming of its nuclear weapons arsenal and increased assistance to the non-nuclear and new nuclear weapons states in peaceful use of nuclear energy per

¹⁶² [Former President] Jimmy Carter, *Saving Nonproliferation*, WASH. POST, March 28, 2005, available at http://www.wagingpeace.org/articles/2005/03/28_carter_saving-nonproliferation.htm (last visited Dec. 29, 2005).

¹⁶³ *A More Secure World*, *supra* note 47, ¶ 111.

¹⁶⁴ Albeit slowly but they are talking. Teresita C. Schaffer, *India-Pakistan Peace Talks: Slow Progress*, 75 S. ASIA MONITOR (South Asia Program, Center for Strategic and International Studies, Washington, D.C.), Oct. 1 2004, available at <http://www.csis.org/media/csis/pubs/sam75.pdf>.

¹⁶⁵ See Union of Concerned Scientists, U.S. Nuclear Weapons Policy: Dangerous and Counterproductive, http://www.ucsusa.org/global_security/nuclear_weapons/us-nuclear-weapons-policy-dangerous-and-counterproductive.html (last visited Jan. 4, 2005) (containing a discussion of U.S. nuclear weapons policy's undermining of the non-proliferation regime).

the spirit of the NPT. If not and India receives a permanent UNSC seat, it will conclusively demonstrate to many the power of nuclear weapons as the new “coin of the realm.”

The U.S. and the other NWS must adhere to their end of the bargain and move the NPT forward from an apparent instrument of “nuclear apartheid.” Regional security and disarmament in South Asia depend on it. The *status quo* understanding in national security circles in India and Pakistan that a limited nuclear war could be fought must not remain.¹⁶⁶ The U.S. today has the most influence it will ever have in South Asia. Failure by the United States and the international community to take this opportunity for nuclear non-proliferation in South Asia specifically will leave blood on our collective hands.

In the final analysis, Waltz was right in that the world should learn from our lessons—just not the one he advocates (regarding his endorsement of nuclear deterrence for South Asia but no need to waste capital and build a lot of nuclear weapons). Instead the world should in the realm of development of nuclear weapons policy and non-proliferation be guided by and remember the reaction and words of one of the pilots of the *Enola Gay*: *My God, what have we done?*¹⁶⁷

¹⁶⁶ See A.M. Vohra, *Pakistan's Nuclear Weapons Posture*, INST. PEACE & CONFLICT STUD. (Article No. 1633), Jan. 31, 2005, <http://www.ipcs.org/newPrintCountry.jsp?action=showView&kValue=1633&country=1016&status=article&mod=a> (containing a critical treatment by the former Chief of the Indian Army of the alleged first use of nuclear weapons doctrine of Pakistan and rejection of a limited nuclear war as leading inevitability to MAD).

¹⁶⁷ JOHN HERSHEY, *HIROSHIMA 188* (Alfred A. Knopf ed., Borzoi Books 2002) (1946) (containing the August 6, 1945 log entry of *Enola Gay* co-pilot Captain Robert Lewis made just after the detonation of the Hiroshima bomb).

**THE CONSTITUTIONAL RIGHT TO
MARRY . . . FUNDAMENTAL RIGHT OR
FACADE? A REVIEW OF THE
CONSTITUTIONALITY OF MILITARY
RESTRICTIONS ON THE RIGHT TO
MARRY . . . AND EVEN IF THEY COULD
. . . WHETHER THEY SHOULD.**

Captain Eric S. Montalvo, USMC*

“A policeman may have a constitutional right to talk politics, but he has no constitutional right to be a policeman”¹

- Justice Holmes

“Everything in war is simple, but the simplest thing is difficult. The difficulties accumulate and end by producing a kind of friction that is inconceivable unless one has experienced war.”²

- Carl von Clausewitz

I. INTRODUCTION

On August 11, 1993, General Carl E. Mundy, Jr., Commandant of the Marine Corps, signed an order that barred the Marine Corps from accepting married recruits and required young single Marines to get prior

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¹ *McAuliffe v. Mayor & City of New Bedford*, 29 N.E. 517 (Mass. 1982) (Justice Holmes speaking on a public employee’s First Amendment right to political speech. Although this philosophy has been largely departed from in a First Amendment context, there are many other examples of job requirements placed on public employees that may invoke constitutional considerations. The focus of this article is on one constitutional right, “the right to marry,” and whether the Department of Defense may condition an offer of employment, or first term service, on the basis of marital status.)

² *CARL VON CLAUSEWITZ, ON WAR* 119 (Michael Howard and Peter Paret eds. and trans., Princeton University Press 1984) (1832).

command approval in order to be married.³ The order was received poorly by senior military officials and the civilian community.⁴ Consequently, General

³ All Marine Administrative Message (ALMAR) 226/93 ("It is Marine Corps policy that first term Marines who desire to marry consult with their commanding officers prior to marriage. This consultation requirement will not be misconstrued as a requirement to obtain permission to marry."); See also B.J. Ramos and Yana Ginburg, *Beating Divorce/ Military Marriages Face Many Obstacles Not Common in the Civilian World*, MARINE CORPS TIMES, Nov 17, 1997, at A1.

⁴ But see James Webb, *The Military is Not a Social Program*, N.Y. TIMES, Aug 18, 1993, at A19.

Our society is becoming ever more divided between people of thought and people of action. Thus, it is not surprising that a wide array of politicians and commentators found the order by the Marine Corps Commandant that would have limited enlistments to unmarried recruits an object of easy derision.

Administration officials concede that Gen. Carl E. Mundy, Jr., possesses the authority to change Marine recruitment policy without their approval. Nonetheless, the order was quickly rescinded, and he was subjected to a public dressing-down for having exercised his judgment without their concurrence.

The general may, indeed, have committed a procedural error. But the reaction to his order and the inability of those in political and media power to clearly see the problem he is trying to address give us a nice allegory of why our national leadership has become so derailed and unrespected.

President Clinton, who has never held a non-bureaucratic or even a private-sector job and is well-remembered for his youthful letter sympathizing with those who "loathed" the military, was said to be astonished at General Mundy's decision. According to The New York Times, the plan flew in the face of Mr. Clinton's "commitment to have the military reflect society at large." Representative Pat Schroeder, who claims military expertise from having gone to Armed Services Committee meetings for two decades, during which she has tried to civilianize the military and cut billions of dollars annually from its operating budget, dismissed General Mundy as a cultural Neanderthal. With an arrogance that has become her imprimatur, she wondered whether he had "taken leave of his senses" and pointed out that "even the Pope allows his Swiss Guards to be married." "Marines have always been the least family-friendly," she said, "and I think we now see that policy in action." The New York Times' front-page coverage said that General Mundy's plan involved "constitutional questions of discrimination and privacy." The Washington Post termed him a "zealous steward of tradition in what is by far the most conservative and insular of the military services."

From a chorus of people who have never handled an operating budget or been responsible for troops sent in harm's way comes an unspoken litany: We are smarter than you. General Mundy could have a field day responding to their comments. For starters:

* How far does Mr. Clinton wish to go in order to have a military that "reflects society at large"? Should the military lower its educational standards, since the military's percentage of high school graduates is higher than society's? Should the military reduce opportunities for minorities, since they are more prevalent in the military than in society? Should Yale lawyers and Rhodes scholars serve in the same percentages as they exist in society?

* How often does Ms. Schroeder think the Swiss Guards travel thousands of miles from their wives for a year at a time? And since when have they required the training, weapons and logistics for heavy combat?

* When do phrases like "least family-friendly" and "most conservative and insular" simply mask an arrogance toward an institution that, beyond cavil, is the least problem-filled and most combat-ready military service our country has ever fielded?

The country and the other military services should listen to General Mundy. He is not harking to the past but informing us of the realities of the future. The greatest challenge as our military weans itself from its North Atlantic Treaty Organization (NATO) role and shapes its forces for the future will be to build and sustain a highly maneuverable and cost-effective fighting force. This will require planners to go against the grain of many recruitment policies that gave us the all-volunteer military.

The all-volunteer system has drawn heavily on young enlistees who are married or wish to marry, because of remarkable family benefits that include free medical care, housing, daycare, counseling services, commissary and Post Exchange (PX) privileges and a generous early retirement compensation plan. Predictably, the percentage of young married servicemembers ballooned as these benefits improved. Although only 14 percent of Army soldiers holding the rank of E-5 were married in 1971, by 1986 that percentage was 73 percent. Today, 40 percent of Marines on their first enlistment are married, and those marriages are suffering a 40 percent divorce rate.

During my time in the Pentagon, the Army's No. 1 budget priority was its quality-of-life programs, which cost more than \$6 billion a year. Even in the 1980's, this ever-increasing spending caused concern among planners, since payments to keep the troops happy and encourage retention took money away from go-to-war budget areas related to mobilization, combat medical readiness and logistics. But military leaders scarred from the disciplinary nightmare of the final days of conscription, as well as the leaders of our NATO allies, were comfortable with the greater percentage of married servicemembers. They were a more contented force; they fit well with the garrison mentality of NATO forces, causing less problems off-base and pumping more money into foreign economies.

But as our NATO bases are being shut down, these circumstances are changing. With a smaller force structure and wider range of potential crisis areas, the Army and tactical Air Force will certainly experience more unscheduled deployments, accompanied by greater family turbulence.

Mundy was directed to rescind the order within the week.

The first obvious question that comes to mind is “why such a violent reaction?” Particularly in the face of retention problems and infrastructure shortfalls, why would a General “risk” political capital and resources on a policy which would effectively delay all first term Marines from entering into the institution of marriage? In response to such questions, General Mundy cited concerns about the high divorce rate among young Marines and the cost of supporting family members.

This article will address whether the uniformed services may enact such a policy and whether such a policy is politically viable. This article will first address the constitutional issues associated with the regulation of marriage and the various levels of judicial scrutiny that the “right to marriage” has been accorded. It will then consider whether having a constitutional right to marry is a relevant consideration in drafting a contemporary General Mundy-like regulation. Next, it will briefly discuss the statistical penumbra which divorce falls into when considered, if at all, by the Department of Defense (DoD) and will also examine some of the possible DoD justifications for such a proposal. Finally, it will discuss whether the DoD should attempt such a regulatory

The Navy and Marine Corps, with its forces continually deployed worldwide without families, began feeling the magnitude of problems associated with young married servicemembers before the Army and Air Force. For decades, in peace and war, a junior enlisted man or officer in the sea services has been away from home six months each year on average. As these services are cut back further -- without any reduction in the worldwide commitments demanded of them -- an even harsher operational schedule and greater family separation can be expected.

If a service chief is given less money and fewer people to perform essentially the same tasks, how can he best meet his requirements? If offered the choice between two people of equal talent, one of which needs only a bunk while the other requires full family benefits, including counseling when a teen-age marriage goes sour, which should he choose? To put it another way, if one is given the awesome task of providing the best defense a specific sum can buy, should he be faulted for wanting to put the money into troops and weapons rather than into dependents and daycare centers?

Perhaps a complete ban on married enlistees is overkill. But a Commandant who takes his stewardship seriously -- and politicians and commentators whose true focus is effective national defense -- would ask that this issue be thoroughly examined as a matter of fiscal and practical leadership.

Id.

scheme and how, if at all, it should be done.

II. What the Supreme Court has to say about the “Right to Marry.”

A. The Supreme Court announces that the right to marry is a fundamental right protected by substantive due process protections of the Fourteenth Amendment.

In *Loving et ux. v. Virginia*,⁵ the Supreme Court addressed, “whether a statutory scheme adopted by the State of Virginia to prevent marriages between persons solely on the basis of racial classifications violates the Equal Protection and Due Process Clauses of the Fourteenth Amendment.”⁶ It is interesting to note that this was the first time that the Supreme Court nullified a state statute regulating marriage (albeit in the context of the civil rights revolution, a criminal statute, and under an equal protection analysis using race, thereby triggering strict scrutiny).⁷

In *Loving*, Mildred Jeter, an African American woman, and Richard Loving, a Caucasian man, were married in the District of Columbia in 1958.⁸ They returned to live in Virginia and were subsequently indicted by a grand jury for violating Virginia’s ban on interracial marriages.⁹ The Lovings were convicted and sentenced to one year in jail.¹⁰ The trial judge, however, suspended the sentence upon the condition that the Lovings would leave Virginia and not return for twenty-five years.¹¹ The Lovings moved to the District of Columbia, and in 1963 filed a motion in state court to vacate the judgment as “repugnant to the Fourteenth Amendment.”¹² In 1964, the motion had still not been heard and they filed a class action in the U.S. District Court for the Eastern District of Virginia seeking a declaration that the Virginia antimiscegenation laws were unconstitutional.¹³ The state trial judge denied the motion.¹⁴ On appeal to the Supreme Court of Appeals, the court upheld the constitutionality of the statute.¹⁵ The Lovings appealed and the

⁵ 388 U.S. 1 (1967).

⁶ *Id.* at 2.

⁷ Lynn D. Wardle, *Symposium Law and the Politics of Marriage: Loving v. Virginia After Thirty Years*, 41 *How. L.J.* 289, 302 (Winter 1998).

⁸ *Loving et ux.*, 388 U.S. at 2.

⁹ *Id.* at 3.

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ *Loving et ux.*, 388 U.S. at 3.

¹⁴ *Id.*

¹⁵ *Id.*

U.S. Supreme Court reversed.¹⁶ The Supreme Court, in a unanimous decision, held that a statute restricting marriage solely because of race violates the Equal Protection Clause and requires the highest scrutiny.¹⁷ Additionally, the Court held that to deny a person the right to marriage simply based on racial classifications effectively deprived a person of liberty without due process of the law under the Fourteenth Amendment. The Court, in the last two paragraphs of the opinion, characterized marriage as one of the “basic civil rights of man . . . fundamental to our very existence and survival.”¹⁸

The language of the opinion pertaining to marriage, although brief, suggests plainly that the right to marriage is a “fundamental right.” One would therefore posit that any state action that would restrict the right to marriage would be viewed through a strict scrutiny analysis. This assumption, however, would be incorrect as subsequent case law has revealed that the Court has relied on more of a rational basis test in reviewing state regulation of marriage and divorce.¹⁹ This begs the question whether the Court’s use of the code words, “fundamental rights,” is being used consistently in its analysis or, alternatively, whether there is a category of fundamental rights that do not trigger a strict scrutiny analysis.

B. The Supreme Court begins to craft a standard.

In *Boddie v. Connecticut*,²⁰ the Supreme Court addressed the question of whether a state could effectively bar indigent persons access to its courts by requiring filing fees or other fees for divorce proceedings. The Court held that Fourteenth Amendment notions of due process prohibited the state from denying, solely because of inability to pay, court access to individuals who sought dissolution of their marriages.²¹ Although this was not a “marriage” case, the Court, in Justice Douglas’s concurring opinion, described the State’s role with regard to regulating marriage. Justice Douglas remarked that the “power of the State over marriage and divorce is, of course, complete except as limited by specific constitutional provisions.”²² He then listed several

¹⁶ *Id.*

¹⁷ *Id.* at. 12 (Justice Stewart filed a lone concurring opinion which stated, “it is simply not possible for a state law to be valid under our Constitution which makes the criminality of an act depend on the race of an actor.” *Id.* at 13.).

¹⁸ *Id.* at 12.

¹⁹ See *infra* notes 20-66 and accompanying text for a discussion on the development of the rational relationship test finally announced by Justice O’Connor in *Turner v. Safley*, 482 U.S. 78 (1987).

²⁰ 401 U.S. 371 (1971).

²¹ *Id.*

²² *Id.* at 385.

examples including race, alienage, religion, and poverty.²³

It appears inconsistent that the Court could assert that marriage is a fundamental right on one hand, and, on the other, proclaim that the State has complete power and control. However, the apparent inconsistency may be because *Boddie* dealt with the regulation of marriage after it had occurred, as opposed to the threshold question of whether to grant marriage, which may garner heightened constitutional scrutiny. Underlying *Boddie* is the Court's refusal to allow regulations that effectively bar a person's access to the court systems when there is no other way to resolve their problems. This interpretive theme is found most profoundly in cases dealing with the Constitutional right to counsel in criminal cases. When the courts determine that there is a substantial interference with a person's access to the courts, the courts have used procedural due process as the vehicle to overcome the statutory provisions.

Justice Harlan, in the majority opinion, outlined the requirements of due process. First, at a minimum, "absent a countervailing state interest of overriding significance, persons forced to settle their claims of right and duty through the judicial process must be given a meaningful opportunity to be heard."²⁴ Justice Harlan noted, however, that that requirement did not mean that an actual hearing must be conducted for every defendant.²⁵ The opportunity to be heard, within the meaning of the Constitution, has to be "granted at a meaningful time and in a meaningful manner."²⁶ The hearing is subject to waiver, but the opportunity to be heard must be *before the person is deprived of any right or interest (i.e. notice)*, unless "some valid governmental interest is at stake that justifies postponing the hearing until after."²⁷ The statute or rule, even though it might be valid as a legitimate exercise of state power, may prove unconstitutional as applied to the specific circumstances such as when the rule is in conflict with religious freedom, free speech, or assembly.²⁸

C. *Sosna v. Iowa*, overruling *Boddie* or consistent scrutiny?

In *Sosna v. Iowa*,²⁹ the Supreme Court addressed the constitutionality of a state statute requiring residency for one year before invoking jurisdiction

²³ *Id.* at 385-86.

²⁴ *Bodie*, 401 U.S. at 377 (emphasis added).

²⁵ *Id.* at 378.

²⁶ *Id.*

²⁷ *Id.* at 378-79.

²⁸ *Id.* at 379.

²⁹ 419 U.S. 393 (1975).

over a marriage for purposes of divorce. The Court held the statute constitutional, finding a legitimate state interest in Iowa's assertion that those who sought a divorce from its courts were genuinely attached to the state, and also in the state's desire to insulate divorce decrees from the likelihood of collateral attack.³⁰ The Court further held that the statute's failure to provide an individualized showing of bona fide residency did not violate Fourteenth Amendment due process.³¹

The Court distinguished *Sosna* from *Boddie* on the basis that the filing fee in *Boddie* effectively excluded "forever a certain segment of the population from obtaining a divorce," whereas the legislation in *Sosna* was based on a legitimate state interest and merely caused a delay in the process.³² Although the context of this case was marital in nature, the Court focused on the procedural protections relative to court access and not the "fundamental right" to be married, or in this instance, to acquire a divorce. The Court continued to leave the question of the fundamental right to be married, and the requisite standard of review, until *Zablocki, Milwaukee County Clerk v. Redhail*.³³ In *Zablocki*, for only the second time in two hundred years, the Supreme Court struck down a state statute regulating marriage.³⁴

D. A fundamental right without the highest level of judicial scrutiny?

In *Zablocki*, the Supreme Court addressed the constitutionality of a Wisconsin statute providing that any resident who was a non-custodial parent and subject to a child support order by a family court, could only remarry by obtaining that court's permission.³⁵ This permission would only be granted upon a showing that the non-custodial parent was in compliance with the support order.³⁶ The case was on appeal from the district court that had declared the statute to be unconstitutional under the Equal Protection Clause, concluding that strict scrutiny was required because "the classification created by the statute infringed upon a fundamental right, the right to marry."³⁷ While the Supreme Court affirmed in an eight to one decision, it could not agree on a rationale; as evidenced by four concurring opinions and one dissenting opinion.

³⁰ *Sosna*, 419 U.S. at 409.

³¹ *Id.* at 410.

³² *Id.*

³³ 434 U.S. 374 (1978).

³⁴ See *supra* note 7 for a discussion on the history of U.S. Supreme Court cases dealing with the right to marry.

³⁵ *Zablocki*, 434 U.S. at 375.

³⁶ *Id.*

³⁷ *Id.* at 381.

The Court's opinion, authored by Chief Justice Marshall, found the right to marry was of "fundamental importance" and that the "classification at issue significantly interfere[d]" and therefore required a "critical examination of the state interests advanced in support of the classification."³⁸ The Court cited *Loving* as the leading decision on the right to marry.³⁹ The majority went on to list a number of cases which reinforced the notion that the right to marry was of "fundamental importance," "the most important relation in life," and "the foundation of the family and of society, without which there would be civilization, nor progress."⁴⁰ Justice Marshall went on to note that the right to marry had become part of the "right to privacy implicit in the Fourteenth Amendment's Due Process Clause."⁴¹ Justice Marshall, relying upon *Califano v. Jobst*,⁴² then qualified the amount of scrutiny required of state regulation of marriage and opined that:

By reaffirming the fundamental character of the right to marry, we do not mean to suggest that every state regulation which relates in any way to the incidents of or prerequisites for marriage must be subjected to rigorous scrutiny. To the contrary, *reasonable regulations that do not significantly interfere with decisions to enter into the marital relationship may legitimately be imposed.*⁴³

Justice Burger, in his concurring opinion, focused on distinguishing the majority's holding with the holding in *Califano*, asserting that the majority opinion was not "in any significant way inconsistent" with the Court's opinion in *Califano*.⁴⁴ Justice Burger explained that the provision in *Califano* did not "attempt to interfere with the individual's freedom to make a decision as important as marriage . . . and, at most, had an indirect impact on that decision."⁴⁵

In his concurring opinion, Justice Stewart disagreed with the majority

³⁸ *Id.* at 383.

³⁹ *Id.*

⁴⁰ *Id.* at 384 (citing *Maynard v. Hill*, 125 U.S. 190 (1888); *Meyer v. Nebraska*, 262 U.S. 390 (1923); and *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942)).

⁴¹ *Id.* (citing *Griswold v. Connecticut*, 381 U.S. 479 (1965)).

⁴² 434 U.S. 47 (1977) (The Court upheld a Social Security Act provision which terminated a dependant's social security benefits upon marriage to an individual not entitled to the benefits under the Act).

⁴³ *Zablocki*, 434 U.S. at 386 (emphasis added).

⁴⁴ *Id.* at 391.

⁴⁵ *Id.*

arguing that the statute was unconstitutional because it “exceeds the bounds of permissible state regulation of marriage, and invades the sphere of liberty protected by the Due Process Clause of the Fourteenth Amendment.”⁴⁶ In significant contrast to the majority’s holding, Justice Stewart asserted that he did not perceive the right to marry as warranting constitutional protections and, instead, stated it was a “privilege.”

I do not agree with the Court that there is a "right to marry" in the constitutional sense. That right, or more accurately that privilege, is under our federal system peculiarly one to be defined and limited by state law. . . . A State may not only "significantly interfere with decisions to enter into the marital relationship," but may in many circumstances absolutely prohibit it. Surely, for example, a State may legitimately say that no one can marry his or her sibling, that no one can marry who is not at least 14 years old, that no one can marry without first passing an examination for venereal disease, or that no one can marry who has a living husband or wife. But, just as surely, in regulating the intimate human relationship of marriage, there is a limit beyond which a State may not constitutionally go.⁴⁷

Justice Stewart also points to the total deprivation of the choice, versus a “delay.”⁴⁸ This reasoning is consistent with the rationale in *Boddie* and *Sosna* discussed above, as the Court seems to give the greatest scrutiny when there is a total deprivation without alternative, as opposed to the “presumption of invalidity” typically associated with a fundamental right.

Justice Powell, in his concurrence, points out that Justice Marshall’s statement that, “reasonable regulations that do not significantly interfere with decisions to enter into the marital relationship may legitimately be imposed,” is a distinction without a difference.⁴⁹ In other words, any barrier to marriage would suggest a “direct interference” with the decision to marry and therefore the standard announced by the majority is of insufficient clarity to guide state legislatures in their efforts to draft constitutionally sound legislation.⁵⁰

Justice Powell also discussed the level of deference normally accorded

⁴⁶ *Id.* at 392.

⁴⁷ *Zablocki*, 434 U.S. at 392 (internal citations omitted).

⁴⁸ *Id.* at 394.

⁴⁹ *Id.* at 396-97.

⁵⁰ *Id.*

marital legislation:

A State has absolute right to prescribe the conditions upon which the marriage relation between its own citizens shall be created, and the causes for which it may be dissolved . . . and . . . the State, representing the collective expression of moral aspirations, has an undeniable interest in ensuring that its rules of domestic relations reflect the widely held values of its people.⁵¹

Justice Powell further disagreed with the majority's position that a state may "never condition the right to marry on satisfaction of existing support obligations simply because the State has alternative methods of compelling such payments."⁵² Once again, this language suggests that the appropriate level of scrutiny is a rational basis test.

Justice Stevens attacked the statute and the majority's reasoning from the standpoint that when reviewed, the statute would not withstand even minimal scrutiny, and therefore there was no cause for the court to announce a strict scrutiny level of review.⁵³ He observed that there are, and have been, reasons for allocating differing level of benefits or burdens on one's marital status:

When a State allocates benefits or burdens, it may have valid reasons for treating married and unmarried persons differently. Classification based on marital status has been an accepted characteristic of tax legislation, Selective Service rules, and Social Security regulations. As cases like *Jobst* demonstrate, such laws may "significantly interfere with decisions to enter into the marital relationship." That kind of interference, however, *is not a sufficient reason for invalidating every law reflecting a legislative judgment that there are relevant differences between married persons as a class and unmarried persons as a class.*⁵⁴

⁵¹ *Zablocki*, 434 U.S. at 398-99 (citing *Pennoyer v. Neff*, 95 U.S. 714, 734-735 (1878)).

⁵² *Id.* at 400.

⁵³ *Id.* at 403.

⁵⁴ *Id.* (emphasis added; internal citations omitted); *see also* Del. Code Ann. Title 13, §101(a) (West 1999) (prohibiting incestuous and same sex marriages); Defense of Marriage Act – 28 U.S.C.A. § 1738C (Supp. 2000) (No state . . . shall be required to give effect to any public act, record, or judicial proceeding of any other State...respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State . . . or a right or claim arising from such a relationship.); *see also* Statutes declaring same sex marriages contrary to

Justice Stevens observed that economic considerations are relevant to the decision to marry, but left open the question of whether the right to marry may be “predicated on economic status.”⁵⁵

It is noteworthy to observe that all eight justices agreed on the proposition that “reasonable regulations” would pass constitutional muster. This language is inconsistent, however, with the burdens of “strict scrutiny” and “compelling state interests.” Indeed, considering the general proposition that there is a correlation between the failure of a statute scrutinized under “strict scrutiny,” as compared to the success rate under a “rational basis test,” the Supreme Court has typically given great deference to the legislature and has upheld their constitutionality.⁵⁶ This would strongly suggest that, although the Court is insistent on using the word “fundamental” in association with the right to marry, its use is devoid of the typical constitutional protections and does not trigger a strict scrutiny analysis.

E. The Court announces a rational relations test.

In *Turner v. Safley*,⁵⁷ Justice O’Connor wrote an opinion which took a significant step in clarifying the standard of review for the right to marry. The case, which arose in a prisoner’s rights context, presented the question of whether a Missouri prison restrictions on inmate correspondence and/or restrictions on inmate marriages were constitutional.⁵⁸ The Missouri regulation at issue permitted an inmate to marry only with the superintendent’s permission; which could be given only when compelling reasons were proffered.⁵⁹ The only compelling reasons enumerated were pregnancy or the birth of an illegitimate child.⁶⁰ Although there was a 5-4 split on most of Justice O’Connor’s opinion, the vote was 9-0 on Part III-B.⁶¹ It is in Part III-B of the opinion where Justice O’Connor discusses the test to be applied.

public policy, Ariz. Rev. Stat. Ann. § 25-101(C) (West 2000); Conn. Gen. Stat. Ann. 5/213.1 (West 1999); La. Civ. Code Ann. Art. 96 (West 1999); S.C. Code Ann. § 20-1-15 (Supp. 1999); Utah Code Ann. § 30-1-2 (West 1998); Va. Code Ann. § 20-45.2 (West 1995); *See generally* Brian H. Bix, *State of the Union: The States’ Interest in the Marital Status of Their Citizens*, 55 U. MIAMI L. REV. 1 (2000).

⁵⁵ *Zablocki*, 434 U.S. at 404.

⁵⁶ *See supra* note 7 (discussing the fact that only three state statutes regulating marriage have been found unconstitutional in the past two hundred years).

⁵⁷ 482 U.S. 78 (1987).

⁵⁸ *Id.* at 81.

⁵⁹ *Turner*, 482 U.S. at 82.

⁶⁰ *Id.* at 82.

⁶¹ *Id.* at 80.

In dismissing the question of whether the marriage regulation might additionally be scrutinized as to its applicability to non-prisoners as not presented, Justice O'Connor provided the standard of review,⁶² "We need not reach this question, however, because even under the *reasonable relationship test*, the marriage regulation does not withstand scrutiny."⁶³ Later in her opinion she restated the rational relationship test:

Nor, on this record, is the marriage restriction *reasonably related* to the articulated rehabilitation goal. First, in requiring refusal of permission absent a finding of a compelling reason to allow the marriage, the rule sweeps much more broadly than can be explained by petitioners' penological objectives.⁶⁴

Note that even though the Court applied the rational relationship test with regard to the right to marry, the regulation still failed as being overbroad and unable to withstand minimal scrutiny. Remember, once again, that until this case the Court had only struck down three regulations related to the regulation of marriage in over two-hundred years of review. In other words, the Court has consistently preserved the regulation of marriage as a State power.⁶⁵ This case exemplifies the Court's jurisprudence, that only when it is faced with an enactment that effectively results in a *total prohibition* or bar to marriage, will the Court find the legislation unconstitutional.⁶⁶

III. There may be a Constitutional right to marriage subject to State regulation, but there is no Constitutional right to enlist or re-enlist in the military.

The question of whether a Constitutional right to marry exists is important. As demonstrated in the preceding section, the level of scrutiny

⁶² *Id.* at 96-97.

⁶³ *Id.* at 97 (emphasis added).

⁶⁴ *Id.* at 98 (emphasis added).

⁶⁵ See Krystal D. Webb, *Baehr v. Lewin: "The Sacrifice" Same-sex Marriages and the Fundamental Right to Equal Protection, Privacy and Due Process*, 25 S.U. L. REV. 254, 264 (1998) (Wherein the author suggests that states have the exclusive power to regulate marriage, "This power allows the states to (1) regulate marriage relations by setting the standards and prerequisites of a valid marriage contract; (2) control the needed forms and procedures necessary to solemnize the marriage; (3) define the duties and legal obligations it creates; (4) determine other legal effects upon property and other rights; and (5) establish the grounds for marital dissolution.").

⁶⁶ See *Montgomery v. Carr*, 101 F.3d 1117 (6th Cir. 1996) (discussing the appropriate judicial scrutiny to be applied to the regulation of marriage concluding that rational basis is the appropriate level of scrutiny).

applied to a Constitutional right is usually correlated to the success or failure of the regulation. The analysis of a contemporary General Mundy-like regulation, however, does not end with the existence of a Constitutional right to marry. Since a challenge to the prohibition, or delay of marriage, as a part of the enlistment qualification would arise in a “hiring” context, the court would have to resolve several additional questions.⁶⁷ The court would have to first consider whether there is a Constitutional right to join the military.⁶⁸ Next, the court would review substantive or procedural due process problems.⁶⁹ Additionally, the court could be faced with justiciability issues and the lack of waiver of sovereign immunity.⁷⁰

A. Where does the power come from?

It is helpful to first consider the source of the military’s regulatory discretion over enlistment. The ultimate source of this power is a delegation from Congress.⁷¹ Congress derives its power from the United States Constitution, specifically, Article 1, Section 8 which provides, *inter alia*:

Congress shall have the power....to raise and support Armies
 . . . to provide and maintain a Navy, to make Rules for the
 Government and Regulation of the land and naval Forces, . .
 . to provide for organizing, arming, and disciplining the
 Militia, . . . to make all laws which shall be necessary and
 proper for carrying into execution the foregoing powers . . .
 .⁷²

Throughout the United States Code, Congress has given the Secretary of Defense broad discretion in the administration of his/her duties.⁷³ The Secretary of Defense has in turn delegated many of these responsibilities to the respective heads of each of the services. Based on this grant of authority, the

⁶⁷ See *Whittle v. United States*, 7 F.3d 1259 (6th Cir.1993) (discussing the distinction between refusal to hire as opposed to a refusal of the plaintiff’s right to practice law in general); *but see* *O’Neill v. Dent*, 364 F. Supp. 565 (E.D.N.Y. 1973).

⁶⁸ See generally *Williams v. United States*, 541 F. Supp. 1187 (E.D.N.C. 1982); see also Kevin W. Brown, Annotation, *Enlistment or Re-enlistment in Branches of the United States Armed Forces as Protected by Federal Constitution or By Federal Statutes*, 64 A.L.R. FED. 489 (2000).

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ See generally 10 U.S.C.S. § 505 (2005) (authorizing the Armed Forces to promulgate regulations for enlistment/re-enlistment).

⁷² U.S. CONST. art. I, § 8, cls. 1, 12-14, 16, 18.

⁷³ See, e.g., 10 U.S.C.S. § 508 (2005) (“ . . . the Secretary concerned *may authorize* the reenlistment in the armed force under his jurisdiction of . . . a person if his conduct after that service has been good.”) (emphasis added).

services have promulgated various physical and intellectual qualifications which determine whether a prospective servicemember will be allowed to enlist/re-enlist.⁷⁴

B. There is no “right to join the military.”

In *West v. Brown*,⁷⁵ the Court of Appeals for the Fifth Circuit, in a unanimous decision by a three judge panel, upheld the constitutionality of a non-waiverable regulation of the Secretary of the Army which barred enlistment of unwed parents of minor children. The plaintiff, Ms. West, “met all other enlistment criteria, but was rejected on the basis of the unwed parents regulation.”⁷⁶ The court held, *inter alia*, that there was “no right to join the military.”⁷⁷

The court announced *Mindes v. Seaman*⁷⁸ as controlling authority on the question of the constitutional review of military enlistment criteria. *Mindes* listed four factors which the court must consider: 1) the strength of the plaintiff’s claim; 2) potential harm to the plaintiff if review is denied; 3) type and degree of anticipated interference with the military function; and 4) extent to which military expertise or discretion is involved.⁷⁹ Under the first prong, the court considered the plaintiff’s assertion that the regulation “burdened the right to marry or not to marry and the right to rear children,” and was a “fundamental right propelling the case into ‘strict scrutiny.’”⁸⁰ The court reasoned that:

. . . rational restrictions on noncontractual government benefits and services are valid in the absence of affirmative government action which curtails important constitutional liberties, since such benefits do not in themselves enjoy constitutionally protected status . . . and it [the regulation] does not affirmatively curtail marriage or child bearing.⁸¹

⁷⁴ See, e.g., *Williams v. United States*, 541 F. Supp. 1187 (E.D.N.C. 1982) (sustaining a regulation that discharged a Marine for violation of height and weight requirements); see also, *Moe v. Dinkins*, 533 F. Supp. 623 (S.D.N.Y. 1981), aff’d, 669 F.2d 67 (2nd Cir. 1982) (upholding, against constitutional challenge, New York’s minimum age requirement and parental consent requirement for enlistment into the military).

⁷⁵ 558 F.2d 757 (5th Cir. 1977), cert. denied, 435 U.S. 926 (1978).

⁷⁶ *West*, 558 F.2d at 759.

⁷⁷ *Id.* at 760.

⁷⁸ 453 F.2d 197 (5th Cir. 1971).

⁷⁹ *West*, 558 F.2d at 759.

⁸⁰ *Id.*

⁸¹ *Id.* at 760.

The court, applying a rational relations test, considered the ability of a single parent with a dependant child to effectively fulfill all the requirements placed upon them by military service.⁸² The court found persuasive the proffered argument that “special treatment” of the single parent would result in inequitable treatment of soldiers without such children, which in turn would adversely affect the morale of the unit.⁸³ As such, the court concluded that the plaintiff’s claim was “tenuous,” thereby failing the first prong.⁸⁴ This reasoning is consistent with the Supreme Court’s treatment of the right to marry as previously discussed.

The court then turned to the plaintiff’s loss which they described simply as “the option to enter into a career in the Army and the special benefits for military dependants.”⁸⁵ The court compressed the final two prongs into a single question and found that a review of the regulation would “entail a sizeable leap into an area in which the only compass is accumulated military experience.”⁸⁶ Consequently the court held that the regulation was constitutional and that there was no fundamental right to join the military.⁸⁷

C. What about Substantive Due Process or Procedural Due Process?

A few years after *West* was decided, the United States District Court for the Eastern District of North Carolina, New Bern Division, addressed the constitutionality of a similar regulation challenged as a Fifth Amendment due process violation.⁸⁸ In *Williams*, the court considered a Marine Corps regulation which required denial of re-enlistment for failure to comply with height and weight standards.⁸⁹ The plaintiff had been a Marine for approximately seventeen years and was denied re-enlistment because he failed to attain the required weight of 203 lbs. The court recognized that the Marine Corps had given the plaintiff several extensions and ample opportunity to comply. The plaintiff was unable to comply and at one point tipped the scales at 263 lbs.

The court did not agree with the plaintiff’s contention that his Fifth Amendment substantive due process rights were violated, reasoning that “certain rights do not vest within the substantive provisions of the Fifth

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *West*, 558 F.2d at 760.

⁸⁶ *Id.* at 761.

⁸⁷ *Id.*

⁸⁸ *Williams v. United States*, 541 F. Supp. 1187 (E.D.N.C. 1982).

⁸⁹ *Id.*

Amendment,” and that there was no “vested right to federal employment.”⁹⁰ The court further asserted, “a citizen enjoys no constitutionally protected right to join the military.”⁹¹ The court then reasoned that when a government benefit “fails to attain the level of a constitutionally protected interest,” then a rational relations test must be used.⁹² The court finding that the regulation was rationally related to a legitimate interest, found no infringement of any substantive right under the Fifth Amendment.⁹³

The court then considered the plaintiff’s procedural due process argument. The court recognized that in order to “trigger the protections of procedural due process, the plaintiff must establish that he possesses a liberty or property interest which has been denied without opportunity to be heard.”⁹⁴ The court held that the military contract was an “at will” employment contract and, as such, there was no “right” to re-enlistment and consequently it was within the discretion of the military to not retain the servicemember.⁹⁵ Therefore, the court reasoned, there was no procedural due process violation because there was no right which triggered the protections.⁹⁶

D. Is *West v. Brown* still good law?

In a more recent decision, the United States Court of Appeals for the Sixth Circuit cited *West* for the proposition that “there is no right to join the military.”⁹⁷ In *Whittle*, the court was considering, *inter alia*, the constitutionality of a regulation which conditioned acceptance into the Judge Advocate Legal Service upon graduation from an ABA accredited institution.⁹⁸ The court held that “public employment is not a constitutional right and the States have wide discretion in framing employee qualifications,” and there is no right to join the military.⁹⁹ The court also noted that in the absence of an interest which required heightened scrutiny, the rational basis test applies.¹⁰⁰ As such, the court found it rational that the military relied on the judgment of the ABA “in determining which schools merit accreditation, and to use that as a proxy for a minimum acceptable level of skill.”¹⁰¹

⁹⁰ *Williams*, 541 F. Supp. at 1191.

⁹¹ *Id.* (citing *West v. Brown*, 558 F.2d 757, 760 (1977), cert. denied, 435 U.S. 926 (1978)).

⁹² *Williams*, 541 F. Supp. at 1192.

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Whittle v. United States*, 7 F.3d 1259 (6th Cir. 1993).

⁹⁸ *Id.*

⁹⁹ *Id.* at 1263 (citing *Personnel Adm’r of Massachusetts v. Feeney*, 442 U.S. 256, 273 (1979)).

¹⁰⁰ *Whittle*, 7 F.3d at 1263.

¹⁰¹ *Id.*

In sum, the courts have found that there is neither a fundamental right warranting strict scrutiny for the right to marry, nor a constitutional right to join the military. This realized, the courts have consistently applied a rational relations test when considering the constitutionality of regulations which affect access to the military and the right to marry. Because the courts have refused to find a right to join the military, the services have broad discretion in determining what qualifications may be required for service in uniform under the rational relations test. Additionally, the courts have reasoned that the regulations in *West*, *Williams*, and *Whittle* only deny a person the opportunity of a career in the armed forces and not to the rights they can exercise outside of service, such as the right to marry. Consequently, a waivable regulation denying enlistment to married persons, or requiring a significant waiting period, would most likely pass constitutional muster as long as the services can proffer some rational basis for the regulation which is tied to a legitimate state interest.

IV. Department of Defense --Is it/should it be concerned?

A. The “Typical Scenario”

It is not just a simple question of “little Johnny” marrying his seventeen year old high school sweet heart from Turtle Lake, North Dakota and moving her fifteen hundred miles to San Diego, California. The stereotypical situation is two very young individuals that are “in love.” Johnny joins the Marine Corps right out of high school, goes to boot camp, and then to follow-on training. Between schools, Johnny takes a leave of absence which is typical at this stage of his career training. While at home, Suzy is upset that she may never see Johnny again. Together, they figure out that there will be a significant pay increase and moving authorization if they marry. Upon assurances that everything will be okay, the parents consent and they marry. Johnny goes back to train and Suzy waits for the moving truck. Soon Suzy finds herself for the first time away from home in a place with all new faces, a check book, household duties once taken care of by mom, and a “husband” who is never there. After about three weeks at her new home, Suzy finds out that Johnny has been attached to a six month deployment leaving in about a week. Suzy is now left alone for six months to manage the household and loneliness. She is known among the services as a “West-Pac widow.”¹⁰²

¹⁰² “West-Pac widow” is a slang term used by Navy and Marine Corps personnel to describe a wife left alone while her husband is deployed on a six month tour aboard a ship in the Pacific Rim or a one year unaccompanied tour in Okinawa, Japan. Though not always, the term is often used

By the time Johnny gets back, he has skeletons in his closet from his adventures abroad, while his wife has found “new love,” spent all the money, bought a new car they cannot afford, and domestic violence rears its ugly head.¹⁰³ This scenario is unfortunately more and more common place and exacerbated by recent deployment requirements. One variation is when Johnny does not have a high school sweet heart, but finds one while on deployment overseas. Upon the next deployment, the scenario is likely the same.

B. Will a delay in marriage realistically increase the readiness of a servicemember?

Many of the anticipated arguments against such a policy were captured in *O'Neill v. Dent*.¹⁰⁴ In *O'Neill*, a United States District Court for the Eastern District of New York considered the constitutionality of a marriage prohibition as applied to the United States Merchant Marine Academy.¹⁰⁵ In concluding that the regulation violated the Constitution, the court gave weight to four arguments made by the plaintiff which seemingly undercut the government's position regarding the effect that marriage would have on students.¹⁰⁶ The first proposition was that married students appeared to demonstrate more motivation in their studies than their unmarried counterparts. This was captured by the testimony of Roy Luebbe a professor from the Calhoun Engineering School. The court found persuasive the anecdotal accounts that many married engineer students had “greater motivational drive than single men.”¹⁰⁷ The next argument that the court found persuasive was the idea that married men maintained a greater adherence to rules.¹⁰⁸

as a derogative for a married dependent that frequents the base officer or enlisted clubs while their spouse is on deployment.

¹⁰³ See Annual Reports of the Defense Task Force on Domestic Violence available at <http://www.dtic.mil/domesticviolence/reports/Start.pdf> (Established by The National Defense Authorization Act for Fiscal Year 2000, Pub. L. No. 106-65, the Defense Task Force on Domestic Violence publishes an annual report detailing their findings and recommendations for ameliorating the problem of domestic violence in the military. The 2003 report cited an ineffective Domestic Violence Policy within the DoD. The 211 page report concluded that the issue is not “well-understood” in the military and proffered 76 recommendations to remedy failing programs and policies).

¹⁰⁴ 364 F. Supp. 565 (E.D.N.Y. 1973).

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *O'Neill*, 364 F. Supp. at 574.

¹⁰⁸ *Id.* at 575.

This stemmed from a risk/reward proposition. In other words, married men had more to risk than their single counterparts and therefore had a greater incentive to succeed. Tied into that proposition was the idea that married men generally maintain higher performance standards. This finding was based on a number of studies which found that married college students generally have higher grade point averages than their single counterparts.¹⁰⁹ Finally, the court reviewed a sample pool of about thirty married cadets who were currently attending the service academies at that time. The court concluded that there was no correlation between marriage and cadet performance.¹¹⁰

In addition to the above, the Court considered certain data examining the relationship of the marital status of college students to academic achievement. These studies indicate that married students generally perform no worse than their single colleagues. Marshall and King report, for example, in a major study in 1966 drawn from large state-supported universities in the Midwest and West that married students appear to be somewhat older than unmarried students; that there are no discernible differences in grade point averages of married students as compared with unmarried students; that married male students are more apt to come from families of lower socio-economic status than unmarried male students; that married students have larger debts to be repaid; that their major source of income is employment of wife and husband; that they have less leisure time; and that married men aspire to higher future goals.

Id. (quoting Marshall and King, *Undergraduate Student Marriage: A Compilation of Research Findings*, 28 J. OF MARRIAGE AND THE FAMILY 350 (1966)).

¹⁰⁹ *Id.* at 575 (“Another researcher concluded that married students were more successful in achieving a higher grade point average than unmarried students. Russo, *Predicting Academic Achievement of Students in Arizona Junior Colleges*, 30 Dissertation Abstracts International 2309A (1969). A third researcher noted that a male’s grade point average at the University of Nebraska Teacher’s College went up during the semester after marriage, except for business administration and engineering majors. Wilder, *Relationship of College Achievement to Marital Status*, 27 Dissertation Abstracts 3326-27 (1967). Horner concluded that marriage made no difference between ‘persisters’ and ‘non-persisters.’ Horner, *An Analysis of Persisters and Non-Persisters at the University of Nebraska*, 30 Dissertation Abstracts International 850A (1970). But Watley found that single non-black men got better freshman grades than nonblack men who married. Watley, *Black and Non-Black Youth: Does Marriage Hinder College Attendance?* 7 National Merit Scholarship Corporation Reports #5, at 19, 25 (1971).”).

¹¹⁰ *Id.* at 575-76.

The analogy to married college students, however, is imperfect because the military environment is vastly different. Accordingly, the Court requested both the plaintiff and the Government to compile a list of all known married cadets who attended the U.S. Merchant Marine Academy, or the U.S. Military Academy, or the U.S. Naval Academy, or the U.S. Coast Guard Academy, or the U.S. Air Force Academy. A list of 27 cadets and their academic and conduct records was compiled: eight cadets at the U.S. Merchant Marine Academy; six at the U.S. Military Academy; three at the U.S. Coast Guard Academy; and ten at the U.S. Naval Academy. n15

It is likely that many if not all of these issues would be raised in a challenge to any policy restricting marriage should it be instituted. What is interesting, however, is that the military has already promulgated and implemented regulations which do exactly what this article argues in favor of – albeit in relatively narrow circumstances.

C. The military is already doing it.

1. The military academies

One need only look to the various military academies to find out that the suggested policy of “delay in marriage” has already been adopted in some form.¹¹¹ In fact, this policy recommendation is not a 21st century concept -- it was instituted as policy as early 1855.¹¹² As noted in *O’Neill*, the government offered in support of their position the following:

. . . all of these witnesses offered the opinion that the obligations of a husband coupled with the responsibilities of complying with the unusually stiff academic and training regime at the Academy, would definitely interfere with the cadet's performance and record at the Academy. They averred that the program was very time-consuming; that the

While the sample is manifestly too small and wholly inadequate to be representative, an examination of the academic and conduct performance of these cadets, who married at various points during their years at the service academies, fails to reveal any correlation between marriage and cadet performance. The performance of some cadets improved after marriage; others remained essentially the same both before and after the date of marriage; still others slightly declined after marriage. Moreover, these cadets ranged the spectrum from very fine students to just barely passing students.

Id.

¹¹¹ See 32 C.F. R. § 901.4 (2006) which states, *inter alia*, “(e) *Marital Status*. Applicant must be unmarried. (Any cadet who marries is disenrolled from the Academy);” see also U.S. Naval Academy admissions website at <http://www.usna.edu/Admissions/steps2.htm>.

¹¹² See *O’Neill*, 364 F. Supp. at 573 n.13 (“The Naval Academy regulations prohibiting marriage date back to 1855. Regulations of Naval Academy 1855, Ch. 111, ‘Discipline: ‘27. If any student shall be found to be married, or shall marry while attached to the Academy, his marriage will be considered sufficient to dissolve his connection with the Academy, and to authorize his name to be dropped forthwith from the Navy List.’ The Coast Guard Academy marriage-dismissal regulations date back at least as far as the ‘Rules and Regulations governing the course of instruction on the practice ship ‘Chase’ (1897) for Revenue Cutter Service cadets, which stated at Article 31: ‘The marriage of a cadet shall be considered as equivalent to his resignation.’ Five of the six state maritime academies also have similar prohibitions against married cadets.”).

Academy is a very structured environment vastly different from the normal college or university atmosphere; that married men would be subject to greater stress than single men; that these stresses would be compounded because the cadet would be obligated to reside at the Academy, away from his spouse, and because his financial resources would generally be meager; in a word, that married men would be incapable or less capable of coping with the structured environment than single men, and hence their performances would be poorer. Moreover, they suggested that the attrition rate at the Academy would rise, and administrative problems would be compounded if the no-marriage rules were changed. Some of the Government witnesses conceded that older and more mature cadets in the upper classes would be more capable of adjusting to the Academy environment, if married, than the younger cadets. But all strongly opined that an absolute prohibition against marriage, regardless of age and circumstance, was necessary in order to achieve the lawful objects of the Academy.

While the Government witnesses did concede that the reasons for cadet attrition are many, varied and complex, including medical reasons, incapacity to adapt to a military environment, academic problems and a change in career goals, it was their experience that this attrition rate would sharply rise if marriage were permitted because married cadets would necessarily render a poorer performance. To buttress this argument, they point out that teenage marriages carry with them an exceptionally high risk of divorce, which in turn would increase the number of dropouts. The statistical evidence made available to us substantiates the assertion that, all other things being equal, teenage marriages have a higher propensity to end up in divorce than marriages of older persons¹¹³

Thus, even in 1973, there were strong arguments that there existed a correlation between youth, marriage, inexperience, divorce and the unique additional pressures associated with the service academies.

2. Promulgated “rationale bases”

¹¹³ *O’Neill*, 364 F. Supp. at 573.

Not only have the service academies instituted this policy successfully for one- hundred fifty years, but also the active duty component has instituted this policy, in some form or another, in dealing with potential marriage of service personnel abroad to foreign nationals.¹¹⁴ The services have designated

¹¹⁴ See Naval Military Personnel Manual (MILPERSMAN), Article 5352-030, available at http://buperscd.technology.navy.mil/bup_updt/upd_CD/BUPERS/MILPERS/MILPERSMAN%20%205352%20-%20OVERSEAS%20DIPLOMACY.PDF.

1. Authority. Marriages outside the United States (U.S.) to foreign nationals shall be governed by the instructions of the local area commander.
2. Local Regulations
 - a. The senior naval commander in the area concerned will implement the regulations through local policies and procedures. The policies should include
 - (1) requirements for medical examinations of the member and the prospective spouse;
 - (2) marriage counseling;
 - (3) evidence of financial ability to prevent the spouse from becoming a public charge; and
 - (4) notarized written consent from parent(s) or legal guardian(s) of either party if under the legal age for marriage in the state, territory, or country in which the marriage is to take place.
 - b. See the area commander's instruction, 1752 series, for required forms and further requirements.
3. Application. All members contemplating marriage outside the U.S. to a foreign national will submit an application for permission to the area commander in the area where the alien lives.
4. Background Investigation. The most time-consuming element in premarital processing is the background investigation of the prospective spouse. Members are encouraged to contact the local U.S. Embassy or consulate to request a background investigation, including a criminal and subversive record check, be initiated to determine the eligibility of their prospective spouses' entry into the U.S.
5. Screening Process. The screening of prospective spouses is substantially similar to the processing of requests for entry of alien spouses into the U.S. Inadmissibility to the U.S. of a prospective alien spouse does not require disapproval of a marriage request. Authorization to marry is not given in such cases until both parties to the proposed marriage signify, in writing, they have been counseled and advised the prospective alien spouse may be ineligible for admission to the U.S. but they desire the marriage take place.
6. Application Approval
 - a. Applications should be sent for approval to area commanders, or their designee, as indicated below:
 - Area Commanders Countries
 - COMUSNAVEUR Europe, United Kingdom, Africa, Middle East
 - COMNAVAIRLANT Iceland, Bermuda, Azores
 - COMUSNAVSO Caribbean, Central/South America
 - COMNAVFORJAPAN Japan
 - COMNAVFORKOREA Korea

certain area commanders as the initial approving official for any prospective marriages by personnel within their area of responsibility.¹¹⁵ This authority provides for a *full prohibition* of any prospective marriage if the criteria listed in the regulation are met.¹¹⁶

These regulations also provide a detailed discussion of the concerns or issues to be considered by the commander in making an approval decision. An obvious one relates to the eligibility of the applicant to immigrate to the United States.¹¹⁷ Another issue addressed by the DoD Policy is the ability of junior enlisted to support their prospective family.¹¹⁸

If the above are adequate bases for the disapproval of an OCONUS marriage, one would be hard pressed to distinguish their application to a CONUS marriage. The only distinction appears to be that the person is not standing on U.S. soil. These regulations would certainly raise constitutional concerns under a *Zablocki* analysis, as they would certainly fulfill the first

COMNAVFORMARIANAS Pacific, Philippines, Hong Kong, Macau, China, Singapore, Vietnam, Thailand, Cambodia, Australia, New Zealand
CO, NAVSUPFAC, DIEGO GARCIA Indian Ocean
COMNAVREGNW/COMNAVREGNE Canada
COMNAVREGSW Mexico

b. Contact Commander, Navy Installations (N2122) for guidance in determining appropriate area commander for any areas not listed above.

c. If the prospective alien spouse resides in a country where no military investigative or medical facilities are available, the U.S. consular officials in the country concerned may be asked to conduct the necessary premarital investigations.

Id.

¹¹⁵ MILPERSMAN 5352-030.

¹¹⁶ See U.S. DEP'T OF ARMY, REG. 600-240; U.S. DEP'T OF AIR FORCE, REG. 211-18; U.S. MARINE CORPS ORDER, ORDER 1752.1., MARRIAGE IN OVERSEA COMMANDS 1 (1 Jun 1978), *available* *at*

<http://www.usmc.mil/directiv.nsf/0/e5941d2af7e88395852564970041ba37?OpenDocument>.

¹¹⁷ U.S. DEP'T OF ARMY, REG. 600-240; U.S. DEP'T OF AIR FORCE, REG. 211-18; U.S. MARINE CORPS ORDER, ORDER 1752.1., MARRIAGE IN OVERSEA COMMANDS 1 (1 Jun 1978) ("1. Purpose. This regulation provides information and policy guidance to commanders on marriage of personnel stationed in or visiting overseas commands, and on applications for the immigration of alien spouses, fiancée, children, stepchildren, and adopted children. *a.* The restrictions imposed by this regulation are not intended to prevent marriage. These restrictions are for the protection of both aliens and US citizens from the possible disastrous effects of an impetuous marriage entered into without appreciation of its implications and obligations. *b.* This regulation is intended to make both aliens and US citizens aware of the rights and restrictions imposed by the immigration laws of the United States and to assist in identifying and *hopefully precluding the creation of US military dependants not eligible for immigration to the United States who may pose a logistical burden on, and possible embarrassment to, the US military service concerned.*") (emphasis added).

¹¹⁸ *Id.*

prong of the *Zablocki* test which commands the court to ask “whether the policy or action is a direct or substantial interference with the right to marriage.”¹¹⁹ The question would then turn on whether the government could withstand a strict scrutiny analysis as required by prong two.¹²⁰

Given that at least one of these regulations has been in effect for over one-hundred fifty years, and the international regulations for close to thirty years, without question, the government would likely sustain its burden to demonstrate “sufficiently important state interests which are closely tailored to effectuate only those interests.”¹²¹ As such, extending these regulations to state-side commands, based upon very similar criteria, is foreseeable and sustainable even under a strict scrutiny analysis.

D. Theory of war and the combat multiplier.

Policy makers in the DoD are faced with many decisions and uncertainties in planning for contingencies. These decisions must be reconciled with the realities of an ever-changing list of new and old enemies and the rapid development of, and access to, technologies. In the face of these contingencies is one of the largest and most powerful “risk management organizations” in the world, the Pentagon. Operating within a political arena and competing for precious budgetary allocations, the Pentagon must accord appropriate levels of training, money, and personnel to mitigate national threats to security. Consistent with this philosophy, the Marine Corps’ war fighting doctrine, for example, has identified “frictions”¹²² which could

¹¹⁹ *Montgomery*, 101 F.3d at 1124.

¹²⁰ *Id.*

¹²¹ *Montgomery*, 101 F.3d at 1124.

¹²² JOHN SCHMIDT, MCDP 1: WARFIGHTING 5-6 (United States Marine Corps 1997)

Friction: Portrayed as a clash between two opposing wills, war appears a simple enterprise. In practice, the conduct of war becomes extremely difficult because of the countless factors that impinge on it. These factors collectively have been called friction, which Clausewitz described as ‘the force that makes the apparently easy so difficult.’ Friction is the force that resists all action and saps energy. It makes the simple difficult and the difficult seemingly impossible.

The very essence of war is a clash between opposed wills creates friction. In this dynamic environment of interacting forces, friction abounds.

Friction may be mental, as in indecision over a course of action. It may be physical, as in effective enemy fire or a terrain obstacle that must be overcome. Friction may be self-induced, caused by factors as lack of clearly defined goal, lack of coordination, unclear or complicated plans, complex

conceivably frustrate success in the execution of war. In other words, factors that when considered in the construct of battle, work to complicate efforts and drain resources.¹²³ These factors, as the theory goes, are present in all facets of combat and are not restricted to friendly or opposition forces. Therefore, the goal is to identify as many of these factors in peacetime, so that in the time of war they are managed to the point that will give our forces a decisive advantage over the enemy. This in turn will increase the probability of a successful campaign.¹²⁴

While Congress directed the Pentagon to establish the Task Force on Domestic Violence, the DoD currently does not fully understand the pervasive problem of marriage/divorce among servicemembers. In fact, the Air Force appears to be the only service which “formally” tracks marriage and divorce statistics.¹²⁵ The following statistics are extrapolated from an Air Force

task organizations or command relationships, or complicated technologies. Whatever form it takes, because war is a human enterprise, friction will always have a psychological as well as a physical impact.

Id.

¹²³ *Id.*

¹²⁴ JOHN SCHMIDT, MCDP 1: WARFIGHTING (United States Marine Corps 1997).

¹²⁵ Interview with Tony Velasco, Former Analyst, Air Force Personnel Center, Randolph Air Force Base, in San Antonio, TX (circa Fall, 2001) (discussions revealed that even though the Air Force tracks these statistics, Mr. Velasco was not aware of any other service which compiled similar data, and knew of no use of the data by the Air Force other than for recording purposes); *see also*, MARSHA L. THOLE AND FRANK W. AULT, DIVORCE AND THE MILITARY II viii-xi (The American Retirees Association 1998) (discussing the fact that various attempts to gain statistics on divorce in the military were unsuccessful and asserting that the data can be retrieved through the military pay center data bases.); *But see* United State Marine Corps, Marines Awaiting Training (MAT) Program, available at <http://www.tecom.usmc.mil/downloads/mat/PF08-ig.doc>. Reproduced in part below, this instructor’s guide for training contains some alarming statistics and addresses the “why of this article.”

UNITED STATES MARINE CORPS
Marines Awaiting Training (MAT) Program
JUL 98

MARRIAGE IN THE MARINE CORPS

3. **INTRODUCE LESSON PURPOSE.** The purpose of this period of instruction is to familiarize Marines with the special challenges a Marine Corps career presents to a married couple. The material in this lesson will not be tested. There are no terminal or enabling learning objectives.

TRANSITION: Having watched the video, you understand some of the challenges a Marine Corps career presents to a marriage. The choice of a mate is so important because it affects you for the rest of your life. In the "old Corps," most Marines did not worry about it; they simply could not afford marriage. That's not the case today.

1. **MARRIAGE AND DIVORCE STATISTICS:**

a. Marriage Rates. The marriage rate in the Marine Corps continues to rise. Figures on Marine Corps marriage rates show that in 1980, 33% of Marines were married. Five years later that number increased to 44%. In 1993, the marriage rate among Marines was approximately 49%.

b. Marriage Age. While the number of young people in the United States has been declining, the number of married Marines between the ages of 17 and 21 has continued to increase. The number of divorces among first-term Marines has, unfortunately, also grown significantly.

c. DIVORCE STATISTICS.

- 1) The United States has the highest divorce rate in the world.
- 2) Studies show that in 1980 when the divorce rate peaked in the United States, divorces occurred in one out of every two marriages.
- 3) While the civilian divorce rate has remained constant into the 1990's, the Marine Corps has seen its overall divorce rate increase.
 - a) Between 1980 and 1993, Marine Corps divorce rates jumped to 77%. Looking at the percentage of divorces among enlisted Marines only, there has been an increase of 95%. If one looks even more closely at the increase in divorces for first-term Marines, privates through corporals, the divorce rate has increased 117%.
 - b) The majority of Marines marry and divorce during their first term of enlistment. Data has further shown that military personnel are inclined to remarry sooner than civilians.
 - c) When one or both partners are still "on the rebound," 40% of military second marriages end in divorce within the first five years.

2. WHY MANY FIRST-TERM MARINES MARRY:

a. Make more money. When our military went to an all volunteer force, pay was increased and family entitlements were expanded to attract more recruits. By calling attention to family benefits such as Basic Allowance for Quarters (BAQ), separation allowances, and commuted rations (COMRATS), the military itself created the "financial illusion" that married military couples make more money than single personnel. So a number of first-term Marines believe they can support a spouse and children on their military pay and live comfortably in the process.

b. Escape loneliness and the barracks life. Some Marines marry to escape loneliness and barracks life. While barracks life subjects you to room inspections and does not usually allow you a choice of roommates, married life allows you to choose your "roommate" while avoiding the hassle of inspections.

c. Sex. "Sleeping around" may end a Marine's life through disease. It may end their career through legal procedures in the case of adultery, sodomy, rape (to include statutory/underage or lack of consent), or indecent acts with a minor. The risk of contracting a sexually transmitted disease, including AIDS, is greatly reduced in a faithful marriage because no diseases will be acquired from outside the marriage.

d. Love. There are divorced couples today who say: "We loved one another very much, but love was not enough." Many people misunderstand love; they think of it as an emotion, then they wonder why their commitments last only as long as their feelings. Marriage is a partnership of common values and goals.

- 1) In order for a couple's love to grow and mature throughout life, the couple needs to be willing to work with each other on critical marriage issues such as finances, children, personal responsibilities, and goals.
- 2) If a couple's relationship is grounded in a deep and mature respect for one another that produces actions which show their commitment to each other, the chances of entering into a life-long and happy marriage are greatly increased.

e. Pregnancy. Another reason for marrying is pregnancy. "I got her pregnant, so I had to marry her," or "I wanted my child to have a father" are reasons given for marriage.

1) Those who make that commitment need to realize the difficulty a third person will bring to the early years of a marriage. The unexpected financial demands of an extra mouth to feed and the time-consuming physical needs of a baby are painfully difficult for a young couple. Either or both partners may become resentful of the situation and the loss of "freedom" enjoyed when he/she was single.

2) People who marry because of pregnancy very often find themselves unable to make a success of the marriage.

3. WHY SO MANY MARRIAGES END IN DIVORCE:

It is disturbing to note that Marines interviewed after going through a divorce have said that they did not take part in any marriage preparation classes or counseling. In fact, one young, first-term Marine made this interesting comparison:

"I prepared more for my bungy cord jump; checking the site, checking the equipment, rope length, catch lever, receiving line, and double checking everything again and again. You want to make sure everything is good to go before you do it. But for my marriage, I didn't do anything but go to the Justice of the Peace."

a. Marines Lead Unique Lives. Statistics show that the things that make the Marine Corps unique are among the things that add stress and difficulty to marriage.

- 1) Problems with money, lack of maturity, and children from previous relationships.
- 2) Extended separations.
- 3) Frequent moves.

b. Money. Many Marines mistakenly believe that by getting married, they'll have more money. While married Marines do qualify for some financial help such as BAQ and COMRATS, and sometimes separations allowance when deployed, they also acquire extra expenses. If there are children, expenses are even higher. Several points must be kept in mind:

- 1) Base housing is not always available and off-base housing in many areas where Marines are assigned has been found to be unaffordable to young enlisted families.
- 2) If you and your spouse are planning for him/her to work, recognize that there is always the possibility of unemployment. Even with a college degree, or other qualifications, there may simply be no jobs to be had.
- 3) The high cost of child care often offsets the income that may be earned by a spouse with a low paying job.
- 4) While dependants qualify for medical benefits, limited military medical staffing may require dependants to be cared for at civilian hospitals. This will result in an out-of-pocket expense for the Marine.
- 5) It is not uncommon to see a divorced lance corporal with two children. The amount of alimony and child support that can be ordered varies widely in different states. The court will decree that you establish an allotment, and your pay will be withheld to assure timely payment of both alimony and child support.
- 6) Marriage during your first term of enlistment should be thought out completely. Getting married to collect BAQ and COMRATS is not the answer to raising your income, because the extra expenses will always exceed the amount of increase.

c. EXTENDED SEPARATION. As Marines, we are the "911 Force" for the country. You will be deployed at a moment's notice. Many may be aware of the Marine Corps' rapid deployments to such places as Panama, Liberia, Southwest Asia, and Somalia. Your duties require you to be deployed 40% to 60% of your fleet time. This is especially true

database system entitled Interactive Demographic Analysis System (IDEA) and

during your first tour of duty as a junior Marine. Because of this, it becomes extremely important that a Marine's spouse have the essential maturity and ability to carry on in your absence.

d. FREQUENT MOVES. You have chosen a profession that requires you to transfer to duty stations where the Corps needs your skills, and not necessarily the place you choose. Marine families are transferred from one duty station to the next on the average of every 2.4 years. Although the Commandant is taking steps to make tours longer at each duty station, the frequency of these moves is still a financial and emotional burden on the Marine family. Assignments to overseas duty are a real possibility. There are two basic kinds of overseas assignments:

1) Accompanied. The Marine Corps provides support and housing for the spouse and dependants with the Marine.

2) Unaccompanied. The Marine goes alone. The Marine Corps family must be adaptive and flexible in response to the challenge of living in a foreign culture without the close support of family and friends. These frequent relocations can be especially difficult for a young spouse who is away from their family for the first time.

e. LACK OF Maturity. While an immature individual may tend to act impulsively, a mature person generally thinks about the long term effects of a decision before undertaking a particular action. For example, a Marine reports to his first duty station, a large base, and decides that he needs "wheels." Rather than calculating what kind of vehicle he can really afford, he purchases a late model sports car at a local used car lot. Later he discovers that:

1) The interest rates make the car twice as expensive as originally estimated.

2) There are mechanical defects that were not initially visible and will cost an "arm and a leg" to repair.

3) Insurance is often unaffordably high. This cost can also increase if the Marine subsequently receives even just one traffic ticket.

f. INFIDELITY. A recent Gallop Poll reported that an overwhelming majority of Americans are faithful to their marriage vows. People who are separated from their spouses for extended periods of time, however, can be tempted, particularly when they are under stress or when alcohol might lower their inhibitions. Marines who face multiple deployments away from their spouses need to commit themselves to remain faithful to their marriage vows. While infidelity may be portrayed in a casual fashion in some afternoon television soap operas, adultery is deemed a criminal offense under Article 134 of the Uniform Code of Military Justice.

g. CHILDREN FROM PREVIOUS RELATIONSHIPS. The number of marriages involving partners with children from previous relationships is higher in the military than in the civilian sector.

1) Being a step-parent is difficult enough, but adding long-term separations and frequent moves makes it even more challenging.

2) Many young Marines have not yet acquired the unique parenting skills necessary to raise children from a previous relationship of the spouse. While the anticipated arrival of children in a marriage can help foster stability and increase the chances that a couple will remain together, children from a previous relationship add challenges that many people find they are not ready to take on.

During this lesson, we discussed marriage and divorce in the United States and the Marine Corps, reasons people marry or divorce, considerations a Marine should make before getting married, and the resources provided within the Corps to assist Marines increase their chances of enjoying a happy and successful marriage.

they are, unfortunately, not particularly useful. Indeed, they generate as many questions as answers. As noted below, the statistics represent Fiscal Year 2000.

OFFICERS¹²⁶

(67,527 total active duty officers)

YEARS OF SERVICE (YOS)

YOS	1-4	5-9	10-14	15+
DIVORCED	398	681	734	1,148
MARRIED	8,437	10,775	11,122	19,123
TOTAL POPULATION	18,483	14,610	13,120	21,314
% of Total Population (Married + Divorced)	47.80%	78.41%	90.37%	95.11%
Military divorced per/ 1000	22	47	56	5
Civilians divorced per/ 1000 (1998) ¹²⁷	4.2*	4.2*	4.2*	4.2*
Military married per/ 1000	456	738	848	897
Civilians married per/ 1000 (1998) ¹²⁸	8.4*	8.4*	8.4*	8.4*

* These numbers do not reflect civilian rates that can be directly associated with a members' time in service. Instead, they reflect the civilian divorce and marriage rates for the civilian population as a whole.

GRADE¹²⁹

YOS	O1	O2	O3	O4	O5
1-4	7023	5823	5165	453	16
5-9	797	764	12,046	928	69

¹²⁶ HQ AFPC/DPSARA available at <http://www.afpc.randolph.af.mil./demographics> (statistics represent FY 2000).

¹²⁷ U.S. Department of Health and Human Services, Center for Disease Control and Prevention available at <http://www.cdc.gov>.

¹²⁸ *Id.*

¹²⁹ HQ AFPC/DPSARA available at <http://www.afpc.randolph.af.mil./demographics> (statistics represent FY 2000).

10-14	773	412	3524	7902	464
15+	237	181	1759	5983	9465
TOTAL POPULATION	8,827	7,180	22,497	15,266	10,014
% Total Officer (67,527)	13.1%	10.6%	33.3%	22.6%	14.8%

ENLISTED¹³⁰

(282,352 total active duty enlisted)

YEARS OF SERVICE (YOS)

YOS	1-4	5-9	10-14	15+
DIVORCED	2,594	4,589	4,629	8,146
MARRIED	37,863	32,221	32,058	62,288
TOTAL POPULATION	119,054	46,524	40,487	74,547
% of Total Population (Married + Divorced)	34.1%	79.1%	90.6%	94.5%
Military divorced per/1000	22	99	114	109
Civilians divorced per/1000 (1998) ¹³¹	4.2*	4.2*	4.2*	4.2*
Military married per/1000	318	693	792	836
Civilians married per/1000 (1998) ¹³²	8.4*	8.4*	8.4*	8.4*

* These numbers do not reflect civilian rates that can be directly associated with a members' time in service. Instead, they reflect the civilian divorce and marriage rates for the civilian population as a whole.

GRADE¹³³

YOS	E1/E2	E3	E4	E5	E6	E7+
1-4	25,728	52,378	37,452	1,049	93	4

¹³⁰ *Id.*¹³¹ U.S. Department of Health and Human Services, Center for Disease Control and Prevention, available at <http://www.cdc.gov>.¹³² U.S. Department of Health and Human Services, Center for Disease Control and Prevention, available at <http://www.cdc.gov>.¹³³ HQ AFPC/DPSARA, available at <http://www.afpc.randolph.af.mil./demographics> (statistics represent FY 2000).

5-9	90	224	18,460	27,959	206	36
10-14	37	4	166	31,366	11,203	999
15+	42	10	98	7,980	30,435	36,395
TOTAL POPULATION	25,897	52,616	56,176	68,354	41,937	37,372
% Total Enlisted (282,352)	9.2%	18.6%	19.9%	24.2%	14.9%	13.2%

As the data suggests, the incidence of marriage and divorce within the military when compared to civilian rates is intriguing. Looking at the 1-4 years of service category, the above statistics suggest that the chances of being married in the military during this period are around 45.6% for officers and 31.8% for enlisted. This is truly astonishing, as the average chance of being married in the civilian population as a whole is only .84%. Postulating that service years 5-9 represent the marriage years 1-4, the divorce rate in the military for this period would appear to be about 23 times the national average. Again, however, this is assuming the data as reflected by the Air Force reflects actual divorces during that period.¹³⁴ Further, these statistics may be deceiving. On the one hand, the above statistics suggest that the chances of being divorced in the military during the first 1-4 years of service is 2.2%, significantly higher than the .42% national average for the total population. On the other hand, the same statistics suggest that divorce might actually be significantly less likely in the military when one compares the number of divorces to the overall number of reported divorces and marriages for a particular period. Assuming those servicemembers who report being divorced during the 1-4 years of service category actually obtained their divorce during that same period of time, then the chances of getting divorced during a member's first 1-4 years would appear to be about 5% for officers and 6% for enlisted -- far less than the 33% figure suggested by the overall civilian figures. Note, however, that the 33% civilian divorce rate is not looking at a discreet time period during an individual's career, but rather at the population as a whole without regard for what stage a person might be in their career or even if they are employed. Another intriguing aspect of the statistics is that the divorce rate seems to peak at the 10-14 years of service category and then goes back down in the 15+ years of service category, especially among

¹³⁴ *Supra* note 125 (Mr. Velasco suggested that this assumption is correct, however, the way the data is presented seems to detract from this assumption. This is because the information is drawn from pay system data. Without a survey, the system would be blind to remarriage, repeat divorces, and other statistical variations which would compromise these totals).

officers. This begs the question of whether divorce, or the threat of a divorce, is contributing to the decision of some of our most valuable, experienced servicemembers to leave the military before reaching retirement.

In any event, all of the above statistics are likely comparing apples to oranges, as the national average reflects figures for the population as a whole, which would, of course, include large numbers of people who are not in a comparable position to those in the military (e.g., the elderly, the highly disabled, and the unemployed) and, in any event, do not correlate precisely to the military figures. Further, the overwhelming tendency to marry in the military may make any comparisons to civilian divorce rates extremely problematic. Even if the military were to be compared to a similar group of civilians, such as policemen and firemen at similar points in their careers, the divorce rate in the military might be less only because the number of marriages in the military is inflated as a result of an excellent benefits package for dependents. Still, this disconnect only underscores the need for further studies that can compare apples to apples. Finally, even if divorce rates turn out to actually be less in the military, this does not mean that the “friction” associated with divorce in the military does not warrant further research, as well as the consideration of reasonable steps to minimize the impact of this “friction.”

It is time for the services to begin collecting this data and analyzing it in a way that determines the true depth of this problem. I have been in the Marine Corps for seventeen years and served as legal assistance attorney at Marine Corps Base, Quantico, Virginia for two years. During that tenure, I performed duties as a staff attorney and as the head of the branch. I serviced over four thousand clients during that tenure, about half of which were divorce clientele. Viewed from this particular perspective, military divorce would appear to be a problem that is simply out of control and in need of repair. In sum, marriage of the first term servicemember, and its unfortunate counterpart divorce, appear to have established themselves as a “friction,” or factor to be considered, in the perpetuation of the services and our future successes on the battlefield.

As Justice O’Connor observed in *Turner*, an entry into marriage is much more than an exchange of vows:

Marriages are expressions of emotional support and public commitment In addition, many religions recognize marriage as having spiritual significance . . . therefore, the commitment of marriage may be an exercise of religious faith

as well as an expression of personal dedication . . . marital status often is a pre-condition to the receipt of government benefits (*e.g.*, Social Security benefits), property rights (*e.g.*, tenancy by the entirety, inheritance rights), and other, less tangible benefits (*e.g.*, legitimization of children born out of wedlock).¹³⁵

Evident in Justice O'Connor's comments is the fact that entering into a marriage commitment is much more involved than a simple ceremony. The Justices have acknowledged throughout their opinions that there are a wealth of legal rights and obligations that arise after the words, "I do," are spoken.¹³⁶

E. Some more statistics.

1. Pay

Young, first term Marines make up 68% of total personnel strength.¹³⁷ This trend is consistent throughout the services.¹³⁸ Half of that percentage represents the three lowest pay grades.¹³⁹ A single service person starting out in the lowest pay grade of E-1 makes \$1,273.50 a month, or \$318.38 per week before taxes.¹⁴⁰ If he/she chooses to tie the knot he/she could receive an additional \$1,173.00 non-taxable income in the form of Basic Allowance for Housing (BAH).¹⁴¹ A married servicemember who gets promoted to the pay grade of E-4 will receive \$1,935.90 per month, or \$483.98 per week and the same \$1,173.00 for BAH.¹⁴² Fifty-three percent of

¹³⁵ *Turner*, 482 U.S. at 95-96.

¹³⁶ Although not a focus of this article, it is important to note that the institution of marriage confers obvious benefits as well as tremendous responsibilities. Those responsibilities cannot be underestimated in their influence over a young person in the face of the culture shock and transition into military organizations which do not allow the freedom of movement and autonomy found elsewhere in this great country. *See also* Susanne M. Schafer, *Marriage Can Wait, Marines Preach*, ASSOCIATED PRESS, July 5, 1998, at A1.

¹³⁷ Gordon Lubold, *Fewer Unmarried Marines: Downward Trend Reflects National Statistics Since 94*, MARINE CORPS TIMES, Jan 22, 2001, at A1.

¹³⁸ Defense Almanac, available at <http://www.defenselink.mil/pubs/almanac>.

¹³⁹ *Id.*

¹⁴⁰ Defense Finance and Accounting Service web page at <http://www.dod.mil/dfas/money/milpay/pay> (based on paygrade of E-1, with over four months of service).

¹⁴¹ Department of Defense Per Diem, Travel, and Transportation Allowance Committee web page at <https://secureapp2.hqda.pentagon.mil/perdiem/bah.html> (based upon zip code 22134, Quantico, VA. BAH rates vary according to pay grade and cost of housing around the servicemember's duty station).

¹⁴² Defense Finance and Accounting Service web page at <http://www.dod.mil/dfas/money/milpay/pay> and Department of Defense Per Diem, Travel, and

military personnel fall into one of these pay grades.¹⁴³

2. Age and Education

Twenty-five percent, or 288,271, military personnel are under age 21.¹⁴⁴ Forty-five percent, or 615,488, military personnel are age 24 or younger.¹⁴⁵ Considering all active duty enlisted military personnel, 95% are without a bachelor’s degree.¹⁴⁶ Seventy-one percent have a high school diploma or equivalent, and 24% have some college classes.¹⁴⁷ This is a somewhat startling statistic given the high profile educational benefits that have been made available in recent years. This is compared to 94% of officers who have a minimum of a bachelor’s degree.¹⁴⁸

3. Dependents

The old adage is that “if the [service name of choice] wanted you to have a wife, they would have issued you one.” The table below is a numerical summary of what servicemembers add to the DoD in terms of costs and benefits. It is significant to note that non-servicemembers comprise roughly the same amount of personnel that are in uniform. In other words, the amount of persons the DoD is accountable for roughly doubles as a result of marriage and children.¹⁴⁹

DOD Totals (includes Army, Navy, Marine Corps, Air Force)¹⁵⁰

Comp	Males	Females	Spouses	Other Dep.s	Children	Total
O’s	192,312	30,969	157,099	1,802	239,748	398,649
E’s	1,005,630	165,518	607,574	8,740	934,384	1,550,698
Total	1,197,942	196,487	764,673	10,542	1,174,132	1,949,347

Transportation Allowance Committee web page at <https://secureapp2.hqda.pentagon.mil/perdiem/bah.html> (Based on a pay grade of E-4 with 4-6 years of service and the zip code of 22134, Quantico, VA).

¹⁴³ Defense Almanac, available at <http://www.defenselink.mil/pubs/almanac>.

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ *Id.* (Note that a bachelor’s degree is a prerequisite for becoming a commissioned officer).

¹⁴⁹ In addition to the benefits that are provided to a servicemember, the DoD also provides medical, dental, and commissary privileges, travel on military aircraft, and moving expenses for dependents.

¹⁵⁰ Defense Almanac, available at <http://www.defenselink.mil/pubs/almanac> (These statistics are accurate as of Sept 30, 1998).

4. The Budget.

The total DoD budget for FY 2001 was \$292 billion.¹⁵¹ The budget allocated a little over \$92 billion for military personnel, housing, and facility maintenance and construction.¹⁵² This represented approximately 32% of DoD outlays. President Bush's administration has promised to continue to increase spending on military personnel in efforts led by former Joint Chief of Staff, General Colin Powell, Vice President Cheney, and Secretary of Defense Donald Rumsfeld.¹⁵³ Trends that will most likely continue are increases in pay and allowances, housing, health care, and quality of life initiatives.¹⁵⁴ Specifically with regard to housing, the goal was to eliminate out-of-pocket costs for off base housing by 2005. Unfortunately, this has not occurred. The amount of money required to accomplish this goal is in the neighborhood of an additional \$3 billion yearly increase to current spending levels.

F. So what does this all mean?

The typical first term servicemember is under twenty-one years old, earning at most \$483.98 a week, with little more than a high school diploma, typically away from home for the first time, who enters into a marital commitment with a young lady of equal stature, facing a chance of divorce 23 times greater than the civilian rate, before he finishes his term.¹⁵⁵

The DoD has committed, and will commit, billions of dollars to support these failing relationships. Curiously, the DoD is underinvested in the awareness of this "crisis" and the costs that this dilemma is invariably inflicting upon the armed services, both in terms of real fiscal pressures (e.g., housing, retirement benefits, health care, etc.) and servicemember morale.

One cost that has not been addressed is the emotional toll on the individual servicemember as this process occurs. While they are on deployment, their minds are wondering about the home front with little, if any, ability to communicate effectively or assist in resolving "emergency" matters regarding their family members. Often, young women become mothers, raise

¹⁵¹ Department of Defense Budget, available at http://www.dod.mil/comptroller/defbudget/fy2001/fy2001_greenbook.pdf.

¹⁵² *Id.*

¹⁵³ Rick Maze, *Lawmakers to Take Close Look at Military Issues*, MARINE CORPS TIMES, Jan 15, 2001, at A1.

¹⁵⁴ Department of Defense news release on DoD Budget for FY 2001, available at http://www.defenselink.mil/releases/2000/b02072000_bt045-00.html.

¹⁵⁵ *Supra* notes 131-33 and accompanying text (demonstrating that there are 99 divorces per 1000 airmen with 5-9 years of service, as opposed to the national average of 4.2/1000).

their children through the first six months of life, and their father has never seen his child in person. The frustration of a nineteen year old woman in a strange place, facing financial concerns, sick babies, homesickness, and loneliness make for high cost phone bills and a lot of tears. Remembering the definition of friction and its effects on a combat unit, consider what this scenario does in terms of benefit or burden related toward training and/or combat, should it arise. The indirect and direct costs of the dissolution of these relationships and parentless children are significant.

V. CONCLUSION

A. Is there a Solution?

The complications, or “frictions,” that derive from unsuccessful and unstable first term marriages are likely problems that pervade the military services. Considering the national security interests and vast amount of taxpayer dollars at stake, this is an issue that must be addressed.

The Supreme Court, in *Turner*, announced a rational relations test with regard to the right to marry. The Court has also, however, refused to uphold provisions which may be shown to be effectively a total bar to marriage (notwithstanding age, incest, homosexuality, etc.). On the other hand, a regulation by the DoD which would prevent enlistment of married persons would not be a complete bar to marriage, it would be a complete bar to married civilians joining the military. As seen in *West*, this question was resolved under a regulation very similar to that proffered by this comment. The military has successfully discriminated and denied service to obese people, short people, disabled people, old people, homosexuals, vision impaired, and those who have not graduated high school or received a GED equivalent, just to name a few.

B. Not a total prohibition

What is certain is that a total prohibition will most likely result in constitutional failure when scrutinized. Not only would a complete prohibition likely fail judicial scrutiny, but a total bar is likely not necessary to effectively address the potential DoD goals. Before enacting any regulation, however, the DoD must first define the goals that it would like to achieve. Among possible goals are: 1) minimizing the costs associated with dependants; 2) increasing the probability of success of marriages in the service; 3) increasing the morale of families in the service which in turn will increase servicemember morale; 4) recognizing and adopting fiscal policy which recognizes that dependants are a

part of the service structure and consequently gain control over spending in that area by limiting the potential population through proactive efforts; and 5) drafting a policy that will withstand constitutional as well as political scrutiny.

In crafting a policy, the DoD must ensure that any restriction is a temporary one. The Court has been unclear how long of a delay will pass constitutional muster, but it appears that a delay of a year will not offend constitutional sensibilities. The services could move toward an at-will system of employment and/or consider the first year of service an evaluation period without full benefits due to training. The second year of service would require a delay of marriage for one year in order to accommodate an acclimatization period for the servicemember and afford him/her the opportunity to participate in a program geared toward preparing the servicemember to assimilate a new spouse into the military culture. Waivers may be granted in situations where age, financial, and marital situation are such that the concerns of the policy intended to be addressed are not present. A program to acquaint the non-uniformed servicemember with the service prior to the commencement of training should be developed to educate the spouse as to the process and time commitment in order to mitigate misunderstandings and misinformation in the initial months of service.

A reconsideration of recruitment policies and the implementation of “realistic job interviews” would relieve the pressure on recruiters and instead of selling a one way ticket to boot camp, they could focus on a successful tour not ending in an adverse discharge because of a messy divorce, domestic violence, drugs, or adultery. To reinforce this effort, the services could revamp the incentive system in recruiting by rewarding recruiters’ bonuses for each recruit that successfully completes a full tour of duty with an honorable discharge or re-enlistment. The money for such a program could be recouped from the current losses incurred from failed tours and a reduction in the budget allocated for families which would no longer exist in the same quantity. In short, with a little more time, the chances of successful relationships would exponentially increase. This would mitigate the costs associated with divorce, illegitimate children, servicemember morale, and failed retention. A delay combined with due process protections (i.e. hearing and notice) would virtually ensure constitutional muster and achieve the goals set forth by the DoD. A total restriction unto itself would not survive political scrutiny and is an incomplete and ineffectual solution. The solution to this problem must be focused on all levels of the first term ascension. The money saved through minimizing the costs of unsuccessful marriages in the service would reduce the burden on the national budget and would allow for a quality investment in the people we have and not those we will lose as a result of this dilemma.

MILITARY JURISDICTION OVER CIVILIAN CONTRACTORS: A HISTORICAL OVERVIEW

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Over the past decade, the U.S. Government has employed an increasing number of civilian contractors to perform duties formerly performed by members of the armed services. These contractors form an integral component of the military, providing an unprecedented variety of essential services. The legal rights and responsibilities of contractors who accompany military forces overseas, however, are poorly defined.¹ What federal agency should prosecute contractors accused of wrongdoing and what body of law should govern such prosecutions remains unclear. The amenability of contractors to prosecution by the military justice system presents a particularly acute problem. Military authorities have the greatest interest in governing the actions of contractors accompanying military forces abroad. However, allowing military authorities to try U.S. civilians conflicts with the traditional jurisdictional separation of U.S. military and civilian authorities. Thus, civilian contractors exist in a jurisdictional “no-man’s land” between the military and civilian justice systems that has only recently been addressed by legislation.

Recent scholarship has advocated a range of solutions to contractors’ apparent status as military-civilian hybrids. Some have argued that the military justice system should have jurisdiction over contractors overseas and even within the continental United States.² Others have suggested that

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¹ The rights and liabilities of contractors working within the United States vary from those deployed with the armed forces. For the purposes of this paper “contractor” refers to contractors deployed with military forces abroad, unless otherwise noted.

² See Colonel Lawrence J. Schwartz, *The Case for Court-Martial Jurisdiction Over Civilians Under Article 2(a)(10) of the Uniform Code of Military Justice*, ARMY LAW., Oct./Nov. 2002, at 31, 31–32, 37 (advocating exclusive military jurisdiction over civilian contractors); see also Lieutenant Colonel Michael J. Davidson & Commander Robert E. Korroch, *Extending Military Jurisdiction to American Contractors Overseas*, 35 PROCUREMENT LAW. (Section of Public Contract Law, American Bar Association, Chicago, Ill.), Summer 2000, at 1 (arguing that the federal civilian justice system lacks adequate authority to try civilian contractors for crimes overseas).

contracts to “assimilate” contractors into the armed services while deployed provide an adequate solution.³ Finally, it has been argued that contractors present sufficiently serious legal problems that their use should be curtailed.⁴ Current economic and military trends, however, dictate an increasing use of civilian contractors aboard.⁵ The increased number of civilian contractors operating abroad corresponds to an increased danger that contractor misconduct will have a negative effect on military operations.⁶ Thus, it is necessary to create clear, legally sound policies to prosecute effectively civilian contractors who commit crimes overseas.

This paper attempts to outline the major historical developments of military jurisdiction over civilians and to rationalize that historical evolution with current debates over the legal status of civilian contractors. Five aspects of the development of military jurisdictions over civilians are considered: (1) the boundaries between civilian and military legal authorities established in the Civil War; (2) the expansion of the military justice system to discipline civilians accompanying military forces in World War II; (3) the incorporation of expanded military jurisdiction over civilians in the Uniform Code of Military Justice (UCMJ); (4) the Supreme Court’s post-World War II restrictions on military jurisdiction over civilians; and (5) the creation of the Military Extraterritorial Justice Act of 2000 (MEJA). Examining the development of these five aspects reveals that, except during World War II, American law has predicated military jurisdiction on the individual’s status as a member of the armed forces. Attempts to use the military justice system to try civilian contractors are incompatible with the tradition of status-based military jurisdiction as well as the current Supreme Court’s interpretation of the 6th Amendment. A legally sound approach to prosecuting contractors would adopt the expanded Federal criminal jurisdiction permitted by MEJA and invigorate it with a clear allocation of responsibilities between the Department of Justice and Department of Defense.

³ Major Brian H. Brady, *Notice Provisions for United States Citizen Contractor Employees Serving with the Armed Forces of the United States in the Field: Time to Reflect Their Assimilated Status in Government Contracts?*, 147 MIL. L. REV. 1, 58–66 (1995).

⁴ Major Rebecca Rafferty Vernon, *Battlefield Contractors: Facing the Tough Issues*, 33 PUB. CONT. L.J. 369, 420–21 (2004).

⁵ See, e.g., Deborah Avant, *Mercenaries*, FOREIGN POL’Y, July/Aug. 2004, at 20 (outlining social and economic conditions supporting the use of civilian contractors); see also Spencer E. Ante & Stan Crock, *The Other U.S. Military*, BUS. WK., May 31, 2004, at 76 (discussing business trends in private military contracting).

⁶ See, e.g., Mary Kissel, *Law Suit Claims Two Contractors Accused of Roles in Abu Ghraib Abuse*, WALL ST. J., June 10, 2004, at A3 (describing potential misconduct by civilian contractors in the Abu Ghraib prison); see also Avant, *supra* note 5, *passim* (noting criminal aspects of contractor misconduct in an international setting).

I. NATURE OF CIVILIAN CONTRACTORS ACCOMPANYING U.S. ARMED FORCES

Civilian contractors have provided services to U.S. Armed Forces throughout the nation's history.⁷ The current patterns of contractor use, however, evolved from the needs of the post-cold war military. The U.S. Army articulated its need for civilian contractors by noting:

Recent reductions in military structure, coupled with high mission requirements and the unlikely prospect of full mobilization, mean that to reach a minimum of required levels of support, deployed military forces will often have to be significantly augmented with contractor support. As these trends continue, the future battlefield will require ever increasing numbers of often critically important battlefield employees.⁸

The U.S. Army's policy statement reflected the consequences of 1990s Department of Defense policies designed to reduce the size of the military's support infrastructure without proportionally reducing the combat-oriented infrastructure.⁹ It also reflected fundamental decisions in military personnel policy made earlier after the end of the peacetime draft. The "Total Force" policy as adopted envisioned the use of civilian logistical infrastructures to provide a "surge capacity" to support military operations in response to a national emergency.¹⁰ Programs such as the Civil Reserve Air Fleet and Military Sealift chartering programs were developed to permit the military to take advantage of existing commercial transportation networks on short notice.¹¹

Contractor support is not limited to logistical support. The Department of Defense employs contractors as linguists, intelligence specialists, vehicle mechanics, security guards, and computer network

⁷ See, e.g., Vernon, *supra* note 4, at 373-74 (providing a brief history of the use of contractors on the battlefield).

⁸ U.S. DEP'T. OF ARMY, FIELD MANUAL 3-100.21, CONTRACTORS ON THE BATTLEFIELD Preface (3 Jan. 2003).

⁹ Vernon, *supra* note 4, at 371 & nn.2-3.

¹⁰ JOINT CHIEFS OF STAFF, JOINT PUB. 4-05, JOINT DOCTRINE FOR MOBILIZATION PLANNING (22 June 1995).

¹¹ *Id.*

administrators, among other tasks.¹² Contractors employed as linguists and security guards have received the most criticism.¹³ They interact with enemy combatants and often hostile noncombatants in stressful environments, increasing the possibility of serious misconduct. Moreover, security and linguist functions place civilian contractors in roles that require them to operate alongside uniformed members of the armed services, often under combat conditions.

While not as visible as contractors serving as security guards or linguists, civilian contractors maintain a large portion of the military's most sophisticated equipment. The Army National Guard relies exclusively on contractors to maintain its helicopter fleet.¹⁴ Even the active component of the U.S. Army relies on contractors to supplement its own maintenance crews.¹⁵ Likewise, the U.S. Air Force employs contractors to support the Predator surveillance drone because it has not trained sufficient military personnel to operate the drone.¹⁶

The increasing prevalence of military systems that require support from civilian contractors in order to operate effectively has given rise to the concept of "cradle to grave" contractors.¹⁷ Cradle-to-grave contractors maintain a given system throughout its use by the military. Use of the system and use of civilian contractors to maintain it, even when deployed in combat, are inseparable. Thus, the military has no alternative to the cradle-to-grave contractors' support services. The General Accounting Office (GAO) in 2003 found few adequate plans to replace contractor services in the event that the contractor could not or would not provide an essential service.¹⁸

Not only did the GAO find few plans to replace essential contractor services, it found that the armed services had provided little guidance on the nature of the relationship between contractors and military forces when abroad.¹⁹ Only the U.S. Army had published formal guidelines for military commanders on how to manage civilian contractors in the field.²⁰ How, and

¹² U.S. GEN. ACCOUNTING OFFICE, *MILITARY OPERATIONS: CONTRACTORS PROVIDE VITAL SERVICES TO DEPLOYED FORCES BUT ARE NOT ADEQUATELY ADDRESSED IN DOD PLANS 2, 6-9, 23-24* (2003) [hereinafter GAO].

¹³ Kissel, *supra* note 6.

¹⁴ See GAO, *supra* note 12, at 8.

¹⁵ *Id.*

¹⁶ *Id.* at 2, 8.

¹⁷ Vernon, *supra* note 4, at 377-79.

¹⁸ GAO, *supra* note 12, at 16.

¹⁹ *Id.* at 24.

²⁰ See *id.* at 23-24. While all five services employ civilian contractors and have general policies concerning the role of contractors, only the Army has issued guidelines for the employment of

under what circumstances, a military command could punish a civilian contractor for criminal behavior or behavior that jeopardized a military mission remained unclear.

II. SOURCES OF LAW GOVERNING CIVILIAN CONTRACTORS ABROAD

The laws governing civilian contractors serving alongside military units evolved haphazardly because no single body of law offered clear guidance. Military jurisdiction over civilians is an anomaly resulting from extraordinary circumstances. It arises at an intersection of military law, martial law, and the laws of civil liberties. The primary function of each body of law is unrelated to the relationship between the military and civilians serving along side it. Military law governs soldiers, sailors, airmen, and marines. It evolved from an idiosyncratic body of law based on military custom to a code of criminal justice focused on the unique needs of the military.²¹ Martial law is best described as the imposition of military order during times of crisis. Continental European legal traditions contain procedures regulating the scope of martial law and the circumstances necessitating it.²² The American legal tradition does not generally approve of it, but in times of crisis, martial law appears as a legal justification for various extraordinary measures.²³ Law related to civil liberties generally concerns the freedoms and rights enjoyed by citizens in time of peace and war. The subjects covered by civil liberties law vary as legal doctrines evolve, but the focus is on the citizen's rights in his or her daily life. The legal doctrines related to civilians serving with the military develop from the fringes of these three bodies of law. Compounding these issues, courts tend to confront questions concerning civilians serving with military forces during times of crisis, usually wartime. Thus, the body of law that concerns the military's ability to try civilians is shaped by the peculiar historical circumstances of each case and the need to rely on bodies of law that usually concern the relationships between civilians and the military in a tangential sense.

contractors alongside deployed units. The Air Force issued a memorandum concerning deployed contractors overseas in 2001. The Navy and Marine Corps expressed limited interest in the issue. The Navy contended that most of its deployed contractors remained aboard ships and the Marine Corps' official position is that contractors do not accompany forces beyond the port of embarkation. *See id.* at 20–25.

²¹ *See* Sam Nunn, *Fundamental Principles of the Supreme Court's Jurisprudence in Military Cases*, 29 WAKE FOREST L. REV. 557 (1994).

²² *See, e.g.*, 1 HENRY WAGER HALLECK, INTERNATIONAL LAW 602–03 (G. Sherston Baker & Maurice N. Drucquer eds., 4th ed. rev., Kegan Paul, Trench, Trubner & Co., Ltd. 1908) (describing the French experience with martial law).

²³ *Id.* at 603–04.

Currently, when civilian contractors serve alongside service members, different legal regimes govern their rights and responsibilities. The Uniform Code of Military Justice (UCMJ) governs servicemembers.²⁴ Civilians accompanying the armed forces can fall under the jurisdiction of state or federal governments while within the United States or under federal or foreign law while abroad. The different regimes that govern civilians and military personnel operating in the same area are the result of constitutional compromises between the rights of American citizens abroad and the military's need to prosecute successfully its military goals, that is, "military necessity." Consequently, the set of laws governing civilians accompanying military forces is shaped by evolving concepts of constitutional rights, foreign policy concerns, and the military's interest in maintaining order.

The U.S. Constitution, the ultimate legal authority in America, restricts military authority to certain narrow spheres of activity. The Constitution protects civilian authority over the military by placing a civilian executive in the position of commander-in-chief, by constraining appropriations, and by placing the ability to declare war in the hands of the legislature.²⁵ John Adams, when tasked with drafting rules for the government of the Continental Army, copied the Articles of War governing the British Army.²⁶ He did so without debate or protest from other framers. Adams's use of the British Articles of War contrasted with the Framers' strident objections to the use of British military government and profound distrust of standing armies.

The drafting and adoption of the Constitution, with its restrictions on military authority, did not substantially alter the Articles of War. The Constitution submitted to the former colonies contained restrictions of Congress's ability to appropriate funds for a standing army.²⁷ It placed the army of the United States under civilian control and entrusted the states' part-time militias with defending the nation.²⁸ The theme of civilian control extended to the government of the armed forces. Congress had the power to issue rules governing the "land and naval forces."²⁹ The small number of Americans serving in the Armed Forces of the early republic rendered military

²⁴ 10 U.S.C. § 802 (2000).

²⁵ U.S. CONST. arts I & II; see Richard Kohn, *The Constitution and National Security: The Intent of the Framers*, in *THE UNITED STATES MILITARY UNDER THE CONSTITUTION OF THE UNITED STATES, 1789-1989*, at 61, 71-75 (Richard Kohn ed., 1991).

²⁶ JOHN ADAMS, 3 *DIARY AND AUTOBIOGRAPHY OF JOHN ADAMS* 409-10 (L.H. Butterfield ed., 1961).

²⁷ Kohn, *supra* note 25, at 77.

²⁸ *Id.* at 77.

²⁹ U.S. CONST. art. I, § 8.

law a minor concern of most Americans.³⁰ Few Americans appeared to have been concerned with whether or not a civilian might fall under military jurisdiction.

III. *LUTHER V. BORDEN*:³¹ THE QUESTION OF MILITARY AUTHORITY IN A REPUBLIC

The first attempt to address the relationship between military and civilian jurisdiction occurred in the aftermath of the Dorr Rebellion. Following challenges to Rhode Island's archaic legislature, the governor of Rhode Island declared martial law and called forth the state's militia.³² Suits for property damage followed, one of which the U.S. Supreme Court heard in *Luther v. Borden*.³³ The majority decision held that the Supreme Court could not review the propriety of declaring martial law, a decision entirely within the powers of a state's executive.³⁴

Justice Levi Woodbury, however, wrote a dissent arguing that, while the Supreme Court had reached the correct result, it should take a position on whether martial law had a legitimate purpose in a republican government.³⁵ Woodbury maintained that martial law, which derived its authority from military fiat, had no place in a republican government even during a crisis.³⁶ He condemned the use of martial law in Rhode Island by noting:

[Martial law] exposed the whole population, not only to be seized without warrant or oath, and their houses to be broken open and rifled, and this where the municipal law and its officers and courts remained undisturbed and able to punish all offenses, but to send prisoners, thus summarily arrested in a civil strife, to all the harsh pains and penalties of courts-martial or extraordinary commissions, and for all kinds of supposed offences. By it, every citizen, instead of reposing under the shield of known and fixed laws as to his liberty, property, and life, exists with a rope round his neck, subject

³⁰ See Frederick Bernays Wiener, *Courts-Martial and the Bill of Rights: The Original Practice* (pt. 1), 72 Harv. L. Rev. 1, 8-10 (1958).

³¹ *Luther v. Borden*, 48 U.S. (7 How.) 1 (1849).

³² *Id.* at 34.

³³ *Id.*

³⁴ *Id.* at 46-47.

³⁵ *Id.* at 51 (Woodbury, J., dissenting).

³⁶ *Id.* at 62.

to be hung up by a military despot at the next lamp-post, under the sentence of some drum-head court-martial.³⁷

Woodbury's grim conclusions echoed the abuses of the British Colonial Government that urged the creation of the Fourth and Fifth amendments.³⁸ Likewise, he suggested that only civilian tribunals had the authority to impose judgments on U.S. citizens.³⁹

Woodbury did not limit his conclusions to scenarios like the Dorr Rebellion where little actual violence took place. Instead, Woodbury argued that martial law had no place in the American republic even during time of crisis. He urged:

It looks . . . like pretty bold doctrine in a constitutional government, that, even in time of legitimate war, the legislature can properly suspend or abolish all constitutional restrictions, as martial law does, and lay all the personal and political rights of the people at their feet.⁴⁰

Woodbury's conclusion placed martial law on the same level as trial by ordeal—an unjust, obsolete relic of the past. He further connected courts-martial and military commissions with the deprivation of civil liberties associated with martial law.⁴¹

While Justice Woodbury directly addressed the dangers of martial law in a constitutional government, his words vividly capture the conflict between evolving notions of civil rights and the use of military courts. Woodbury's disdain of military courts reflects the draconian practices of 19th century military law, practices that the Bill of Rights denied the Federal Government.⁴² Permitting military courts, controlled by officers of the Federal Government, to try civilians under any circumstances, negated the protections of the Bill of Rights.

³⁷ *Id.* at 62.

³⁸ *See id.* at 63–67.

³⁹ *See id.* at 69.

⁴⁰ *Id.* at 70.

⁴¹ *Id.* at 86.

⁴² For example, although the Eighth Amendment forbade cruel and unusual punishments, the Articles of War authorized flogging until after 1812. It reappeared as punishment for desertion in 1833 until Congress finally abolished it in 1861. Branding remained a legal, if rare, punishment until 1872. Frederick Bernays Wiener, *Courts-Martial and the Bill of Rights: The Original Practice* (pt. 2), 72 Harv. L. Rev. 266, 290 (1958); *see also* BUCKNER F. MELTON, JR., A HANGING OFFENSE 69–71 (2003) (describing the use of flogging in the U.S. Navy until the 1850s).

IV. CIVIL WAR AND RESTRICTIONS ON MILITARY JURISDICTION OVER CIVILIANS

Justice Woodbury's lengthy opinion about the military's role in maintaining domestic order remained a theoretical discussion until the outbreak of the Civil War in 1861. The Civil War tested the boundaries of the military's ability to try civilians during a widespread insurrection. The U.S. Army employed martial law of the sort condemned by Justice Woodbury to control a large portion of the region formed by the Kansas-Missouri border.⁴³ President Lincoln suspended the writ of habeas corpus and used military authorities to imprison persons considered disloyal to the union.⁴⁴

Legal objections to the use of military authority to control civilian dissent appeared shortly after the outbreak of hostilities.⁴⁵ The Supreme Court's opinions on the matter appeared, however, relatively late. The court took up the question of the military's ability to try civilians in *Ex parte Vallandigham*⁴⁶ and *Ex parte Milligan*,⁴⁷ decided in 1864 and 1866, respectively. Both cases concerned civilians imprisoned for expressing sympathy with the Confederate States and condemning the Civil War.⁴⁸ Later legal scholars would consider their actions to qualify as "core" political speech protected by the First Amendment.⁴⁹ The context of the Civil War, in contrast, transformed political speech into a perceived threat.⁵⁰

Vallandigham, decided while hostilities continued, stood for the principal that the Supreme Court should refrain from hearing habeas corpus petitions from prisoners convicted by military tribunals.⁵¹ The Department of the Ohio, where Vallandigham lived, set up military commissions to try persons suspected of espionage or disloyal behavior.⁵² A military commission, rather than a court-martial, convicted Vallandigham.⁵³ Vallandigham was tried

⁴³ See ANDREW BIRTLE, U.S. ARMY COUNTERINSURGENCY AND CONTINGENCY OPERATIONS DOCTRINE, 1860-1941, at 30-36 (1998).

⁴⁴ See WILLIAM H. REHNQUIST, ALL THE LAWS BUT ONE 22-25 (1998).

⁴⁵ See, e.g., *Ex parte Merryman*, 17 F. Cas. 144 (C.C.D. Md. 1861) (No. 9,487) (declaring that President Lincoln had no authority to suspend the writ of habeas corpus).

⁴⁶ *Ex parte Vallandigham*, 68 U.S. 243 (1864).

⁴⁷ *Ex parte Milligan*, 71 U.S. 2 (1866).

⁴⁸ See THE MILLIGAN CASE 32-35 (photo. reprint 1997) (Samuel Klaus ed., 1929) (detailing Vallandigham's and Milligan's leadership roles in political parties with pro-Confederate agendas).

⁴⁹ See, e.g., *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

⁵⁰ THE MILLIGAN CASE, *supra* note 48, at 25.

⁵¹ *Vallandigham*, 68 U.S. at 254; *cf. Dynes v. Hoover*, 61 U.S. 65 (1858) (concluding that the federal court system has less power to review military cases than civilian criminal cases).

⁵² *Vallandigham*, 68 U.S. at 244.

⁵³ *Id.*

by such a commission in accord with the rules approved by the Department of the Army.⁵⁴

Vallandigham appealed his conviction on the grounds that the commission had no legal jurisdiction over him.⁵⁵ He argued that his arrest occurred without a legitimate warrant issued by a magistrate of competent jurisdiction.⁵⁶ He further urged that his trial began without a proper indictment, and continued before a body of military officers instead of the jury of his peers guaranteed by the Constitution.⁵⁷ Thus, Vallandigham's trial lacked nearly every one of the procedural guarantees listed in the Fourth, Fifth, and Sixth Amendments.

Despite the numerous constitutional violations Vallandigham alleged, the Supreme Court concluded that it had no jurisdiction over appeals from military commissions. Justice Wayne argued that military jurisdiction encompassed two sorts of cases: offenses under the Articles of War and offences against "the common law of war," otherwise known as the law of war.⁵⁸ Vallandigham's conviction arose under the law of war, which properly applied due to the state of rebellion.

Justice Wayne ultimately concluded that the Supreme Court had limited jurisdiction to hear appeals from military tribunals or courts-martial.⁵⁹ Absent an explicit grant to hear a class of cases, the Supreme Court had no jurisdiction. Wayne questioned whether military commissions properly qualified as federal judicial bodies, whose decisions the Supreme Court could review.⁶⁰ He concluded that the commission that convicted Vallandigham did not qualify as a judicial body but as an exercise of executive authority.⁶¹ The military commission acted to carry out orders on behalf of the executive. The Supreme Court could not review executive action, nor could it review the actions of those acting on behalf of the executive.⁶² Thus, the court dismissed Vallandigham's case without hearing the merits.⁶³

⁵⁴ *Id.* at 245.

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.* at 249.

⁵⁹ *Id.* at 251.

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.* at 252.

⁶³ *Id.* at 254.

While *Vallandigham* tacitly approved of the use of military commissions to try dissident civilians, the Supreme Court foreclosed future jurisdiction over civilians in similar circumstances in *Ex parte Milligan*. The Supreme Court held in *Milligan* that where civilian courts remain open and functioning, a military court cannot try a civilian.⁶⁴ Milligan concerned facts essentially identical to those in *Vallandigham*. Milligan lived in Indiana, a state that remained loyal to the Union and under Union control throughout the Civil War.⁶⁵ He belonged to a society that promoted the Confederate cause, a fact that motivated Union authorities to arrest him without a warrant and place him in a military jail.⁶⁶ A military commission then tried and convicted Milligan.⁶⁷

Milligan filed a writ of habeas corpus to secure his release.⁶⁸ The Government argued that, like *Vallandigham*, Milligan's imprisonment did not derive from a judicial proceeding amenable to Supreme Court review.⁶⁹ The Supreme Court disagreed. Justice Davis observed that the suspension of habeas corpus authorized by Congress directed the Federal Government to institute civilian criminal proceedings against prisoners held on suspicion of disloyalty to the Union.⁷⁰ If twenty days elapsed after the time of arrest and the termination of the session of the grand jury for the jurisdiction, the Government had to release the prisoner.⁷¹ The judge of the jurisdiction where the prisoner resided had the duty of releasing any prisoners not indicted by the grand jury.⁷² Milligan, however, remained imprisoned despite the grand jury's failure to indict him.⁷³

The Indiana court failed to follow procedures enacted by Congress; thus, the Supreme Court could hear Milligan's case as it concerned the supervision of lower federal courts.⁷⁴ Milligan's lawyers used the Indiana district court's error as a means of addressing the fundamental question behind Milligan's imprisonment, namely, the validity of his conviction. They argued that, while the Constitution provided for the suspension of the writ of habeas corpus in times of national emergency, it did not provide for the suspension of

⁶⁴ *Ex parte Milligan*, 71 U.S. 2, 121–25 (1866).

⁶⁵ *Id.* at 107, 121.

⁶⁶ REHNQUIST, *supra* note 44, at 83, 90.

⁶⁷ *Milligan*, 71 U.S. at 2.

⁶⁸ *Id.* at 135.

⁶⁹ *Id.* at 15.

⁷⁰ *Id.* at 115–16.

⁷¹ *Id.*

⁷² *Id.*

⁷³ *See id.* at 116–17.

⁷⁴ *Id.*

the right to trial by jury.⁷⁵ Through a colorful and impassioned argument, Milligan's lawyers characterized the military tribunal that convicted Milligan as a sort of extraordinary court beyond the provisions of the Constitution.⁷⁶ They noted that the English, following the English revolution, eliminated the king's ability to create extraordinary courts.⁷⁷ Likewise, they noted that the Code Napoleon forbade similar courts in France.⁷⁸ The Sixth Amendment's guarantee of a jury trial in criminal cases and the Fifth Amendment's grand jury requirements effected similar restrictions on extraordinary courts within the United States.⁷⁹

The Supreme Court ultimately sided with Milligan. It concluded that the military had no jurisdiction over Milligan.⁸⁰ Where civilian courts remained open and functioning, they alone could try U.S. citizens for crimes.⁸¹ Only in cases where the courts did not function, or lay in territory administered by the U.S. Army as an occupier, could military necessity justify the use of military tribunals.⁸² The Fifth and Sixth Amendments applied during times of national emergency as well as during peacetime; therefore, they applied to Milligan. The Supreme Court emphasized that the Constitution did not permit the sweeping emergency powers possible under European governments.⁸³ Military necessity, therefore, could not justify extraordinary courts or any other measure that forced civilians to submit to military jurisdiction.

The holding in *Milligan* conflicted with the Supreme Court's deference to military authorities in *Vallandigham*. The Supreme Court decided *Vallandigham* while portions of the United States remained war zones. *Milligan*, in contrast, was decided after open hostilities ended. The deferential attitude in *Vallandigham* reflected a cautious, uncertain attitude, while *Milligan* reflected the more permissive attitude of a government seeking to mitigate excesses carried out during wartime.⁸⁴ *Milligan* would stand as a limitation on the Federal Government's power to justify extraordinary legal measures at the behest of military necessity. It, however, did not eliminate the possibility that

⁷⁵ *Id.* at 60–61.

⁷⁶ *Id.* 63–64.

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.* at 122.

⁸¹ *Id.* at 122.

⁸² *Id.* at 127–28.

⁸³ *See id.* at 124–26.

⁸⁴ THE MILLIGAN CASE, *supra* note 48, at 56–57.

the Government might respond to grave national threats with extraordinary legal measures.⁸⁵

V. WORLD WAR II AND THE EXPANSION OF MILITARY JURISDICTION OVER CIVILIANS

The dichotomy between the military needs of the nation and the fundamental civil rights of American citizens evolved once again during World War II. Notably, military jurisdiction over civilians reached an unprecedented and expansive limit. The global scope of the war and the perceived gravity of the threat of totalitarian governments compelled large numbers of civilians to work alongside the U.S. Military overseas.

A series of lower federal courts clearly upheld the right of the military to try civilians accompanying the armed forces by courts-martial. This line of cases concerning the subjection of civilians to military jurisdiction during World War II did not attract the interest of the Supreme Court.⁸⁶ It consisted primarily of district court hearings of habeas corpus petitions and, to a lesser extent, circuit court review of those petitions.

Early in 1942, the U.S. Government contracted with the Douglas Aircraft Company (Douglas) to establish a repair depot in the former Italian colony of Eritrea.⁸⁷ Under the contract, Douglas would provide mechanics and other personnel to repair aircraft for both American and British forces.⁸⁸ The U.S. Army would control the operations of the depot and supervise both Army and Douglas personnel.⁸⁹

Anthony diBartolo, one of the Douglas mechanics, stole a diamond ring during August of 1942.⁹⁰ A U.S. Army court-martial tried and convicted diBartolo, basing jurisdiction on Article of War 2(d).⁹¹ He filed for a writ of

⁸⁵ See *id.* at 60 (noting that the Supreme Court left the law of martial law as “unsettled”).

⁸⁶ The Supreme Court did uphold the subjection of thousands of Japanese-American citizens to military orders restricting their liberty. Considered an emergency measure founded on the Executive’s ability to respond to wartime emergencies, the cases concerning the internment of Japanese-Americans revisited arguments supposedly settled by *Milligan* and proved dubious precedent. See JOSEPH W. BISHOP, JR., JUSTICE UNDER FIRE 196–202 (1974) (noting the Court’s reluctance to criticize the Executive branch during wartime); see also Eugene V. Rostow, *The Japanese American Cases—A Disaster*, 54 YALE L.J. 489 (1945) (arguing that the Supreme Court approved of a relationship between civil and military power forbidden by *Milligan*).

⁸⁷ *In re diBartolo*, 50 F. Supp. 929, 930 (S.D.N.Y. 1943).

⁸⁸ *Id.*

⁸⁹ *Id.* at 931.

⁹⁰ *Id.* at 930.

⁹¹ *Id.*

habeas corpus, alleging that the court-martial had no jurisdiction over him.⁹² He had suffered a minor injury that prevented him from working at the time he stole the ring.⁹³ Douglas permitted him to remain in Eritrea and paid his salary while he recuperated.⁹⁴ DiBartolo argued that he no longer actively provided services to the Army and could not therefore be subject to military jurisdiction.⁹⁵ Although the court rejected diBartolo's arguments entirely, it noted that military jurisdiction over a civilian "cannot be claimed merely on the basis of convenience, necessity, or the non-availability of civil courts"⁹⁶ and a civilian court could not turn a civilian defendant over to a military tribunal absent a specific order from Congress.

Congress enacted Article of War 2(d) (Article 2(d)) in 1916, permitting the military to try "persons accompanying or serving with" the U.S. Army outside of the continental United States.⁹⁷ Article 2(d), as understood by the court, embodied Congress's intent to allow the U.S. Army to try civilians accompanying military forces, even if a private company employed the civilians in question.⁹⁸ DiBartolo fell squarely within the category of civilians described by Article 2(d). He lived and worked on a base administered by the U.S Army in a foreign country.

The relationship between the United States and the Eritrean Government further supported permitting the military to try civilians. Eritrea had been governed as an Italian colony until British military forces arrived.⁹⁹ A British military government thereafter administered Eritrea. Local courts administered by Eritrean authorities existed but they heard only cases concerning Eritrean nationals. The military government could approve,

⁹² *Id.*

⁹³ *Id.* at 931.

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ Article of War 2(d) provides for military jurisdiction over:

All retainers to the camp and all persons accompanying or serving with the Armies of the United States without the territorial jurisdiction of the United States, and in time of war all such retainers and persons accompanying or serving with the Armies of the United States in the Field, both within and without the territorial jurisdiction of the United States, though not otherwise subject to these articles.

In re diBartolo, 50 F. Supp. at 932.

⁹⁸ *In re diBartolo*, 50 F. Supp. at 933.

⁹⁹ *Id.*

revise, or reject those decisions without contest.¹⁰⁰ The Eritrean courts did not qualify as functioning civil courts in any generally understood sense.

Thus, the Southern District of New York's decision rested on the undeveloped character of the Eritrean legal system in addition to diBartolo's presence at an overseas military base. The court understood the traditional restrictions placed on military jurisdiction. Those restrictions did not apply to diBartolo because of Congress's explicit grant of jurisdiction over persons in diBartolo's jurisdiction. The court did not suggest that diBartolo's civil rights might have been adversely affected by subjecting him to military jurisdiction. The facts surrounding his employment placed diBartolo outside the sphere of normal Constitutional criminal procedure.

The Third Circuit approved of the logic behind *diBartolo* when confronted with similar facts in *Perlstein v. United States*.¹⁰¹ It concerned a petition for a writ of habeas corpus filed by another contractor working in Eritrea.¹⁰² The Third Circuit concluded that accompanying an armed force under "stark war conditions" justified trial by court-martial for a criminal offense.¹⁰³ Termination of the defendant's employment contract did not terminate the Army's power to try him for criminal offenses.¹⁰⁴ So long as the defendant remained with an Army garrison overseas, he remained subject to military law.

Merchant seamen occupied a close relationship with the armed forces during World War II. Traditional naval law did not include an analogue to Article 2(d), although Congress passed a law granting the U.S. Navy similar jurisdiction in 1943.¹⁰⁵ Merchant seamen were integrated into military operations to a greater degree than Army contractors were. While participating in convoys, merchant ships took orders from naval officers, carried U.S. Navy gun crews, and faced attack by aircraft and submarines.¹⁰⁶

¹⁰⁰ *Id.* at 931.

¹⁰¹ *Perlstein v. United States*, 151 F.2d 167, 170 (3d. Cir. 1945).

¹⁰² *Id.* at 167.

¹⁰³ *Id.* at 170.

¹⁰⁴ *Id.*

¹⁰⁵ *McCune v. Kilpatrick*, 53 F. Supp. 80, 88 (E.D. Va. 1943) (discussing 34 U.S.C. § 1201 (Supp. 1943)).

¹⁰⁶ These facts would later allow members of the U.S. Merchant Marine to collect veterans' benefits. *See Schumacher v. Aldridge*, 665 F. Supp. 41, 46 (D.D.C. 1987).

Service in the merchant marine, one official noted, was tantamount to service in the military.¹⁰⁷

Military control over the civilian merchant seamen resulted in over 100 courts-martial of seamen in 1943 alone.¹⁰⁸ Merchant seamen convicted by courts-martial, like the similarly situated Army contractors, filed for writs of habeas corpus with varying degrees of success. The Western District of Washington granted a writ to a seaman convicted of striking a civilian engineer on a merchant ship.¹⁰⁹ The assault took place on an oiler carrying fuel under contract for the U.S. Navy.¹¹⁰ The ship had docked at Noumea, New Caledonia, and the ship's engineer ordered the defendant, Hammond, to remain on the ship.¹¹¹ Instead, he struck the engineer.¹¹² A U.S. Navy court-martial, held onboard a warship, convicted Hammond of "striking his superior officer, while in the execution of the duties of his office."¹¹³ Notably, the event took place before Congress extended naval courts-martial jurisdiction to civilians accompanying naval forces.¹¹⁴

The Western District of Washington held that the court-martial had no jurisdiction over Hammond.¹¹⁵ It reasoned that, despite Hammond's presence in a war zone on a ship carrying military cargo, the Navy had no compelling interest to prosecute him for an essentially military offense. The Navy argued that Hammond's behavior impeded military operations. The court rejected this argument after observing that Hammond had not actually impaired the readiness of the oiler.¹¹⁶ Moreover, the Navy charged Hammond as if he and the engineer were members of the military.¹¹⁷ Hence, Hammond's status as a civilian defeated the Navy's jurisdiction.

The Eastern District of Virginia reached a different conclusion when faced with a seaman who violated military orders.¹¹⁸ An Army court-martial convicted McCune of desertion after he jumped off a transport ship carrying

¹⁰⁷ *Id.* at 47–48 (quoting the comments of Gen. Lewis Hershey, then-director of the Selective Service Board).

¹⁰⁸ *Id.* at 47.

¹⁰⁹ *Hammond v. Squire*, 51 F. Supp. 227, 232 (D.D.C. 1943).

¹¹⁰ *Id.* at 228–30.

¹¹¹ *Id.* at 231–32.

¹¹² *Id.* at 230.

¹¹³ *Id.* at 228.

¹¹⁴ *Id.* at 231.

¹¹⁵ *Id.* at 232.

¹¹⁶ *Id.* at 230.

¹¹⁷ *Id.* at 229–30.

¹¹⁸ *McCune v. Kilpatrick*, 53 F. Supp. 80 (E.D. Va. 1943).

soldiers.¹¹⁹ McCune jumped overboard into the port of Hampton Roads after a verbal altercation with an Army officer.¹²⁰ He justified his action by arguing that he had signed articles to serve as a cook for the vessel's crew, not several hundred troops.¹²¹ Furthermore, McCune signed articles as a merchant seaman, binding him to obey the master of the vessel and not Army officers.¹²² The contract between the vessel operator and the U.S. Government had stated that the crew was subject only to the master's orders, although he would act as an agent for the United States.¹²³

The court rejected McCune's arguments on the ground that he qualified as a person serving in the field with an Army unit and was subject to Article 2(d).¹²⁴ The Army's decision to charge him with desertion did not defeat jurisdiction either. Nothing in Article 2(d) prevented the Army from charging civilians under that article with military offenses.

Cases like McCune and diBartolo suggested that military jurisdiction could be founded on the factual circumstances of the defendant's employment. Although other cases like Hammond reiterated a status-based test for military jurisdiction, the factual circumstance test received no significant criticism during World War II. It would provide the model for the tests incorporated into what, after World War II, became the Uniform Code of Military Justice (UCMJ).

VI. CREATION OF THE UNIFORM CODE OF MILITARY JUSTICE AND MILITARY JURISDICTION OVER CIVILIANS

During World War II, over 12 million Americans were inducted into the armed services and placed under military jurisdiction. The Articles of War governing these 12 million servicemembers remained unchanged in substance from the Articles of War adopted in 1775.¹²⁵ Many Americans, previously ignorant of military law, criticized the Articles based on their wartime experiences.¹²⁶ Members of the legal profession inducted into the Armed Forces served in a variety of capacities, enabling them to observe the

¹¹⁹ *Id.* at 82.

¹²⁰ *Id.*

¹²¹ *Id.* at 83.

¹²² *Id.* at 84.

¹²³ *Id.* at 83.

¹²⁴ *Id.* at 86.

¹²⁵ Colonel William R. Hagan, *Introduction to COLONEL WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS* (W.S. Hein & Co., Inc. 2000) (2nd ed. rev. & enlarged 1920).

¹²⁶ WILLIAM GENEROUS, JR., *SWORDS AND SCALES: THE DEVELOPMENT OF THE UNIFORM CODE OF MILITARY JUSTICE 14-16* (1973).

administration of justice from the perspective of officers and enlisted members.¹²⁷ Once active hostilities concluded, Congress heard proposals for a reformed military justice code, starting with the Elison Act and ending with what would become the UCMJ.¹²⁸

The congressional hearings on what would eventually become the UCMJ addressed numerous issues related to the administration of military justice. Servicemembers' right to counsel, the problem of command influence, and potential for an independent judge advocate general's corps received extensive scrutiny.¹²⁹ Military jurisdiction over civilians, in contrast, received comparatively little attention. While the proposed UCMJ incorporated the Articles' jurisdiction over civilians accompanying military forces, neither Congress nor those called to testify expressed significant concern.

The proposed code contained three articles conferring military jurisdiction over civilians. Article 2(10) adopted the language of Article of War 2(d) without meaningful change.¹³⁰ Article 2(10) provided that "all persons serving with or accompanying an armed force in the field," shall be subject to military jurisdiction.¹³¹ Article 2(11), also derived from Article

¹²⁷ *Id.*

¹²⁸ See, e.g., H.F. "Sparky" Gierke, *Message from the Mall*, FED. LAW., Oct. 2004, at 30. (current chief judge of the Court of Appeals for the Armed Forces commenting on the origin of the UCMJ).

¹²⁹ See, e.g., *A Bill to Unify, Consolidate, Revise, and Codify the Articles of War, the Articles for the Government of the Navy, and Disciplinary Laws of the Coast Guard, and to Enact and Establish a Uniform Code of Military Justice: Hearings on H.R. 2498 Before a Subcomm. of the H. Comm. on Armed Services*, 81st Cong. 565, 622-23 (1949) [hereinafter *House UCMJ Hearing*] (statement of Frederick P. Bryan, Chairman, Special Committee on Military Justice of the Bar Association).

¹³⁰ No analogous provision existed in the Articles for Government of the Navy. However, 34 U.S.C. § 1201, passed in March 1943, subjected the following to naval court-martial jurisdiction:

All persons . . . 1. Outside the continental limits of the United States in time of war or national emergency accompanying or serving with the United States Navy, the Marine Corps, or the Coast Guard when serving as part of the Navy, including officers, members of crews, and passengers onboard merchant ships of the United States, and including those employed by the government, or by contractors and subcontractors engaged on naval projects;
2. Within an area leased to the United States which is without the territorial jurisdiction thereof and is under the control of the Secretary of the Navy, in time of war or national emergency.

See COMM. ON THE UNIF. CODE OF MILITARY JUSTICE, U.S. DEP'T OF DEF., COMPARATIVE STUDIES NOTEBOOK pt. 1 (Jan. 6, 1949).

¹³¹ *House UCMJ Hearing*, *supra* note 129, at 567.

2(d), provided for expansive peacetime military jurisdiction over civilians in outlying territories. It subjected to military jurisdiction:

All persons serving with, employed by, accompanying, or under the supervision of the armed forces without the continental limits of the United States and the following territories: That part of Alaska east longitude one hundred and seventy-two degrees west, the Canal Zone, the main group of the Hawaiian Islands, Puerto Rico, and the Virgin Islands.¹³²

Article 2(12) paralleled Article 2(11) in providing expansive military jurisdiction over residents of outlying territories. It subjected to military jurisdiction:

All persons within an area leased by the United States which is under the control of the Secretary of a Department and which is without the continental limits of the United States and the following territories: That part of Alaska east longitude one hundred and seventy-two degrees west, the Canal Zone, the main group of the Hawaiian Islands, Puerto Rico, and the Virgin Islands.¹³³

The three articles retained the substance of Article 2(d) that had existed since the 1775 Articles of War. It made “suttlers and retailers to a camp” and “all persons whatsoever, serving with the continental army in the field” amenable to court-martial.¹³⁴ Article 2(10) followed the older article’s language closely and, in general, served the same purpose of enabling military commanders to discipline civilians accompanying an armed force.

Articles 2(11) and 2(12) of the proposed UCMJ extended the scope of court-martial jurisdiction to a degree not found in the old Articles of War. The new articles created a sort of “colonial” jurisdiction over outlying territories and dependencies. The language of Article 2(11) did not explain what “under the supervision of the armed forces” meant. It appeared to

¹³² *Id.*

¹³³ *Id.*

¹³⁴ Rules and Regulations (June 30, 1775), 2 Journals of the Continental Congress, 1774–1789, at 111, art. XXXII, at 116–17 (Gov’t Printing Office 1905).

subject a variety of civilians with minimal connections to the military to court-martial jurisdiction.¹³⁵

Article 2(12) provided for more expansive jurisdiction than the proposed Article 2(11). While Article 2(11) retained a requirement of some limited connection to the military, Article 2(12) conferred jurisdiction based solely on the status of the territory. Anyone found on a base leased by the United States could face court-martial jurisdiction regardless of his or her status or if a state of peace existed.

The expansive peacetime jurisdiction conferred by Articles 2(11) and 2(12) proposed to expand military jurisdiction beyond the limits established in the old Articles of War. Article 2(10) could be justified on the grounds that it conferred jurisdiction over civilians accompanying the armed forces in order to maintain discipline within military formations. Articles 2(11) and (12), in contrast, appeared to authorize military rule in less-developed territories and dependencies.

Reaction during the congressional hearings evaluating proposed Articles (10), (11), and (12) varied, although they were comparatively uncontroversial articles. Article 2(10) received negligible attention. When Felix Larkin, the Assistant General Counsel to the Secretary of Defense, testified before Congress, he was questioned about the scope of Article 2(10). Representative Edward deGraffenreid of Alabama asked if it would cover “the Red Cross, the Salvation Army, or the church organizations that very often accompany and serve with the armed forces.”¹³⁶ Larkin replied affirmatively and added that it would also cover civilian employees and newspaper correspondents if they “accompanied the armed forces in the field.”¹³⁷ Congress raised no further objections to Article 2(10).

Article 2(11) and (12) received more critical scrutiny. Representatives of the American Legion, who generally supported the proposed UCMJ, did not favor Articles 2(11) and (12). They argued that any attempt to extend military jurisdiction to civilians should be “closely restricted and circumspectly granted.”¹³⁸ Article 2(11), as explained to the Committee, provided jurisdiction over civilians accompanying the armed forces in peacetime. It essentially expanded Article 2(10) to cover civilians living

¹³⁵ See *id.* at 748–49 (statement of Col. John P. Oliver, JAG, Reserve, Legislative Counsel of the Reserve Officers Association of the United States).

¹³⁶ *Id.* at 872.

¹³⁷ *Id.*

¹³⁸ *Id.* at 683 (statement of John Finn, Counsel, American Legion).

outside the contiguous United States or its major dependencies during peacetime.

The committee understood that Article 2(11) was limited by the construction of “accompanying the armed forces” put forth by federal district courts during World War II. Felix Larkin offered an analysis of the district courts’ decisions:

One may be considered to be accompanying the Army of the United States, although he is not directly employed by the Army or the Government but works for a contractor engaged on a military project or serving on a merchant ship carrying war supplies or troops.¹³⁹

He further explained that the civilian in question could not “accidentally” accompany the armed forces. Larkin noted:

[W]here a civilian has been held to have been accompanying the Armies it appeared that he has either moved with the military operation or that his presence within a military installation was not merely incidental but was connected with or dependent upon activities of the Armies or their personnel. He must in order to come within this class of persons subject to military law accompany the military service in fact.¹⁴⁰

The intent of the UCMJ’s drafters was to incorporate the case law developed in federal habeas corpus cases like *Perlstein* and *diBartolo*.¹⁴¹ Americans who accompanied the armed forces for business purposes would be subject to military jurisdiction. Likewise, spouses and other dependents would be subject to similar jurisdiction.

Once Larkin explained that the UCMJ drafters intended only to codify the jurisdiction over civilians established by federal district courts, the Committee had no further objections. The committee members only expressed concern that the new UCMJ not interfere with occupation courts set up in Germany or subject short-term visitors to military jurisdiction. The requirement that “accompanying the forces” encompassed only those Americans that intentionally accompanied military units satisfied the Committee’s concerns. Likewise, the proposed UCMJ would not displace the

¹³⁹ *Id.* at 875 (statement of Felix Larkin, Assistant General Counsel, Secretary of Defense).

¹⁴⁰ *Id.* at 876.

¹⁴¹ *Id.* at 875–77.

authority occupation courts had over American civilians. Occupation courts in Germany derived their authority from the law of war, which tasked an occupying military force to establish tribunals to keep order.¹⁴²

If Article 2(11) derived from Article 2(10), which incorporated the provisions of the articles of war, Article 2(12) owed its origin to circumstances peculiar to World War II. The global nature of World War II required the U.S. Military to operate throughout the world, often in areas that lacked any infrastructure to support military operations. The U.S. Government expanded its military infrastructure, in part, by leasing land from various foreign countries. These leases allowed the United States to create forward bases to support military operations in territories where allied nations exercised sovereignty. These bases generally fell under the management of the Navy department.¹⁴³ After the war concluded, the United States continued to lease some of the bases. Article 2(12) derived from 34 U.S.C. § 1201, a wartime measure designed to establish military jurisdiction over civilians working in bases leased from the British Government and the Philippines.¹⁴⁴ The only difference between 34 U.S.C. § 1201 and Article 2(12) was that Article 2(12) would apply during peace as well as war.

Robert L'Heureux, the Senate Banking and Commerce Committee's chief counsel and a former U.S. Army judge advocate who prosecuted black-market activities in Marseille, France during World War II offered a short, critical analysis of Article 2(12).¹⁴⁵ He argued that Article 2(12) confused martial law with military law and violated international law.¹⁴⁶ Only the plenary power of an army occupying a territory under martial law could subject a wide variety of civilians to military jurisdiction. Article 2(12), part of a code proposed to govern the U.S. Military, subjected American citizens and citizens of friendly nations to military law. L'Heureux concluded that such an expansion of American military law would violate international law, because American military law only governed the members of the American forces and had no authority over other persons.¹⁴⁷ Hence, absent a state of war, the American military could not subject American citizens, let alone citizens of other nations, to military jurisdiction. The fact that the U.S. Military leased bases overseas did not permit the exercise of military

¹⁴² *Id.*

¹⁴³ *Id.* at 877-78.

¹⁴⁴ *Id.*

¹⁴⁵ *Id.* at 808 (statement of Robert D. L'Heureux, Chief Counsel, Senate Banking and Currency Committee).

¹⁴⁶ *Id.* at 811.

¹⁴⁷ *Id.*

jurisdiction either.¹⁴⁸ L’Heureux concluded by noting that “the State Department . . . must have definite views on that matter.”¹⁴⁹ The committee responded to L’Heureux’s concerns and questioned the need for Article 2(12).

The Armed Services Committee also expressed concern that expansive military jurisdiction over leased bases might raise constitutional issues. Considered an emergency wartime measure, 34 U.S.C. § 1201 escaped judicial review entirely. Incorporating the statute into the UCMJ would make the provisions of 34 U.S.C. § 1201, drafted as an expedient measure, into a permanent law. Felix Larkin again explained the intent of the drafters in the interest of defending the article. When asked if Congress had the right to make such jurisdiction permanent, Felix Larkin replied that, even if the Supreme Court had not passed judgment, the United States already had international agreements where the nation leasing the base ceded jurisdiction to the U.S. Government.¹⁵⁰ Thus, the legal justification for Article 2(12) lay in the host nation’s voluntary surrender of jurisdiction to the United States.¹⁵¹

Despite the concern that Article 2(12) might conflict with international law or the U.S. Constitution, the Armed Services Committee did not request any changes in the proposed article.¹⁵² Satisfied that the article only applied to areas outside the contiguous United States lacking established courts, the Committee approved of the Article without change.

Even the Armed Services Committee’s questions about Article 2(12) represented a small fraction of the debate surrounding the proposed UCMJ. Permitting military jurisdiction over civilians in limited cases created no major controversies. Contrasted with, for example, the intense debate over the need for a separate judge advocate general’s corps or the need for civilian judicial review of courts-martial, military jurisdiction over civilians was a minor concern.

The Senate and House staff members who reviewed the UCMJ likely knew of the precedent set by *Milligan* and the long-standing hostility to military jurisdiction over civilians as exemplified by Justice Woodbury’s dissent in *Luther v. Borden*.¹⁵³ William Winthrop had concluded after the Civil War that “a statute cannot be framed by which a civilian can lawfully be

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ *Id.* at 877.

¹⁵¹ *Id.*

¹⁵² *See id.* at 879.

¹⁵³ *Luther v. Borden*, 48 U.S. (7 How.) 1, 48 (1849) (Woodbury, J., dissenting).

made amenable to the military jurisdiction in time of peace.”¹⁵⁴ Yet Articles 2(10), (11), and (12) passed without substantial changes and subjected civilians to military jurisdiction. Some minor changes were enacted. Articles 2(11) and (12) were changed to avoid conflict with international law. They, as adopted, included provisions subjecting them to “any treaty or agreement to which the United States is or may be a party or to any accepted rule of international law.”¹⁵⁵ The troublesome phrase “under the supervision of [the armed forces]” was deleted from Article 2(11) as well. Nonetheless, the three articles as adopted retained the same substance as the proposed articles.

The expansive jurisdiction over civilians permitted by the UCMJ resulted from the peculiar features of World War II. Active hostilities had ceased only four years before the adoption of the UCMJ, and thousands of Americans remained overseas on occupation duty or stationed at remote posts. Never before had the American military confronted operations on a global scale. Maintaining global operations required establishing support networks for the military throughout the world. Those networks included civilian technicians, construction workers, seamen, and countless other individuals needed to support the Armed Forces.

Federal district courts reasoned that if these civilians traveled outside the United States for the sole reason of supporting the military, then they could fall under military jurisdiction. Similar logic supported allowing the military to retain its expanded jurisdiction over civilians in the UCMJ. The Armed Services Committee noted with approval cases where dependents and civilian contract workers were tried in courts-martial or occupation tribunals.¹⁵⁶ No one argued against such jurisdiction. So long as the civilian in question resided overseas because of a pre-existing connection to the military, the UCMJ’s drafters and the Armed Services Committee approved of military jurisdiction.

The unprecedented expansion of military jurisdiction over civilians during and after World War II is understandable in the context of military necessity and the contemporary doctrines of international law. The distribution of civilian support personnel throughout the world was a wartime measure in response to the conditions peculiar to World War II. No governmental structures existed to regulate the conduct of these civilians. Allowing the military to govern them provided a ready solution that did not

¹⁵⁴ WINTHROP, *supra* note 125, at 107.

¹⁵⁵ Act of May 5, 1950, Pub. L. No. 81-506, arts. 2(11)–(12), 64 Stat. 107, 109 (creating the Uniform Code of Military Justice).

¹⁵⁶ *House UCMJ Hearing*, *supra* note 129, at 805.

require establishing further government agencies or creating a new legal regime. Moreover, the primary purpose of civilian support personnel and dependents was to support the armed forces. The military consequently had an interest in maintaining good order among civilians accompanying the armed forces.

Further supporting the military's interest in governing the civilians accompanying the armed forces, international law provided no clear means of regulating the conduct of Americans abroad. International law, as understood in the 1940s, primarily regulated the conduct of nations.¹⁵⁷ Laws governing individuals in an international context did not have any meaningful effect.¹⁵⁸ The American military's presence abroad had been minimal compared to World War II. Thus, the few cases where civilians accompanied the military abroad could be quietly dealt with by the military or by consular courts. Consular courts held jurisdiction over most Americans, civilian or not, in less-developed "uncivilized" nations. Consuls had authority to dispense justice as they saw fit without interference from U.S. courts.¹⁵⁹

Consular courts derived much of their authority from a 19th century understanding that the U.S. Constitution did not apply extraterritorially.¹⁶⁰ This view continued until the second half of the 20th Century when legal fields such as human rights and transnational law enforcement developed theories about the extraterritorial application of the U.S. Constitution.¹⁶¹ During World War II, however, the Articles of War set forth rights and duties of American military personnel and civilians accompanying the Armed Forces. The only precedents for long-term overseas military government did not offer guidance. United States military personnel and their dependents had occupied portions of Cuba and the Philippines since the end of the 19th Century.¹⁶² Existing court-martial jurisdiction proved satisfactory in each case. The number of civilians involved was small and, if necessary, Article of War 2(d) would have provided authority to try American civilians accompanying the armed forces. Furthermore, events in Cuba and the Philippines qualified as "low intensity" conflicts that did not require a national-level war effort.¹⁶³ Similarly, they did not require legal structures beyond the Articles of War to maintain order. Only when the U.S. Armed Forces engaged in warfare on a

¹⁵⁷ See Peter Spiro, *Treaties, International Law, and Constitutional Rights*, 55 STAN. L. REV. 1999, 2004 (2003).

¹⁵⁸ See *id.* at 2013.

¹⁵⁹ See *In re Ross*, 140 U.S. 453, 469-70 (1891).

¹⁶⁰ See *id.* at 464-65.

¹⁶¹ Spiro, *supra* note 157, at 2001.

¹⁶² BIRTLE, *supra* note 43, at 100-04.

¹⁶³ *Id.*

global level did they need broad military jurisdiction. World War II required that the American civilian, industrial, and military communities unify to respond to a global crisis. Sweeping military law jurisdiction provided a means of ensuring that military and civilian personnel worked united and subject to the same standards.

VII. MILITARY JURISDICTION OVER CIVILIANS AND THE POST-WAR SUPREME COURT

During World War II, the Supreme Court did not address the expansion of military jurisdiction that lower federal courts approved. The post-war Supreme Court, however, took a critical view of the expansive military jurisdiction embodied in the UCMJ. Between 1956 and 1960, the Supreme Court invalidated the provisions of the UCMJ that granted peacetime military jurisdiction over civilians. Perhaps in no other period had the Supreme Court heard so many cases concerning military law. Notably, each of the cases concerned civilians convicted of crimes before military courts.

Only seven years after the adoption of the UCMJ, two cases appeared before the Supreme Court challenging the constitutionality of Article 2(11). *Reid v. Covert*¹⁶⁴ and *Kinsella v. Kruger*¹⁶⁵ both concerned murders of military personnel by their wives. Dorothy Krueger murdered her husband, an Army colonel, while both were living in Japan.¹⁶⁶ Clarice Covert similarly murdered her husband, an Air Force sergeant, while they lived in England.¹⁶⁷ Both women lived with their husbands in compounds leased by the United States to provide housing for American military personnel and their dependents.¹⁶⁸ Since both women qualified as dependents accompanying the armed forces, they fell squarely within the court-martial jurisdiction created by Article 2(11).

Military courts in England and Japan convicted Covert and Krueger, respectively.¹⁶⁹ Their attorneys appealed the decisions to courts of military review and then to the Court of Military Appeals. Each court approved the sentences.¹⁷⁰ Eventually Krueger filed a petition for habeas corpus that the U.S. District Court for the Southern District of West Virginia dismissed.¹⁷¹

¹⁶⁴ *Reid v. Covert*, 351 U.S. 487 (1956) [hereinafter *Covert I*].

¹⁶⁵ *Kinsella v. Kruger*, 351 U.S. 470 (1956).

¹⁶⁶ *Id.* at 471.

¹⁶⁷ *Covert I*, 351 U.S. at 489.

¹⁶⁸ *Id.* at 491; *Kinsella*, 351 U.S. at 474.

¹⁶⁹ *Covert I*, 351 U.S. at 491; *Kinsella*, 351 U.S. at 474.

¹⁷⁰ *Covert I*, 351 U.S. at 491; *Kinsella*, 351 U.S. at 474.

¹⁷¹ *Kinsella*, 351 U.S. at 473.

Krueger appealed the dismissal to the Fourth Circuit Court of Appeals and the Government sought certiorari, which the Supreme Court granted.¹⁷²

Covert followed a different procedural path. She filed for a writ of habeas corpus alleging that transferring her from England to a District of Columbia jail ended the military's jurisdiction over her.¹⁷³ The U.S. District Court for the District of Columbia issued the writ and the Government appealed the decision.

The Supreme Court heard both *Covert* and *Kinsella* on the same day. Notably, Frederick Bernays Wiener represented both *Covert* and *Krueger*. Wiener, a military attorney and scholar of military law, had testified before the Committee on the Armed Services while it evaluated the proposed UCMJ.¹⁷⁴ He advanced a conservative philosophy of military law and, at that time, did not favor placing the military justice system under civilian review. He explained:

The object of civilian society is to make people live together in peace and in reasonable happiness. The object of armed forces is to win wars, not just fight them, win them, because they do not pay off on place in a war. That being so, the institutions of our armies, even in a democratic society like ours, military institutions necessarily differ from [civilian institutions].¹⁷⁵

Weiner's perspective on military law followed from a tradition espoused earlier by General Sherman, who understood military law as the means of controlling "a collection of armed men obliged to obey one man."¹⁷⁶ Overhauling the military justice system by using the civilian justice system as a model risked, in Wiener's view, thwarting the fundamental objectives of military justice.

Weiner first argued *Krueger's* and *Covert's* cases on May 3, 1956. The Supreme Court approved both convictions and discussed the merits of each case in a short decision. Notably, Justice Frankfurter sided with the majority but issued an opinion containing his "reservations."¹⁷⁷ Chief Justice

¹⁷² *Id.*

¹⁷³ *Covert I*, 351 U.S. at 490.

¹⁷⁴ *House UCMJ Hearing*, *supra* note 129, at 778.

¹⁷⁵ *Id.* at 778-79.

¹⁷⁶ *Id.* at 780.

¹⁷⁷ *Kinsella*, 351 U.S. at 481.

Warren, and Justices Black and Douglas dissented but withheld issuing their opinions until the subsequent term.

The May 3 decision upheld the conviction on the grounds of military necessity. Justice Clark emphasized that “practical necessity” justified allowing American servicemen to travel with their dependents.¹⁷⁸ Establishing overseas communities of military and civilian personnel accompanying the military created conditions where, “in all matters of substance, the lives of military and civilian personnel alike are geared to the local military organization which provides their living accommodations, medical facilities and transportation from and to the United States.”¹⁷⁹ Clark’s language echoed the concept of civilian integration developed in the *Perlstein/diBartolo* line of cases. So long as the civilians in question relied upon the military for support, they could be subject to military jurisdiction.

Subjecting military personnel and the civilians accompanying them to the same system of justice furthered the goal of effective law enforcement outside of the continental United States. Justice Clark reasoned that Congress had the power to determine the means of accomplishing that goal. The Supreme Court could overturn Congress’s decision only if military courts were not a necessary or appropriate means of securing the public welfare.¹⁸⁰

Justice Clark understood military courts as a type of legislative court. He analogized placing civilians under military law to the use of territorial tribunals in administering unincorporated territories. Likewise, he drew on the experience of consular courts in trying American citizens indicted for crimes in foreign countries.¹⁸¹ Both legislative and consular courts served as exceptional tribunals, hearing cases where access to U.S. courts was impossible or impractical. They were created out of necessity, administering justice to a small number of Americans.¹⁸² Through using these exceptional courts as examples, Clark tacitly approved of the assumptions inherent in Article 2(11) of the UCMJ. Article 2(11) granted the military jurisdiction to hear cases arising in the body of civilians that accompanied the U.S. Armed Forces during World War II. Justice Clark viewed the communities of civilians accompanying the armed forces as an exceptional measure; no different from the small numbers of civilians accompanying U.S. military forces and

¹⁷⁸ *Id.* at 476.

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

¹⁸¹ *Id.* at 474.

¹⁸² *Id.*

diplomatic interests in less-developed parts of the world during the 19th century.

Four of Clark's fellow justices did not agree with his reasoning and, foreshadowing the invalidation of Article 2(11), they dissented. Specifically, Chief Justice Warren and Justices Black and Douglas dissented while Justice Frankfurter issued a "reservation."¹⁸³ Frankfurter noted that the law did not recognize a "third class which is part civil and part military."¹⁸⁴ Military law applied to citizens who fell into the category of military -- only then could they be subject to Congress's authority to govern the armed forces. Clark did not consider the emphasis placed on civilian or military status by Quarles, an omission that undermined the decision according to Frankfurter.

Frankfurter further objected to Clark's analogizing military courts to consular courts. The concept of a consular court, Frankfurter noted, arose from "concessions wrung by the United States as were the capitulations wrung, often by force, from the Ottoman Empire and other Eastern Nations because they were deemed inferior by the West, long ago and far away."¹⁸⁵ The treaties governing civil-military relationships in Europe and Japan bore no resemblance to the consular courts, relics of the 19th century.¹⁸⁶

Frankfurter and the dissenting justices also criticized the expedited hearing schedule that rushed *Kinsella* through the Supreme Court's docket before the term ended.¹⁸⁷ Justices Black and Douglas did not issue dissents to accompany Clark's decision. They noted that Clark's decision touched upon the fundamental right of a criminal defendant to receive a jury trial. This subject required more thought than an expedited schedule allowed.¹⁸⁸ Consequently, Black and Douglas noted their objections and promised full opinions the next term.¹⁸⁹

Justices Black and Douglas never issued their promised dissents. Weiner petitioned the court for a rehearing, which the court granted.¹⁹⁰ The Supreme Court's extraordinary motion resulted from changes to the court as

¹⁸³ *Id.* at 481.

¹⁸⁴ *Id.* at 481-82 (quoting COLONEL WILLIAM WINTHROP, *MILITARY LAW AND PRECEDENTS* 145 (2nd ed. 1896)).

¹⁸⁵ *Kinsella*, 351 U.S. at 481.

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*

¹⁸⁸ *Id.* at 483.

¹⁸⁹ *Id.* at 485.

¹⁹⁰ BISHOP, *supra* note 86, at 61-62.

well as the dissatisfaction with *Kinsella's* expedited handling.¹⁹¹ Justice Minton, part of the earlier majority, retired between the 1956 and 1957 terms. Justice Harlan, another majority member, changed his mind during the recess between the terms. Minton's replacement, Justice Brennan, did not take part in the rehearing.

The 1957 Supreme Court approached the question of military jurisdiction over civilians abroad as an issue of fundamental constitutional right. While the 1956 court viewed the application of Article 2(11) as an extraordinary case outside of the main body of constitutional criminal law, the 1957 court viewed Article 2(11) as directly conflicting with the 5th and 6th Amendments.¹⁹² Justice Black noted at the beginning of his decision that constitutional rights apply to citizens, even when they reside abroad.¹⁹³ So long as a government agency is prosecuting a U.S. citizen, Black maintained, the Constitution governs the relationship between the Government and the individual.

The consular courts that Justice Clark used to justify his analysis of Article 2(11) did follow from the arrangement of rights set forth in the Constitution. Consular courts conferred executive and judicial powers on a single person, the U.S. Consul. They had powers to make criminal laws, initiate charges, and try subjects without restriction or supervision.¹⁹⁴ A comparable unification of powers in the Federal or State Government would be patently illegal under the doctrine of separation of powers. Hence, Justice Black dismissed the concept of consular courts as "at best . . . a relic from a different era" without any bearing on contemporary military law.¹⁹⁵

The relevant issue was whether Article 2(11), an exception to the provisions of the 5th and 6th Amendments, could stand as a constitutional application of the Necessary and Proper Clause.¹⁹⁶ The Supreme Court held that Congress had no power to do away with constitutional criminal protections under the Necessary and Proper Clause.¹⁹⁷ Article 2(11) could never be constitutional because it denied civilians the right to a jury trial and the right to a grand jury indictment. The 5th Amendment's exception for "cases arising in the land or naval forces" applied only to members of the Armed forces. The Supreme Court's strict construction of that clause contrasted with the

¹⁹¹ *Id.*

¹⁹² *Reid v. Covert*, 354 U.S. 1, 5-19 (1957) (hereinafter *Covert II*).

¹⁹³ *Id.* at 5-6.

¹⁹⁴ *Id.* at 11-12.

¹⁹⁵ *Id.* at 12.

¹⁹⁶ *Id.* at 20-37.

¹⁹⁷ *Id.*

expansive sense of military jurisdiction written into the UCMJ. The Supreme Court revitalized the holding of *Milligan*: that is, no civilian may be tried in a military court where civilian courts remain open and functioning.¹⁹⁸

The Supreme Court further restricted military jurisdiction over contractors and other civilians who, while not dependents of servicemembers, accompanied the armed forces.¹⁹⁹ The court held that the military could not exercise jurisdiction over civilian contractors during peacetime.²⁰⁰ Even a contractor's employment at a post overseas would not enable military jurisdiction. Notably, Justice Clark questioned the need for civilian contractors.²⁰¹ He reasoned that if the military needed technical specialists to maintain equipment overseas or in the field, it should create some corps of specialists.²⁰² Requiring technical specialists to enlist in the military would allow the military to subject them to military discipline and law without threatening the Constitutional rights of civilians.

Justice Clark's suggestion encapsulates the principals behind *Covert* and subsequent decisions restricting military jurisdiction over civilians. Emphasizing status as either a civilian or a member of the military reflected the Constitution's separation of military and civilian spheres. Even if contemporary military establishments did not reflect the military despotism feared by the Framers, Constitutional boundaries between military and civilian deserve as much respect as the boundaries between the three branches of government. Status as a civilian or a soldier, not factual circumstances, determined the appropriateness of military jurisdiction.

VIII. COURT OF MILITARY APPEALS AND MILITARY JURISDICTION OVER CIVILIANS DURING WARTIME

The Supreme Court refused to foreclose the military's traditional jurisdiction over civilians accompanying armed forces in the field during wartime.²⁰³ Despite the critical analysis of military necessity handed down by the court in *Covert* and related cases, the court reserved judgment over cases arising out of circumstances peculiar to the scene of actual conflict. The Court of Military Appeals, in contrast, confronted the issue of what circumstances

¹⁹⁸ *Id.* at 30-33.

¹⁹⁹ *McElroy v. United States ex rel. Guagliardo*, 361 U.S. 281, 284-85 (1960).

²⁰⁰ *Id.*

²⁰¹ *See id.* at 285-87.

²⁰² *Id.* at 286-87.

²⁰³ *Covert II*, 354 U.S. at 33-36.

permitted the military to exercise criminal jurisdiction over civilians.²⁰⁴ Decided in 1970, *United States v. Averette* continued the trend of restricting military jurisdiction over civilians.²⁰⁵ *Averette* concerned: “[T]he constitutionally delicate question of military jurisdiction over civilians”²⁰⁶ Convicted of larceny and conspiracy to commit larceny by a general court martial, Averette, a civilian contractor, received a sentence of one year imprisonment and a \$500 fine.²⁰⁷ The U.S. Army Court of Military Review upheld the conviction and the Federal District Court in Kansas rejected his habeas corpus petition. The Army employed Averette as a civilian contractor and he resided in Camp Davies, an Army installation located in South Vietnam.²⁰⁸ His court-martial took place in Long Binh, Vietnam.²⁰⁹ At Camp Davies, Averette used the PX, commissary, and other support facilities as if he were a member of the military.²¹⁰ The Court of Military Appeals concluded that Averette qualified as a civilian “accompanying an armed force in the field” as described in UCMJ Article 2(10).²¹¹

After concluding that Averette accompanied U.S. forces in Vietnam, the Court of Military Appeals sought to determine if, in light of the Supreme Court decisions limiting the exercise of military jurisdiction over civilians, military jurisdiction had been appropriate. The Court of Military Appeals ultimately concluded that the military did not have jurisdiction over Averette, reasoning that Article 2(10) applied only “in time of war,” which meant a war formally declared by Congress.²¹²

The U.S. Army Court of Criminal Appeals had approved Averette’s sentence.²¹³ It compared Averette’s petition to habeas corpus petitions brought during World Wars I and II challenging the propriety of military jurisdiction over contractors. The Court of Military Review found no need to discuss Article 2(10) at length; it considered the article a well-settled part of military law.²¹⁴

²⁰⁴ Although now called the Court of Appeals for the Armed Forces, I refer to the court as the Court of Military Appeals (CMA), as it was known in 1970.

²⁰⁵ *United States v. Averette*, 41 C.M.R. 363, 365–66 (C.M.A. 1970).

²⁰⁶ *Id.* at 365.

²⁰⁷ *Id.* at 363.

²⁰⁸ *Id.* at 365.

²⁰⁹ *Id.* at 363.

²¹⁰ *Id.* at 365.

²¹¹ *Id.* at 363.

²¹² *Id.* at 365–66.

²¹³ *United States v. Averette*, 40 C.M.R. 891 (A. Ct. Crim. App. 1969).

²¹⁴ *Id.* at 892.

Likewise the Court of Military Appeals noted that the Supreme Court, in *Reid v Covert*, left open the possibility that military courts could try a civilian if the civilian resided in an area of actual fighting.²¹⁵ The Supreme Court specifically justified such jurisdiction on the grounds that “‘extraordinary circumstances present in an area of actual fighting’” made selected civilians amenable to military jurisdiction.²¹⁶ Averette lived in a military compound subject to attack. Military authorities permitted him to carry a firearm for self-defense. His duties and privileges provided evidence of his “complete personal and physical integration into the military community.”²¹⁷ Thus, the Court of Military Review found sufficient evidence to uphold Averette’s conviction.

The Court of Military Appeals did not, in contrast, consider the *diBartolo/McCune* line of cases in its decision. Those cases were decided before the adoption of the UCMJ and the Supreme Court’s decision in *Covert*; therefore, they provided questionable precedent. The cases considered relevant by the court, however, provided equally questionable precedent. Judge Darden distinguished cases interpreting “in time of war” to mean any sort of active hostilities on the grounds, as those cases did not concern military jurisdiction over civilians.²¹⁸ He then concluded that “in time of war” meant a war formally declared by Congress. He cited *Pyramid Life Insurance Co. v Masch*²¹⁹ and *Ex parte Givens*²²⁰ in support of his conclusion. Neither case concerned military jurisdiction over civilians. *Pyramid Life* concerned a deceased soldier’s next of kin’s ability to recover life insurance benefits.²²¹ The policy did not cover deaths during time of war.²²² The Supreme Court of Colorado viewed the policy as ambiguous and construed it against the insurance company. Concluding that “in time of war” meant a war declared by Congress allowed the soldiers next of kin to recover the benefits of his policy. The Supreme Court of Colorado’s interpretation of “in time of war” had no bearing on military law; rather, it was an exercise of contract law.

The Court of Military Appeals’ use of *Ex parte Givens* presented further dilemmas. *Givens* concerned a habeas corpus petition filed by a former infantry captain imprisoned after a court-martial convicted him of

²¹⁵ *Id.*

²¹⁶ *Id.* (quoting *Reid v. Covert*, 354 U.S. 1, 33 (1957)).

²¹⁷ *Id.* at 893.

²¹⁸ *United States v. Averette*, 41 C.M.R. 363, 364 (C.M.A. 1970).

²¹⁹ *Pyramid Life Ins. Co. v. Masch*, 299 P.2d 117 (Colo. 1956).

²²⁰ *Ex parte Givens*, 262 F. 702 (N.D. Ga. 1920).

²²¹ *Masch*, 299 P.2d at 118–19.

²²² *Id.*

manslaughter.²²³ The court-martial convened in September 1918 and the sentence was approved in April 1919.²²⁴ The captain argued, in part, that he had been stationed in the United States where no actual fighting took place and his sentence was approved after open hostilities ended overseas in November 1918.²²⁵ The then-existing Articles of War did not permit a court-martial to try a member of the military for murder or manslaughter during peacetime.²²⁶ Since Givens had not been stationed in a combat zone and hostilities had ended before his sentence was approved, the court-martial had no authority to try him for manslaughter.²²⁷ The Northern District of Georgia rejected Givens's argument. It reasoned that although Givens did not serve in an area of active hostilities, he still served during "time of war." The court noted that Congress had declared war on Germany and that "time of war" continued until such time as "a recognized body" issued a formal declaration of peace.²²⁸ Thus, so long as Givens served in the Army after Congress declared war, but before a formal recognition of peace appeared, he served "in time of war."²²⁹ The court added that the exigencies of mobilizing an army required that all posts, whether in the rear echelon or at the front, maintain a heightened state of discipline and readiness.²³⁰ So long as the army remained mobilized for war, "time of war" existed, even if actual hostilities did not exist.

Givens, then, provided the Court of Military Appeals with less relevant precedent than *Pyramid Life*. Captain Givens was an active duty Army officer and nothing in *Givens* concerned civilians accompanying an armed force. The understanding of a formal declaration of war presented by the Northern District of Georgia had little bearing on *Averette*. The court's dicta concerning formal declarations of war argued only that where a formal declaration of war exists, only a formal declaration of peace would determine when hostilities end. If anything, *Givens* appeared to contradict the Court of Military Appeals' position. It suggested that a time of heightened military readiness qualified as "time of war." The court, however, offered no clarification as to why it viewed *Givens* and *Pyramid Life* as relevant.

Instead, the court referred to "recent guidance" from the Supreme Court in the area of military jurisdiction over civilians.²³¹ Presumably, the

²²³ *Givens*, 262 F. at 703.

²²⁴ *Id.* at 703-04.

²²⁵ *Id.* at 704.

²²⁶ *Id.* at 705-06.

²²⁷ *Id.* at 704-06.

²²⁸ *Id.* at 705.

²²⁹ *Id.* at 705-06.

²³⁰ *Id.*

²³¹ *United States v. Averette*, 41 C.M.R. 363, 364 (C.M.A. 1970).

Court of Military Appeals meant decisions like *Covert* or *Gugliardino*. None of the Supreme Court's decisions concerning the military's ability to prosecute dependents foreclosed the possibility that wartime exigencies might permit the trial of civilians accompanying a military force. Justice Harlan explicitly reserved judgment on the validity of Article 2(10) because *Covert* did not concern events during wartime. Judge Darden, in contrast, appeared to interpret the Supreme Court's decisions as foreclosing military jurisdiction over civilians in all but rare circumstances.

The *Averette* court's decision to avoid directly confronting the question of military jurisdiction over civilians likely resulted from an awkward position the court found itself in when confronting an issue of such serious constitutional import. Offering a decision that even touched upon the Vietnam War's legal status carried serious political implications. When *Averette* arrived at the Court of Military Appeals, the United States had begun to withdraw gradually from Vietnam.²³² Suggesting that a state of declared war existed would have cast judgment on the Nixon administration's decision to "Vietnamize" the war effort rather than seek a formal peace treaty.²³³

The status of the Court of Military Appeals within the federal court system further hindered its ability to issue a decision that touched upon the definition of what "in time of war" meant. Since *Curtis-Wright*, the Supreme Court had reserved issues of foreign policy to the executive branch.²³⁴ The Court of Military Appeals could not encroach upon questions of foreign policy if the Supreme Court had forbidden itself that jurisdiction. Moreover, Congress had issued the underlying legal framework for the U.S. intervention in Vietnam by approving the Gulf of Tonkin resolutions.²³⁵ The propriety of Congress's action and the propriety of subsequent Presidential action seemed to invoke political questions inappropriate for judicial review and questions of separation of powers reserved to the Supreme Court. Justice Darden's description of the *Averette* case as "constitutionally delicate" underscores the fact that the Court of Military Appeals did not have the authority or the inclination to rule upon all of the issues raised by the definition of "time of war." Issuing a narrow, uncontroversial holding would best support the interests of justice and the integrity of the federal court system.

²³² GEORGE C. HERRING, *AMERICA'S LONGEST WAR: THE UNITED STATES AND VIETNAM, 1950-1975*, 228 (1979).

²³³ *Cf. Ex parte Givens*, 262 F. at 705-06 (suggesting that a declared war requires a "declared peace" to formally end hostilities; likewise the ongoing state of conflict between North and South Korea).

²³⁴ *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936).

²³⁵ HERRING, *supra* note 232, at 122-23.

Equally as important as the external factors surrounding the Court of Military Appeals, the justices on the court in 1970 had become more critical of both the UCMJ and military jurisdiction than their predecessors.²³⁶ Congress confirmed the first three appointments to the Court of Military Appeals in 1952. The first three judges, Robert Quinn, George Latimer, and Paul Brosman, came from military backgrounds. Quinn had served in the Navy's legal department.²³⁷ Latimer served as a National Guard artillery officer and later as the 40th Infantry Division's Chief of Staff.²³⁸ Brosman served as Chief of Military Justice for the Air Force until immediately before his appointment—a fact that conflicted with the requirement that Court of Military Appeals judges be “appointed from civilian life.”²³⁹ Thus, the initial appointments to the Court of Military Appeals possessed significant experience in administering military justice under the Articles of War and, in the initial years of the court, focused on efficiently administering justice under the UCMJ.

The court had changed significantly by the time it heard *Averette* in 1970. Robert Quinn, who dissented, remained on the court. Homer Ferguson, a former U.S. Senator, municipal judge, and ambassador to the Philippines, replaced Brosman in 1956.²⁴⁰ William Darden, former Chief of Staff for the Senate Armed Services Committee, was confirmed in 1968.²⁴¹ Neither Ferguson nor Darden had previous military experience, a point of contention between them and Judge Quinn. Quinn earlier had remarked that members of the Court of Military Appeals should have experience with military justice so that they might know “the military problems incidental to the conduct of courts-martial.”²⁴² The original purpose of the Court of Military Appeals had been to provide civilian review over military justice. Ferguson and Darden, having no loyalty to any service, tended to interpret “civilian review” broadly.²⁴³

Ferguson, in particular, doubted that the UCMJ represented a meaningful improvement over the Articles of War.²⁴⁴ His opinions consequently emphasized the application of the Bill of Rights to military justice

²³⁶ JONATHAN LURIE, *PURSUING MILITARY JUSTICE: THE HISTORY OF THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES* 143–47 (1998).

²³⁷ GENEROUS, *supra* note 126, at 60–61.

²³⁸ *Id.*

²³⁹ *Id.* at 62.

²⁴⁰ LURIE, *supra* note 236, at 112–17.

²⁴¹ *Id.* at 208.

²⁴² GENEROUS, *supra* note 126, at 98.

²⁴³ *Id.* at 101–05.

²⁴⁴ *Id.* at 105–06.

at the expense of traditional and “time-honored” court-martial procedures.²⁴⁵ Ferguson’s interpretations of military law seemed to reflect a belief that the Court of Military Appeals should serve as a gadfly, actively challenging outdated military courts-martial procedures.²⁴⁶ He succeeded in aligning the Court of Military Appeals with the Warren-era Supreme Court and incorporating contemporary views on individual rights into military law.²⁴⁷

The *Averette* and *Covert* decisions curtailed the expansive jurisdiction over civilians permitted during World War II. Despite the inclusion of Articles 2(10) and 2(11) in the UCMJ, neither the Supreme Court nor the Court of Military Appeals supported permitting military courts to try civilians under any circumstances. *Averette*, in particular, demonstrated the judiciary’s hostility towards allowing the military to try civilians—even civilians overseas in combat zones. Foreclosing the possibility of military jurisdiction except during a war declared by Congress, the courts implicitly rejected the “military necessity” argument presented throughout the 1940s and 1950s.

IX. MILITARY EXTRATERRITORIAL JURISDICTION ACT AND EXPANDED FEDERAL JURISDICTION OVER CIVILIANS ACCOMPANYING MILITARY FORCES OVERSEAS

The Court of Military Appeals justified *Averette* by holding U.S. citizen’s rights too precious to submit to anything but civilian courts. Protecting those rights, however, resulted in numerous perpetrators of crimes overseas escaping prosecution. A 1979 Government Accounting Office report noted that, with alarming frequency, host nations did not prosecute Americans who committed crimes while deployed with the U.S. Military.²⁴⁸ A number of congressional proposals in the 1980s and 1990s attempted to address the issue and restore military jurisdiction over civilian offenders accompanying U.S. military forces.²⁴⁹

The attempts to restore military jurisdiction over civilian offenders universally failed until the introduction of the Military Extraterritorial Jurisdiction Act (MEJA) in 1999. The Second Circuit case, *United States v. Gatlin*,²⁵⁰ provoked sufficient congressional interest in the jurisdictional gap

²⁴⁵ *Id.*

²⁴⁶ *Id.*

²⁴⁷ *Id.*

²⁴⁸ Glenn Schmitt, *Closing the Gap in Criminal Jurisdiction over Civilians Accompanying the Armed Forces Abroad*, 51 CATH. U. L. REV. 55, 75 (2001).

²⁴⁹ *Id.*

²⁵⁰ *United States v. Gatlin*, 216 F.3d 207 (2d Cir. 2000).

created by the *Covert/Averette* line of cases. *Gatlin* concerned the conviction of a U.S. citizen married to a U.S. Army sergeant for sexually abusing a minor while living on a U.S. military base in Germany.²⁵¹ The Eastern District of New York convicted Gatlin after concluding that the military reservation in Germany was in “the special maritime and territorial jurisdiction of the United States” as defined by 18 U.S.C. § 7(3).²⁵² The Second Circuit analyzed the legislative history of 18 U.S.C. § 7(3) and concluded that the statute granted jurisdiction over crimes committed on territory over which the Federal Government had exclusive jurisdiction.²⁵³ The 1908 Act did not enlarge “the jurisdiction territorially or technically of the United States courts” nor did evidence show that Congress intended the statute to apply extraterritorially.²⁵⁴ The U.S. Government leased the land on which Gatlin committed his crimes in Germany. Germany retained sovereignty over the leased land according to the Status of Forces Agreement. Consequently, the U.S. Government did not have exclusive control over the land, and 18 U.S.C. § 7(3) could not confer jurisdiction.²⁵⁵ The Second Circuit, justifiably frustrated, directed the clerk of court to forward a copy of its decision to the Chairman of the Senate and the House Armed Services and Judiciary Committees.²⁵⁶

Gatlin was decided while the House and Senate began debating the precursors to MEJA.²⁵⁷ Various proposals to end the jurisdictional gap created by *Covert* and *Averette* appeared in the House and Senate after the Vietnam War. None became law. Despite an inability to prosecute civilian offenders accompanying the armed services overseas, the idea that military jurisdiction over them might be restored proved politically untenable in the years following Vietnam.²⁵⁸

Judge Cabranes’s decision to send the *Gatlin* opinion to Congress added an urgent message from a high-ranking judge. Senator Jeff Sessions of Alabama reacted by introducing a bill to amend the federal criminal code to permit the Department of Justice to prosecute civilians like Gatlin who accompanied military forces abroad.²⁵⁹ The bill also attempted to legislate around *Averette* by applying the UCMJ to civilian contractors supporting

²⁵¹ *Id.* at 211.

²⁵² *Id.* at 209.

²⁵³ *Id.* at 223.

²⁵⁴ *Id.* (quoting 42 Cong. Rec. 1108 (1908)).

²⁵⁵ *Id.* at 220.

²⁵⁶ *Id.* at 223.

²⁵⁷ Schmitt, *supra* note 248, at 80.

²⁵⁸ *Id.* at 74.

²⁵⁹ *Id.* at 82.

“contingency operations.”²⁶⁰ The Senate passed the bill without significant modification.

While the House began to debate the Sessions bill, both the Department of Justice and Department of Defense raised objections to the bill’s amendments to the UCMJ.²⁶¹ Neither department supported extending court-martial jurisdiction, believing that any attempt to extend it to civilians would be unconstitutional.²⁶² Representatives of both departments, however, strongly supported the extension of federal criminal jurisdiction to cover civilians overseas.²⁶³ The proposed amendments to the UCMJ were summarily retracted as a result.

Removal of the proposed additions to the UCMJ removed the last major obstacle to the bill becoming a law. Eventually, the Department of Justice, Department of Defense, and the American Civil Liberties Union all publicly expressed support for the bill.²⁶⁴ The only notable opposition to the bill came from the Federal Education Association (FEA), the union representing teachers working on U.S. military bases. The FEA feared that if U.S. Attorneys were allowed to prosecute crimes allegedly committed overseas, teachers working on military bases could be transported back to the United States for pre-trial hearings even if the charges against them proved false.²⁶⁵ The bill was consequently amended to permit the initial hearing before a federal magistrate judge to take place over a video conferencing system.²⁶⁶ President Clinton signed the amended bill into law on November 22, 2000.

MEJA, as enacted, operates as an “assimilative statute.” That is, it does not define any new substantive crime, but expands the jurisdiction over which Title 18 applies.²⁶⁷ MEJA permits the arrest and temporary confinement of:

Whoever engages in conduct outside the United States that would constitute an offense punishable by imprisonment for more than 1 year if the conduct had been engaged in within the special maritime and territorial jurisdiction of the United

²⁶⁰ *Id.*

²⁶¹ *Id.* at 84.

²⁶² *Id.*

²⁶³ *Id.*

²⁶⁴ *Id.* at 111.

²⁶⁵ *Id.* at 95.

²⁶⁶ *Id.* at 99.

²⁶⁷ *Id.* at 114.

States while employed by or accompanying the Armed
Forces outside the United States²⁶⁸

MEJA narrowly defines “employed by the Armed Forces outside the United States” and “accompanying the Armed Forces outside the United States” to include only employees of the Department of Defense, contractors hired by the Department of Defense and their dependents, as well as the dependents of servicemembers.²⁶⁹ Once such a person is properly arrested, the arresting authority, whether civilian or military, must hold a hearing before a federal magistrate judge to show that probable cause exists to believe that the individual in fact committed a crime.²⁷⁰ MEJA permits the initial hearing to take place over telephone or a video conferencing system, but once it is shown that probable cause exists to believe that the defendant committed a crime, the defendant will be transported to the United States for a conventional federal criminal trial.

X. CURRENT ISSUES CONCERNING THE IMPLEMENTATION OF MEJA AND THE LEGAL STATUS OF CIVILIAN CONTRACTORS

MEJA provides a means of prosecuting crimes committed by civilian contractors and other civilians accompanying the armed forces abroad.²⁷¹ MEJA is, however, limited by the nature of federal criminal law and the lack of specific regulations concerning which federal agency should initiate prosecutions. Although federal regulations suggest that the Department of Defense should initiate investigations under the act, the Department of Justice is responsible for the ultimate prosecution of an offender.²⁷² The point at which the Department of Justice takes responsibility for the investigation is unclear. Lacking clear guidance as to the division of responsibility between

²⁶⁸ 18 U.S.C. § 3261(a)(1) (2000).

²⁶⁹ 18 U.S.C. § 3267(1)–(3) (2000).

²⁷⁰ 18 U.S.C. § 3265(a)–(b) (2000).

²⁷¹ Although adopted in 2000, the first prosecution under MEJA took place in 2004. The prosecution resulted in the conviction of an American woman for the murder of her husband, an Air Force sergeant, in Turkey. See David Rosenzweig, *Air Force Wife Guilty in Fatal Stabbing*, L.A. TIMES, Oct. 16, 2004, at B3; David Rosenzweig, *New Law Used in Murder Trial*, L.A. TIMES, July 14, 2004, at B6.

²⁷² U.S. DEP’T OF DEF., INSTR. 5525.11, CRIMINAL JURISDICTION OVER CIVILIANS EMPLOYED BY OR ACCOMPANYING THE ARMED FORCES OUTSIDE THE UNITED STATES, CERTAIN SERVICE MEMBERS, AND FORMER SERVICE MEMBERS (3 Mar. 2005).

the departments has resulted in the Department of Justice hesitating to initiate prosecutions under MEJA.²⁷³

While federal agencies eventually will develop procedures to implement MEJA, if only through trial and error, MEJA will continue to apply to a limited number of the contractors accompanying armed forces abroad. MEJA only applies to Department of Defense contractors. A State Department contractor providing diplomatic security, a Department of Justice contractor training foreign police officers, or a Central Intelligence Agency contractor questioning suspected terrorists would not be subject to MEJA, even if he or she were working alongside members of the military.²⁷⁴

Furthermore, MEJA criminalizes only “traditional” crimes.²⁷⁵ Objectionable behaviors, such as failure to follow military orders, are not federal crimes. The UCMJ, in contrast, criminalizes conduct such as failing to follow lawful orders or absenting oneself without leave.²⁷⁶ These “military offenses” qualify as criminal conduct because they adversely affect the functioning of a military unit. No comparable civilian crime exists or could exist.²⁷⁷ Generally, civilians are not expected to follow orders nor should they be expected to follow orders as if they were members of the military. Contractors accompanying military forces present more subtle issues. A contractor’s performance directly affects the success of a military mission. Where a contractor performs security functions, for example, successful performance ensures the physical safety of others. Modern warfare does not clearly distinguish between those at the front line and those in rear echelons. A contractor deployed with forces in a rear area may face the same level of danger as soldiers directly engaging a hostile force.

Thus, the traditional rationale for permitting military jurisdiction over contractors—the safety of the armed forces they accompany—is more relevant today than it may have been when the Supreme Court decided *Covert*. The often-cited opinion of the U.S. Attorney General during the Indian Wars bears

²⁷³ See Greg Jaffe et al., *Iraq Contractors Pose Problems*, WALL ST. J., May 4, 2004, at A4 (noting the Department of Justice’s reluctance to interfere with investigations initiated by other agencies).

²⁷⁴ See Andrew Higgins, *Contract Cops: As It Wields Power Abroad, U.S. Outsources Law and Order Work*, WALL ST. J., Feb. 2, 2004, at A1 (describing State Department activity in training law enforcement in Iraq).

²⁷⁵ It would, however, permit prosecutions of civilian-perpetrated war crimes under 18 U.S.C. § 2441 (Supp. 2002).

²⁷⁶ 10 U.S.C. § 892 (2000); 10 U.S.C. § 886 (2000).

²⁷⁷ See, e.g., *City of Chicago v. Morales*, 527 U.S. 41, 54–55 (1999) (describing the freedom of movement as an inherent right of a free citizen); see also, *Roberts v. U.S. Jaycees*, 468 U.S. 609, 618 (1984) (providing citizens have a freedom of association).

more than a passing resemblance to the current legal status of contractors.²⁷⁸ That opinion, which in part led to Article 2(10) of the UCMJ, considered the universality of the threat and the equal dangers that both soldier and civilian faced as rational justifications for permitting military jurisdiction over civilians.²⁷⁹

A battlefield contractor's tenuous relationship to military chains of command presents a further problem. Military personnel belong to a distinct chain of command. The distinct chain of command provides clear allocations of authority and responsibility.²⁸⁰ International law recognizes it as a defining characteristic of legitimate military organizations. When a member of a military unit commits an offense against the law of war, that member's superiors may be liable under the doctrine of command responsibility.²⁸¹

²⁷⁸ 14 Op. Att'y Gen. 22 (1872).

²⁷⁹ *Id.*; but see WINTHROP, *supra* note 125, at 101 (suggesting that the opinion was intended only to clarify the nature of the hostilities).

²⁸⁰ See, e.g., Gary Slyman, *Officers Have Exceptional Responsibility*, PROCEEDINGS, Oct. 2004, at 46 (providing an overview of command structures as a means of apportioning responsibility).

²⁸¹ Command responsibility remains a convoluted legal doctrine. It primarily derives from cases decided after World War II. A military tribunal found General Yamashita of the Imperial Japanese Army liable for atrocities committed by troops within his area of responsibility, reasoning that he either knew of their actions or should have known of their actions. The U.S. Supreme Court upheld the tribunal's reasoning and conclusion. *In re Yamashita*, 327 U.S. 1 (1946).

In contrast, the Nuremberg War tribunals applied more lenient standards. It applied an actual knowledge standard, derived from criminal law doctrines, in what became known as the "High Command" case. The tribunal reasoned that a court could not presume that a commander had knowledge of all his subordinates' activities. Only where his ignorance was willful, could he be liable for actions committed without his explicit approval. The German High Command Trial (Wilhelm Von Leeb and Thirteen Others) (U.S. Military Trib., Nuremberg Dec. 30, 1947–Oct. 28, 1948), *reprinted in* 12 THE UNITED NATIONS WAR CRIMES COMM'N, LAW REPORTS OF TRIALS OF WAR CRIMINALS 1, 76 (William S. Hein & Co., Inc. 1997) (1949).

The Nuremberg War tribunals later applied an intermediate standard of constructive knowledge in the "Hostages Case." It reasoned that knowledge of subordinate's activities could be imputed to a commander if reports generated in a military unit's daily activities could have transmitted information about war crimes. The Hostages Trial (Wilhelm List and Others) (U.S. Military Trib., Nuremberg July 8, 1947–Feb. 19, 1948), *reprinted in* 8 THE UNITED NATIONS WAR CRIMES COMM'N, LAW REPORTS OF TRIALS OF WAR CRIMINALS 34, 69–71 (William S. Hein & Co., Inc. 1997) (1949).

American military law has frequently acknowledged the almost strict liability standard of *Yamashita*, although in practice it has followed the lenient version of constructive knowledge described in the High Command case. See Major Michael L. Smidt, *Yamashita, Medina, and Beyond: Command Responsibility in Contemporary Military Operations*, 164 MIL. L. REV. 155 (2000); but see A. FRANK REEL, CASE OF GENERAL YAMASHITA (1949) (providing a critical account of Yamashita's trial, noting irregular procedures).

Who, if anyone, would be responsible for a contractor's offense against the law of war is unclear.²⁸²

Military personnel who do not perform their duties face disciplinary action under the UCMJ for failure to obey lawful orders. A civilian contractor faces no such threat. Historically, it might have been possible to bring criminal charges against a civilian for disobeying orders. Following the logic of the *diBartolo/McCune* line of cases, military authorities could exercise jurisdiction over civilians where a civilian was "completely integrated" into a military force. Integration also compelled a civilian to submit to military orders to the extent that military necessity required it. *McCune*, in particular, suggested that if the military contracted a civilian to perform a duty under the direct supervision of military authorities, that civilian's failure to follow military orders could be punished. The *diBartolo/McCune* cases effectively created the military-civilian hybrid condemned by Winthrop²⁸³ and the Supreme Court in *Covert*.²⁸⁴ Determining amenability to military jurisdiction by examining the facts surrounding a civilian's employment allowed the Court to permit military jurisdiction where convenient, but it violated the Constitution's conceptual separation of the military and civilian sectors.

The U.S. Supreme Court eliminated the expanded jurisdiction permitted by *diBartolo*, *McCune*, and later, the UCMJ in the cases following *Covert*. The Court of Military Appeals followed suit in *Averette*. A final conceptual restriction on military jurisdiction over civilians derived from *Solorio v. United States*.²⁸⁵ The Supreme Court's decision in *Solorio* connected military jurisdiction to the defendant's status as a member of the armed forces.²⁸⁶ Previously, military jurisdiction extended only to crimes considered "service connected."²⁸⁷ Replacing the service connection requirement with a strict status test echoed the rationale in *Covert*; namely, the principle that factual circumstances alone could not determine military jurisdiction. Hence, military jurisdiction extends only to active duty personnel, activated reservists, or federalized members of the National

²⁸² See, e.g., Admiral John Hutson, Analysis: Schlesinger Report, Online Question and Answer Session Moderated by LiveOnline, Washingtonpost.com (Aug. 25, 2004), www.washingtonpost.com/ac2/wp-dyn/A26850-2004Aug23 (discussing problems on mixed civilian-military commands).

²⁸³ WINTHROP, *supra* note 125, at 107.

²⁸⁴ *Kinsella v. Kruger*, 351 U.S. 470, 481 (1956).

²⁸⁵ *Solorio v. United States*, 483 U.S. 435 (1987).

²⁸⁶ *Id.*

²⁸⁷ *O'Callahan v. Parker*, 395 U.S. 258, 274 (1969). See also LURIE, *supra* note 236, at 211-14 (The Court of Military Appeals repeatedly criticized *O'Callahan* and argued that it hindered the effective application of military justice).

Guard.²⁸⁸ Such a narrow construction of military jurisdiction profoundly affects any possible jurisdiction over civilian contractors. After *Solorio*, no civilian is subject to military jurisdiction—no matter the factual circumstances of his or her employment.

The Supreme Court also soundly rejected arguments for expanded military jurisdiction based on the factual circumstances of a contractor's employment. Currently, the sole basis for military jurisdiction is the defendant's status. A defendant can be either a civilian or a member of the military. If the defendant is not a member of the military, a military court will not have jurisdiction. Article 2(10) of the UCMJ provided the only exception acceptable to the Supreme Court. Following the *Averette* decision, Article 2(10) became, essentially, a dead letter.

The Supreme Court, however, has never foreclosed jurisdiction under Article 2(10) of the UCMJ.²⁸⁹ It is not clear if the current Supreme Court would consider Article 2(10) constitutional even during wartime. The Supreme Court has developed a narrow interpretation of the 6th Amendment. It has understood the 6th Amendment to require juries to make any evidentiary findings that might enhance a criminal defendant's sentence.²⁹⁰ Nor may judges increase a sentence imposed by a jury in particularly heinous crimes.²⁹¹ Further, the Court's current interpretation of the 6th Amendment's right to confrontation has limited the admissibility of out-of-court statements in criminal trials.²⁹² Nonetheless, a narrow, almost literal reading of the 6th Amendment is not compatible with military criminal procedure.

Courts-martial do not provide for a traditional jury trial, a fact that informed the Supreme Court's decision in *Covert*. The current Supreme Court's understanding that "every defendant has the right to insist that the prosecutor prove to a jury all facts legally essential to the punishment," cannot be resolved with the use of military officers as fact-finders in courts-martial.²⁹³ Moreover, Justice Scalia's conclusion that before convicting a defendant, the Government should "suffer the modest inconvenience of submitting its

²⁸⁸ See DAVID A. SCHLUETER, *MILITARY CRIMINAL JUSTICE: PRACTICE AND PROCEDURE* §§ 4–5 to 4–6 (6th ed. 2004 & Supp. 2005); see also Major James Pottorff, Jr., *Solorio v. United States: the Supreme Court Reverses Direction on Jurisdiction Over Military Offenders in Civilian Communities*, 57 J. KAN. B. ASS'N., Oct. 1988, at 29 (discussing limited jurisdiction over reservists and National Guard members).

²⁸⁹ A fact some have interpreted to limit the holding of *Covert*. See Schwartz, *supra* note 2.

²⁹⁰ *Apprendi v. New Jersey*, 530 U.S. 466, 498 (2000).

²⁹¹ *Blakely v. Washington*, 542 U.S. 296, 315 (2004).

²⁹² *Crawford v. Washington*, 541 U.S. 36, 70 (2004).

²⁹³ *Blakely*, 542 U.S. at 315.

accusation to ‘the unanimous suffrage of twelve of his equals and neighbors’ rather than a lone employee of the State” suggests that deviations from traditional civilian criminal procedure will not be tolerated.²⁹⁴ Thus, the current Supreme Court’s interpretation of the 6th Amendment as a near-absolute guarantee of traditional civilian criminal procedure would foreclose even voluntary submission to military jurisdiction.

XI. CONCLUSION

Currently, MEJA provides the only means of prosecuting civilian contractors who accompany military forces abroad. MEJA does not allow for the prosecution of civilian contractors for military offenses such as dereliction of duty. If such offenses are to be punished, Title 18 must be amended.²⁹⁵ The Supreme Court’s long history of emphasizing a status-based test for military jurisdiction and traditional restrictions on military authority do not permit expanding military jurisdiction. Recent Supreme Court interpretations of the 6th Amendment foreclose the possibility that military jurisdiction might expand to cover civilian contractors. The shortcomings of MEJA, however, suggest that it should be revised to improve the ability of federal authorities to prosecute contractor misconduct. Specifically, the relationship between Department of Defense authorities and the U.S. Attorneys ultimately responsible for the prosecution should be clarified. The relationship between the military authorities relying on contractors and the civilian authorities responsible for criminal investigations needs to be incorporated into MEJA as well. Ultimately, MEJA and any other act that concerns the governance of civilians accompanying armed forces abroad must balance the critical role that civilian contractors play in the modern military with the traditional American limitations of the military justice system.

²⁹⁴ *Id.* (quoting WILLIAM BLACKSTONE, 4 COMMENTARIES *343).

²⁹⁵ See Joseph Perlak, *The Military Extraterritorial Jurisdiction Act of 2000*, 169 MIL. L. REV. 92, 126 (2001) (suggesting amendments to MEJA to enforce “contractor discipline”).

BOOK REVIEW
TORTURE: A COLLECTION
EDITED BY SANFORD LEVINSON
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Torture, perhaps the most notorious act a nation state can commit against any individual, is universally condemned. The 1987 *United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, which has been accepted and ratified by the United States Senate, specifically states: “No exceptional circumstances whatsoever, whether a state of war or threat of war, internal political stability or any other public emergency, may be invoked as a justification of torture.”¹ However, in a post 9/11 world, the question is being asked whether the threat of a catastrophic terrorist attack should trump this absolute ban. News reports about torture being used as an instrumentality in the war on terrorism are becoming as common as sports scores on the evening news. From the confirmation hearings of Attorney General Alberto Gonzales to the treatment and questioning of individuals detained during the ongoing war on terrorism, torture has been a prominent theme. In fact, CNN listed the Department of Justice’s Office of Legal Counsel memorandum on torture as one of the most important legal developments of 2004.² Despite its current notoriety and purported use, torture remains morally reprehensible and legally prohibited. Policy makers routinely reject its use, while those who engage in such acts are universally condemned and prosecuted. However, the United States is currently engaged in an international war against a stateless and lawless adversary. If a terrorist were to place a ticking bomb that could unleash chemical, biological, or nuclear catastrophe against thousands of innocents and

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¹ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted Dec. 10, 1984, S. Treaty Doc. No. 100-20 (1988), 1465 U.N.T.S. 113 (entered into force June 26, 1987) (entered into force for the United States on Nov. 20, 1994).

² Edward Lazarus, *2004’s Most Important Legal Developments*, CNN.COM, Dec. 28, 2004, <http://www.cnn.com/2004/LAW/12/28/lazarus.2004stories/index.html>.

the only method of locating the bomb in time to save a multitude of lives were to torture the terrorist, should such action be officially sanctioned, justified, or excused? This is the question posed by Sanford Levinson and addressed by the contributors to *Torture: A Collection*.

Torture: A Collection is a series of thought provoking essays that seeks to open a discussion about torture as an instrumentality of the State. The book is broken into four parts, opening with a series of essays addressing philosophical considerations about the use of torture. While recognizing torture as a great moral evil, the essays consider when such an evil practice can be engaged in or should be excused. The essays ask, and attempt to answer, the questions: Are there times when we should expect those who have accepted the responsibility of protecting the public to get their hands dirty? When they do, how should we judge them and how should they judge themselves? This discussion is followed by a series of essays about Torture as practiced.

Torture has always been a part of human history. The absolute prohibition against torture is a relatively recent innovation. During the middle ages, torture was an accepted part of criminal jurisprudence, and it has existed, both officially and unofficially, well into the twentieth century. The history of officially sanctioned torture, both past and present, as well as the mental state of torturers are discussed in the essays in Part II. The essays in this part move from historically remote examples and abstract discussions about torture as practiced towards more concrete and current examples of government sanctioned torture. Through the course of the discussion, it becomes increasingly clear, that it is not only corrupt governments and sadistic actors who commit acts of torture. Soldiers in Argentina's Dirty War truly thought, and were affirmed by members of the clergy, that they were engaged in a great holy struggle and would be absolved of their misdeeds. What constitutes torture is also less than clear. The physical abuses of the old "third degree" are clearly impermissible forms of physical abuse, but are they torture? How should more subtle forms of psychological coercion commonly used by police and other interrogators be considered? Finally, as the definition of torture is broadened, does it begin to weaken the efforts to outlaw the practice entirely?

Part III of the book reviews and critiques the contemporary attempts to abolish torture through law. Essays in this section address both the promise and limits of attempts to abolish torture as well as the possible legal justifications or defenses for those who engage in the practice of torture. One of the more interesting contributions to this section is a summarized opinion by the Supreme Court of Israel concerning the legality of interrogation methods

used by Israeli security services.³ Their analysis of this issue from the perspective of a democracy that has engaged in a longstanding battle against terrorism is certainly worth consideration in light of our nation's current predicament.

The final part of the book has several essays reflecting on the post-9/11 debate about legalizing torture. The part leads off with an essay by Alan Dershowitz arguing for the creation of a "torture warrant."⁴ Under his controversial suggestion, when it is necessary to torture a suspect, like in the ticking bomb case, officials should be able to go to a magistrate and apply for a warrant. Much like police get a warrant to search a house. Dershowitz, premising his thesis on the assumption that torture is already prevalent, asserts that bringing it out into the open in the suggested manner is the best way to preserve civil liberties. The essay that follows is by Elaine Scary, who points out many flaws in Dershowitz's "back to the future" solution for our modern day dilemma.⁵ Chief among these flaws are the unanswered questions: Does torture really work? Does torture provide timely and accurate information which could be used to stop a ticking time bomb?

The issues that are addressed in this book are important for policy makers, operators in the war on terror, and those who provide them legal advice. After the horrors that this nation suffered on 9/11, national security and our nation's response to security concerns have become national priorities. The public debate has already started to address how to balance our security needs against our democratic values that protect and preserve fundamental civil and human rights. In battling terrorism, the United States needs to recognize that not all practices employed by our enemies are open to a free and democratic society. As the Supreme Court of Israel stated in its opinion that disapproved of some of the General Security Service's interrogation methods: "Although a democracy must often fight with one hand tied behind its back, it

³ Supreme Court of Israel, *Judgment Concerning the Legality of the General Security Service's Interrogation Methods* (Sept. 6, 1999), in *TORTURE: A COLLECTION* 165 (Sanford Levinson ed., 2004).

⁴ Alan Dershowitz, *Tortured Reasoning*, in *TORTURE*, *supra* note 3, at 257.

⁵ Elaine Scary, *Five Errors in the Reasoning of Alan Dershowitz*, in *TORTURE*, *supra* note 3, at 281.

nonetheless has the upper hand. Preserving the Rule of Law and recognition of an individual's liberty constitutes an important component in its understanding of security. At the end of the day, they strengthen its spirit and its strength and allow it to overcome its difficulties."⁶ While this book offers no clear answers to where the line should be drawn, it is a good starting point for this very important discussion.

⁶ Supreme Court of Israel, *supra* note 3, at 181.

INFORMATION FOR AUTHORS

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