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# RESPONDING TO TRANSNATIONAL TERRORISM UNDER THE *JUS AD BELLUM*: A NORMATIVE FRAMEWORK

Michael N. Schmitt\*

## I. INTRODUCTION

On April 5, 1986, terrorists bombed Berlin's La Belle discotheque, a bar frequented by U.S. military personnel. One American soldier and one Turkish woman were killed and nearly 200 other patrons injured. Prior to the attack, U.S. intelligence intercepted communications to the Libyan People's Bureau in the city ordering an attack on Americans. Other intercepts, collected both before and after the bombing, further substantiated Libyan involvement.

Ten days later, the United States responded with Operation El Dorado Canyon, a strike involving some 200 aircraft targeting terrorist and Libyan government facilities in Tripoli and Benghazi, including a residence of Libyan leader Muammar el-Qaddafi. The international reaction was overwhelmingly critical. The United Nations General Assembly "condemned" the attack as "a violation of the Charter of the United Nations and of international law,"<sup>1</sup> while Secretary General Javier Perez de Cuellar publicly "deplored" the "military action by one member state against another."<sup>2</sup> The reaction of individual States, with the notable exceptions of the United Kingdom (from which some of the aircraft launched) and Israel, was likewise unsupportive.<sup>3</sup> Indeed, aircraft based in the United Kingdom had to transit the Strait of Gibraltar because the United

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<sup>1</sup> G.A. Res. 41/38, ¶ 1, U.N. Doc. A/RES/41/38 (Nov. 20, 1986).

<sup>2</sup> Elaine Sciolino, *Attack on Libya: The View from Capital Hill*, N.Y. TIMES, Apr. 16, 1986, at A17.

<sup>3</sup> For instance, Shimon Peres, the Israeli Prime Minister, stated "the American action benefited the whole free world, which was becoming more and more a victim of irresponsible terrorism. It is good that a major power like the United States took steps to cut off the arm of the terrorists, at least one of them." Jonathan Broder, *Israelis Praise It While Arabs Vow to Avenge It*, CHICAGO TRIB., Apr. 16, 1986, at A9. On the reaction to the strike, see W. Michael Reisman, *International Legal Responses to Terrorism*, 22 HOUS. J. INT'L L. 1, 33-34 (1999) for a description of the international reaction. See also Stuart G. Baker, *Comparing the 1993 U.S. Airstrike on Iraq to the 1986 Bombing of Libya: The New Interpretation of Article 51*, 24 GA. J. INT'L COMP. L. 99 (1994).

States could not secure overflight rights from countries, including NATO ally France, along the most direct route to the target area.<sup>4</sup>

Fifteen years later, on 11 September 2001, members of al Qaeda, a shadowy terrorist network operating from some 60 countries, seized control of four aircraft, flying two into the World Trade Center in New York City, and a third into the Pentagon. The fourth crashed in Pennsylvania following a valiant attempt by passengers to regain control of the aircraft. In all, nearly 3,000 people died, the citizens of over 100 nations. The financial impact of the attack has been estimated in the hundreds of billions of dollars.<sup>5</sup>

The United States and its coalition partners responded on October 7 by attacking both al Qaeda and Taliban targets in Afghanistan. Not only did the international community refrain from condemning Operation Enduring Freedom (OEF), but many States provided verbal and material support. The United Nations and other intergovernmental organizations treated the 9/11 terrorist strikes as meriting military action in self-defense, even as the United States ousted the Taliban regime, which no credible source cited as behind the attacks.<sup>6</sup> There is little question but that the international normative understandings regarding the application of the *jus ad bellum*, that component of international law which governs when States may resort to force, had changed dramatically. Large-scale transnational terrorism compelled the international community to discover a normative architecture governing the legal bases for counterterrorism that had theretofore been rather obscure. Specifically, although traditionally viewed as a matter for law enforcement, States and intergovernmental organizations now style terrorism as justifying, with certain conditions, the use of military force pursuant to the *jus ad bellum*. It is not so much that the law has changed as it is that existing law is being applied in a nascent context. In law, as in all other aspects of international security, what one sees depends on where one stands.

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<sup>4</sup> Military aircraft are permitted transit passage through international straits, i.e., a strait in territorial waters used for international navigation (including overlapping territorial waters of multiple States) linking two parts of the high seas (or exclusive economic zones). See THE COMMANDER'S HANDBOOK ON THE LAW OF NAVAL OPERATIONS (NWP 1-14M; MCWP 5-12.1; COMDTPUB P5800.7A) (2007), at para. 2.5.3.

<sup>5</sup> The Comptroller of New York City estimated the cost to the city alone at \$95 billion. Richard Wray, *NY Counts Cost of 9/11*, THE GUARDIAN UNLIMITED, Sept. 5, 2002, available at <http://www.guardian.co.uk/september11/story/0,11209,786326,00.html>. Financial losses and the cost to the U.S. government dwarfs that figure.

<sup>6</sup> For a discussion of these events and their legal implications, see Michael N. Schmitt, *Counter-Terrorism and the Use of Force in International Law*, 32 ISRAEL Y.B. HUM. RTS. 53 (2002).

## II. THE JUS AD BELLUM SCHEMA

Set out in the United Nations Charter, the *jus ad bellum* schema is linear. Pursuant to Article 2(4), States Party to the Charter agree to “refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.”<sup>7</sup> There are two universally accepted exceptions to the prohibition.

### A. Security Council Mandate

The first occurs when the Security Council determines pursuant to Article 39 that a breach of the peace, act of aggression, or threat to the peace exists.<sup>7</sup> Having made such a determination, and having attempted to resolve the situation through non-forceful measures as required by Article 41 (or determining that they would prove fruitless),<sup>8</sup> the Council may authorize the use of force to maintain or restore international peace and security pursuant to Article 42.<sup>9</sup> Such actions are known variously as Chapter VII, peace enforcement, or collective security operations.

In the eyes of the Security Council, international terrorism qualifies as a threat to international peace and security. It made exactly that finding the very day after the attacks of September 11. In Resolution 1368, the Council “[u]nequivocally condemn[ed] in the strongest terms the horrifying terrorist attacks which took place on 11 September 2001 in New York, Washington, D.C. and Pennsylvania and *regards* such acts, like any act of international terrorism, as a threat to international peace and security.”<sup>10</sup> Note the scope of the Council’s characterization of *any* act of international terrorism as a threat to international peace and security. It did so again on 28 September in Resolution

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<sup>7</sup> U.N. Charter, art. 2, para. 4.

<sup>7</sup> U.N. Charter, art. 39. “The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.”

<sup>8</sup> U.N. Charter, art. 41. “The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations.”

<sup>9</sup> U.N. Charter, art. 42. “Should the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations.”

<sup>10</sup> S.C. Res. 1368, ¶ 1, U.N. Doc. S/RES/1368 (Sept. 12, 2001).

1373, which encouraged international cooperation in the fight against terrorism, specifically through implementation of international conventions.<sup>11</sup>

On 12 November, the Council adopted Resolution 1377, to which a Ministerial-level declaration on terrorism was attached. The declaration branded international terrorism “one of the most serious threats to international peace and security in the twenty-first century,” declared it “a challenge to all States and to all of humanity,” reaffirmed the Council’s “unequivocal condemnation of all acts, methods and practices of terrorism as criminal and unjustifiable, regardless of their motivation, in all their forms and manifestations, wherever and by whomever committed,” and called on “all States to intensify their efforts to eliminate the scourge of international terrorism.”<sup>12</sup> Since then, the Security Council has characterized terrorist attacks as threats to international peace and security with great regularity: Bali (2002),<sup>13</sup> Moscow (2002),<sup>14</sup> Kenya (2002),<sup>15</sup> Bogotá (2003),<sup>16</sup> Istanbul (2003),<sup>17</sup> Madrid (2004),<sup>18</sup> London (2005),<sup>19</sup> and Iraq (2005).<sup>20</sup>

It is, therefore, irrefutable that international terrorism constitutes a qualifying condition precedent to Article 42 action. On repeated occasions, the Council, exercising its Chapter VII powers, has encouraged, and sometimes required, States to cooperate in combating international terrorism. Most notably, in Resolution 1373, it obliged them to, *inter alia*, prevent the financing of terrorism; criminalize the collection of funds for terrorist purposes; freeze the financial assets of anyone who participates in, or facilitates, terrorism; and take any steps necessary to prevent terrorist acts, including passing early-warning

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<sup>11</sup> S.C. Res. 1373, U.N. Doc. S/RES/1373 (Sept. 28, 2001). The resolution “reaffirmed” Resolution 1373, as well as S.C. Resolution 1269 (Oct. 19, 1999), which had “[u]nequivocally condemn[ed] all acts, methods and practices of terrorism as criminal and unjustifiable, regardless of their motivation, in all their forms and manifestations, wherever and by whomever committed, in particular those which could threaten international peace and security.” See also S.C. Res. 1455, U.N. Doc. S/RES/1455 (Jan. 17, 2003); S.C. Res. 1566, U.N. Doc. S/RES/1566 (Oct. 8, 2004); S.C. Res. 1526, U.N. Doc. S/RES/1526 (Jan. 30, 2004); S.C. Res. 1535, U.N. Doc. S/RES/1535 (Mar. 26, 2004); and S.C. Res. 1617, U.N. Doc. S/RES/1617 (July 29, 2005).

<sup>12</sup> S.C. Res. 1377, Annex, U.N. Doc. S/RES/1377 (Nov. 12, 2001). In 2003, the Council, meeting at the Foreign Minister Level, adopted a similar declaration. S.C. Res. 1456, U.N. Doc. S/RES/1456 (Jan. 20, 2003). At the 2005 Security Council Summit, Resolution 1624, U.N. Doc. S/RES/1624 (Sept. 14, 2005) was adopted, again calling on Member States to intensify their domestic and international efforts to combat terrorism.

<sup>13</sup> S.C. Res. 1438, U.N. Doc. S/RES/1438 (Oct. 14, 2002).

<sup>14</sup> S.C. Res. 1440, U.N. Doc. S/RES/1440 (Oct. 24, 2002).

<sup>15</sup> S.C. Res. 1450, U.N. Doc. S/RES/1450 (Dec. 13, 2002).

<sup>16</sup> S.C. Res. 1465, U.N. Doc. S/RES/1465 (Feb. 13, 2003).

<sup>17</sup> S.C. Res. 1516, U.N. Doc. S/RES/1516 (Nov. 20, 2003).

<sup>18</sup> S.C. Res. 1530, U.N. Doc. S/RES/1530 (Mar. 11, 2004).

<sup>19</sup> S.C. Res. 1611, U.N. Doc. S/RES/1611 (July 7, 2005).

<sup>20</sup> S.C. Res. 1618, U.N. Doc. S/RES/1618 (Aug. 4, 2005).

information to other States. Drawing on the recent Taliban experience, the Resolution additionally instructed States to “[r]efrain from providing any form of support, active or passive, to entities or persons involved in terrorist acts, including by suppressing recruitment of members of terrorist groups and eliminating the supply of weapons to terrorists”; “[d]eny safe haven to those who finance, plan, support, or commit terrorist acts, or provide safe havens; [p]revent those who finance, plan, facilitate or commit terrorist acts from using their respective territories for those purposes against other States or their citizens”; and “[e]nsure that any person who participates in the financing, planning, preparation or perpetration of terrorist acts or in supporting terrorist acts is brought to justice and ensure that, in addition to any other measures against them, such terrorist acts are established as serious criminal offences in domestic laws and regulations and that the punishment duly reflects the seriousness of such terrorist acts.”<sup>21</sup>

Although the Security Council has never expressly mandated the use of force in response to terrorism, it has taken measures short of that remedy. For instance, the Council directed non-forceful sanctions against both Libya and Sudan during the 1990s for their support of terrorism.<sup>22</sup> And in 1999, it imposed sanctions on the Taliban because, among other reasons, the regime was providing safe haven to Usama bin Laden and allowing him and his associates “to operate a network of terrorist training camps from Taliban-controlled territory and to use Afghanistan as a base from which to sponsor international terrorist operations.”<sup>23</sup> The sanctions included a ban on flights to and from Afghanistan and an international freeze on Taliban assets. Further sanctions were imposed in 2000 and a sanctions-monitoring mechanism was established in 2001.<sup>24</sup>

Few would contest the power of the Security Council to take the further step of authorizing force to counter terrorism, should it so deem necessary. It is important to understand that the Council enjoys unconditional authority to determine both when a situation constitutes a threat, breach, or act of aggression and whether to mandate the use of force in response. Once the Council grants a mandate, it is irreversible except by decision of the Council itself or upon occurrence of a termination condition, such as a cessation date, set forth in the

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<sup>21</sup> S.C. Res. 1373, ¶ 2(e), U.N. Doc. S/RES/1373 (Sept. 28, 2001).

<sup>22</sup> S.C. Res. 748, U.N. Doc. S/RES/748 (Mar. 31, 1992) (Libya); S.C. Res. 1054, U.N. Doc. S/RES/1054 (Apr. 29, 1996) (Sudan).

<sup>23</sup> S.C. Res. 1267, pmb1, U.N. Doc. S/RES/1267 (Oct. 15, 1999).

<sup>24</sup> S.C. Res. 1333, U.N. Doc. S/RES/1333 (Dec. 19, 2000); S.C. Res. 1363, U.N. Doc. S/RES/1333 (July 30, 2001).

Resolution in question.<sup>25</sup> No review mechanism exists to effectively challenge the Council's decision.

This being so, it would be entirely within the Security Council's prerogative to determine that any terrorist-related action amounted to a threat to international peace and security necessitating a forceful response. As an example, from 1998 through 2001, the Council frequently censured the Taliban regime over terrorism-related issues.<sup>26</sup> At any time during that period, the Council could have authorized the use of force against the Taliban, either to coerce the regime into compliance with its wishes or to remove it from power. It elected to not take such a dramatic step, even after the attacks of September 11. The key point is that the Council enjoyed the discretion to do so and, in the future, it may opt to exercise said power in the face of transnational terrorism posing catastrophic risks to the global community.

### **B. Self-Defense**

When the United States, United Kingdom, and other States attacked Afghanistan in 2001, they averred self-defense as the operation's legal basis. Self-defense constitutes the second express exception to the Charter prohibition on the use of force. A form of self-help in international law, it is a customary international law norm codified in Article 51 of the United Nations Charter.

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, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.

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<sup>25</sup> An example of expiration involved the U.N. Preventive Deployment Force (UNPREDEP) in the Former Yugoslav Republic of Macedonia. Its mandate, initially set out in S.C. Res. 983, U.N. Doc. S/RES/983 (Mar. 31, 1995), expired on February 28, 1999. China vetoed the resolution seeking extension, a move widely regarded as retaliation for Macedonia's establishment of diplomatic relations with Taiwan.

A resolution may also fall into desuetude when circumstances have so changed that the underlying logic and purpose of the resolution no longer resonate. However, absent that condition or a new resolution repudiating the original resolution "a presumption of continuity is plausible." See Adam Roberts, *Law and the Use of Force in Iraq*, SURVIVAL, June 2003, at 31, 43.

<sup>26</sup> S.C. Res. 1193, U.N. Doc. S/RES/1193 (Aug. 28, 1998); S.C. Res. 1214, U.N. Doc. S/RES/1214 (Dec. 8, 1998); S.C. Res. 1267, U.N. Doc. S/RES/1267 (Oct. 15, 1999); S.C. Res. 1333, U.N. Doc. S/RES/1333 (Dec. 19, 2000); S.C. Res. 1363, U.N. Doc. S/RES/1363 (July 30, 2001).

Note that self-defense may be exercised individually or collectively. Since not every State participating in OEF had been attacked on September 11, the Coalition operations launched on October 7 amounted to both collective defense and individual self-defense.

Operation Enduring Freedom was not the first instance of the United States claiming self-defense as a right in forcefully countering terrorism, although in previous decades it typically addressed transnational terrorism through the prism of law enforcement.<sup>27</sup> The international reaction to such assertion of self-defense has evolved steadily, an evolution that reflects a clear shift in the normative expectations regarding exercise of the right.

Recall Operation El Dorado Canyon in 1986, mentioned at the outset of this article. Following the attack, President Reagan announced that the United States had acted defensively: "Self-defense is not only our right, it is our duty. It is the purpose behind the mission undertaken tonight -- a mission fully consistent with Article 51 of the U.N. Charter."<sup>28</sup> As noted, the international community generally balked at this justification.

The United States again claimed the right to react to terrorism in self-defense when it uncovered an assassination plot against former President George Bush in 1993. In reporting to the Security Council that U.S. forces had replied by launching cruise missiles against Iraqi intelligence facilities, Madeline Albright, U.S. Ambassador to the United Nations, stated "I am not asking the Council for any action . . . but in our judgment every member here today would regard an assassination attempt against its former head of state as an attack against itself and would react."<sup>29</sup> International reaction was certainly more muted than it had been in response to El Dorado Canyon, a fact no doubt influenced by Iraq's status as an international pariah in the aftermath of events that had precipitated the First Gulf War, as well as that nation's non-compliance with the terms of the cease-fire.

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<sup>27</sup> In 1989, President George H.W. Bush elected not to respond militarily when terrorists blew up Pan American flight 103 over Lockerbie, Scotland. Two hundred and seventy people died in the attack. Instead, the United States mobilized international pressure that led to prosecution by a Scottish court sitting in the Netherlands. Extradition and criminal prosecution of those involved in the World Trade Center bombing, particularly Sheik Omar Abdel Rahman, was the chosen course of action.

<sup>28</sup> President Ronald Reagan, Address to the Nation (Apr. 14, 1986), in DEP'T STATE BULL., June 1986, at 1-2. See also, White House Statement, in DEP'T STATE BULL., June 1986, at 1. A suggestion that the motive was retaliation created some confusion: "Several weeks ago in New Orleans, I warned Colonel Qadhafi we would hold his regime accountable for any new terrorist attacks launched against American citizens. More recently, I made it clear we would respond as soon as we determined conclusively who was responsible...."

<sup>29</sup> Stanley Meisler, *U.N. Reaction Mild As U.S. Explains Raid*, L.A. TIMES, June 28, 1993, at A1.

In 1998, the United States again claimed a right to use defensive force following the bombings of U.S. embassies in Nairobi and Dar-es-Salaam. Albright, now Secretary of State, announced that "[I]f we had not taken this action, we would not have been exercising our right of self-defense . . . ."<sup>30</sup> A number of States, including Iran, Iraq, Libya, Pakistan, and Russia, condemned the response, which consisted of cruise missile strikes against terrorist camps in Afghanistan and a pharmaceutical plant in Sudan allegedly tied to terrorism.<sup>31</sup> However, a stream of criticism distinguishing between the two targets foreshadowed a shift in international normative expectations regarding forceful State responses to transnational terrorism. The League of Arab States, for example, criticised the strike into Sudan while offering no comment on that against targets in Afghanistan.<sup>32</sup> At the United Nations, Sudan, the Group of African States, the Arab League, and the Group of Islamic States asked the Security Council to investigate the Sudan attack, but remained silent over the companion operations against Afghanistan-based targets.<sup>33</sup> Perhaps most tellingly, in nearly every case, censure focused not on the fact that a forceful response to a terrorist attack had been mounted, but rather on a belief that the Sudan attack was based on faulty intelligence. In other words, there was implied acceptance of a State's right to react forcefully to terrorism pursuant to the law of self-defense, so long as the action is based on reliable information.

The acceptability of resorting to military force in response to transnational terrorism crystallized in the aftermath of 9/11. Prior to that event, many in the international legal community would still have urged that the international law of self-defense referred only to "armed attacks" by States or armed groups acting on behalf of a State. Violent acts by non-State actors remained the province of law enforcement.

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<sup>30</sup> Michael Lacey, *Self-Defense or Self-Denial, The Proliferation of Weapons of Mass Destruction*, 10 *IND. INT'L COMP. L. REV.* 293, 295 (2000), citing Interview by Dan Rather, CBS News, with Madeleine K. Albright, U.S. Secretary of State, (Aug. 21, 1998).

<sup>31</sup> Sean D. Murphy, *Contemporary Practice of the United States Relating to International Law*, 93 *AM. J. INT'L L.* 161, 164-65 (1999).

<sup>32</sup> Letter from the Chargé d'Affaires A.I. of the Permanent Mission of Kuwait to the United Nations Addressed to the President of the Security Council, U.N. Doc. S/1998/789 (Aug. 21, 1998).

<sup>33</sup> Letter from the Permanent Representative of the Sudan to the United Nations Addressed to the President of the Security Council, U.N. Doc. S/1998/786 (Aug. 21, 1998); Letter from the Permanent Representative of Namibia to the United Nations Addressed to the President of the Security Council, U.N. Doc. S/1998/802 (Aug. 25, 1998) (conveying Group of African States request); Letter from the Chargé d'Affaires of the Permanent Mission of Kuwait to the United Nations Addressed to the President of the Security Council, U.N. Doc. S/1998/791 (Aug. 21, 1998) (conveying League of Arab States request); Letter from the Chargé d'Affaires A.I. of the Permanent Mission of Qatar to the United Nations Addressed to the President of the Security Council, U.N. Doc. S/1998/790 (Aug. 21, 1998) (conveying Group of Islamic States request).

However, within a day of the attacks, and at a time when no one was suggesting a State was behind them, the Security Council adopted Resolution 1368, in which it recognized the inherent right of individual or collective self-defense.<sup>34</sup> This action suggested that the Council now understood the law of self-defense as extending to terrorism, at least of the kind mounted on September 11. Lest the resolution be styled merely an emotive reaction to the events of the previous day, on September 28 the Council again affirmed the right of self-defense in Resolution 1373.<sup>35</sup> Other international organizations took exactly the same approach. For instance, both NATO and the Organization of American States activated the collective defense provisions of their respective treaties.<sup>36</sup> So too did Australia vis-à-vis the ANZUS Pact.<sup>37</sup> Bilateral support for the prospective U.S. exercise of its self-defense rights was equally widespread, as 27 nations granted overflight and landing rights to U.S. military aircraft and 46 issued declarations of support. Quite simply, it was universally accepted that a military response in self-defense would be appropriate and lawful.

On October 7, U.S. and Coalition forces launched that response. U.S. Ambassador to the United Nations John Negroponte contemporaneously notified the Security Council, as required by Article 51, that the United States was exercising its right to self-defense.

In accordance with Article 51 of the Charter of the United Nations, I wish, on behalf of my Government, to report that the United States of America, together with other States, has initiated actions in the exercise of its inherent right of individual and collective self-defense following the armed attacks that were carried out against the United States on 11 September 2001.

... Since 11 September, my Government has obtained clear and compelling information that the Al-Qaeda organization, which is supported by the Taliban regime in Afghanistan, had a central role in the attacks. There is still much we do not know. Our inquiry is in its early stages. We may find that our self-defense requires further actions with respect to other organizations and other States.

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<sup>34</sup> S.C. Res. 1368, U.N. Doc. S/RES/1368 (Sept. 12, 2001).

<sup>35</sup> S.C. Res. 1373, U.N. Doc. S/RES/1373 (Sept. 28, 2001).

<sup>36</sup> North Atlantic Treaty, art. 5, Apr. 4, 1959, 63 Stat. 2241, 2244, 34 U.N.T.S. 243, 246; Press Release, NATO, Statement by the North Atlantic Council (Sept. 12, 2001); Inter-American Treaty of Reciprocal Assistance, art. 3.1, Sept. 2, 1947, 62 Stat. 1681, 1700, 21 U.N.T.S. 77, 93; Terrorist Threat to the Americas, Res. 1, Twenty-fourth Meeting of Consultation of Ministers of Foreign Affairs, Terrorist Threat to the Americas, OAS Doc. RC.24/RES.1/01 (Sept. 21, 2001).

<sup>37</sup> Security Treaty, U.S.-Aust.-N.Z., art. IV, Sept. 1, 1951, 3 U.S.T. 3420, 3423, 131 U.N.T.S. 83, 86; Brendan Pearson, *PM Commits to Mutual Defence*, AUSTRALIAN FIN. REV., Sept. 15, 2001, at 9.

The attacks on 11 September 2001 and the ongoing threat to the United States and its nationals posed by the Al-Qaeda organization have been made possible by the decision of the Taliban regime to allow the parts of Afghanistan that it controls to be used by this organization as a base of operation. Despite every effort by the United States and the international community, the Taliban regime has refused to change its policy. From the territory of Afghanistan, the Al-Qaeda organization continues to train and support agents of terror who attack innocent people throughout the world and target United States nationals and interests in the United States and abroad.

In response to these attacks, and in accordance with the inherent right of individual and collective self-defense, United States armed forces have initiated actions designed to prevent and deter further attacks on the United States. These actions include measures against Al-Qaeda terrorist training camps and military installations of the Taliban regime in Afghanistan....<sup>38</sup>

Despite the fact that the attacks fell on not only al Qaeda, but also the *de facto* government of Afghanistan, the Taliban, criticism was nowhere to be heard. On the contrary, support for the operations was effusive. The United Kingdom participated from the beginning, and Australia, Canada, the Czech Republic, Germany, Italy, Japan, the Netherlands, New Zealand, Turkey, and the United Kingdom offered ground troops.<sup>39</sup> Georgia, Oman, Pakistan, the Philippines, Qatar, Saudi Arabia, Tajikistan, Turkey, and Uzbekistan opened airspace and provided facilities to support operations.<sup>40</sup>

Further, the claim of the right to act in self-defense engendered *de minimis* controversy. China and Russia endorsed the operations, as did Arab states such as Egypt.<sup>41</sup> International organizations were likewise sympathetic to the position. The European Union "confirmed its staunchest support for the military operations . . . which are legitimate under the terms of the United Nations Charter and of Resolution 1368 of the United Nations Security

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<sup>38</sup> Letter from The Permanent Representative of the United States of America to the United Nations Addressed to the President of the Security Council, U.N. Doc S/2001/946 (Oct. 7, 2001), 40 I.L.M. 1281 (2001).

<sup>39</sup> Sean D. Murphy, *Contemporary Practice of the United States Relating to International Law*, 96 AM. J. INT'L L. 237, 248 (2002).

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

<sup>41</sup> *Id.*

Council."<sup>42</sup> The United Nations Security Council continued to adopt resolution after resolution reaffirming the right to self-defense, thereby implicitly accepting the Coalition operations as legitimate and lawful.<sup>43</sup> Even the Organization of the Islamic Conference seemed to approve, simply urging the United States not to expand operations beyond Afghan territory.<sup>44</sup>

Of course, that the United States had acted militarily in self-defense did not preclude it and its partners around the world from taking other measures. For instance, the Security Council imposed financial sanctions on Afghanistan in Resolution 1373, Saudi Arabia and the United Arab Emirates broke off diplomatic relations with the already isolated regime, and the largest international cooperative law enforcement effort in history was (and continues to be) mounted to identify, locate, arrest, and prosecute terrorists. However, with 9/11, international law became unequivocal vis-à-vis the propriety of using armed force to counter transnational terrorism. The military has been added as yet another arrow in the quiver of international counter-terrorism strategy.<sup>45</sup>

### 1. Self-Defense Against Non-State Actors

Despite a paucity of scholarly or policy attention to self-defense against armed attacks by non-State actors acting autonomously from a State, extension of the right to such situations is supportable as a matter of law, not mere political expediency. In particular, note that Article 51 makes no mention of the nature of the entity that commits the offending armed attack, whereas the Article 2(4) prohibition on the use of force specifically refers to “Member states” acting in their “international relations” (i.e., against other States). This suggests there is no limitation on the use of defensive force against entities other than States, a position supported by the fact that neither Article 39 nor 41, which appear in the same chapter as 51, refer to States. Indeed, the Security Council has never restricted enforcement actions to those directed against States. For instance, it has created international tribunals to prosecute individuals charged with crimes against humanity, war crimes, and genocide.<sup>46</sup> It would be incongruous to suggest that Article 51 should be interpreted differently.

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<sup>42</sup> Declaration by the Heads of State or Government of the European Union and the President of the Commission: Follow-up to the September 11 Attacks and the Fight Against Terrorism, at 1, SN 4296/2/01 Rev. 2 (Oct. 19, 2001).

<sup>43</sup> E.g., S.C. Res. 1378, U.N. Doc S/RES/1378 (Nov. 14, 2001); S.C. Res. 1386, U.N. Doc. S/RES/1386 (Dec. 20, 2001); S.C. Res. 1390, U.N. Doc. S/RES/1390 (Jan. 28, 2002).

<sup>44</sup> Daniel Williams, *Islamic Group Offers U.S. Mild Rebuke*, WASH. POST, Oct. 11, 2001, at A21.

<sup>45</sup> Of course, the military is used in many nations for counter-terrorist purposes. What is new is the treatment of counter-terrorism as a classic military operation rather than “assistance to law enforcement.”

<sup>46</sup> International Criminal Tribunal for the Former Yugoslavia, S.C. Res. 827, U.N. Doc. S/RES/827 (May 25, 1993); International Criminal Tribunal for Rwanda, S.C. Res. 955, U.N. Doc. S/RES/955 (Nov. 8, 1994).

Curiously, the International Court of Justice appears to have done just that in its Advisory Opinion on *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*.<sup>47</sup> There, the majority opined that Article 51 was irrelevant because Israel did not avow that the terrorist attacks the wall was intended to thwart were imputable to a foreign State.<sup>48</sup> In doing so, the Court seemed to strictly apply, without directly referencing, its holding in *Military and Paramilitary Activities in and Against Nicaragua*. In *Nicaragua*, the Court found that actions of irregulars could constitute an armed attack if they were “sen[t] by or on behalf” of a State and if the “scale and effects” of the action “would have been classified as an armed attack . . . had it been carried out by regular armed forces.”<sup>49</sup>

Judges Higgins, Kooijmans, and Buergenthal rejected the majority position, correctly pointing to: 1) the absence of mention of a State as the originator of an armed attack in Article 51 and 2) the clear intent of the Security Council to treat terrorist attacks as armed attacks (expressed, *e.g.*, in Resolutions 1368 and 1373).<sup>50</sup> Moreover, the question in the two ICJ cases differed materially. In *Nicaragua*, the issue was when did a State’s support of guerrillas justify imputing their acts to the State, such that the victim could respond in self-defense (individually or collectively) directly against the supporter. The Court did not address the issue at hand in the *Wall* case, *i.e.*, whether the actions of a non-State actor justified the use of force directly against that actor in self-defense.

In this regard, the one point of agreement in the *Wall* opinion was that acts against which the State is responding in self-defense have to be mounted from outside the State (unless they can be imputed to another State) before triggering the right to self-defense. The majority used this as a second basis for rejecting Israel’s claim to self-defense. It distinguished the situation “contemplated by Security Council resolutions 1368 (2001) and 1373 (2001),” arguing that “Israel exercises control in the Occupied Palestinian Territory” and “the threat which it regards as justifying the construction of the wall originates within, and not outside, that territory.”<sup>51</sup> Judges Buergenthal and Higgins both (correctly) contested the Court’s extension of the principle to occupied

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<sup>47</sup> *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion (International Court of Justice, July 9, 2004), 43 INT’L LEGAL MATERIALS 1009 (2004).

<sup>48</sup> *Id.* at para. 139, 43 I.L.M. at 1050.

<sup>49</sup> *Military and Paramilitary Activities in and Against Nicaragua* (Nicar. v. U.S.), Merits, 1986 I.C.J. Rep. 14 (June 27), at para. 195.

<sup>50</sup> *Construction of a Wall*, *supra* note 47, Sep. Op. Judge Higgins, para. 33; Sep. Op. Judge Kooijmans, para. 35; Decl. Judge Buergenthal, para. 6.

<sup>51</sup> *Id.*, Advisory Opinion at para. 139.

territories. In their view, attacks originating therein meet the external attack criterion.<sup>52</sup> The caveat of occupied territory aside though, terrorism occurring wholly within the State does not implicate the right of self-defense. Rather, it falls within the purview of domestic criminal law and, in certain circumstances, the law of non-international armed conflict.

## 2. The Nature of an “Armed Attack”

It is now clear that terrorists may launch armed attacks as that phrase is understood in the Article 51 context. However, this leaves open the question of what constitutes an “armed attack.”

Article 2(4) prohibits certain “uses of force”, whereas the Article 51 condition precedent is an “armed attack.” The distinction is constitutively logical. The Charter was meant to create an organization and set norms that would “save succeeding generations from the scourge of war.”<sup>53</sup> Thus, the drafters set a low threshold for prohibited uses of force by States, while establishing a higher one before a State could use defensive force, absent United Nations acquiescence. In light of the different standards, uses of force that do not rise to the armed attack level must a priori exist. Although Article 2(4) applies only to States, the difference is relevant to this inquiry because there would perform be “uses of force” by terrorists that would not activate the right to self-defense, thereby limiting the victim State’s response to one of classic law enforcement measures.

In 1974, the General Assembly embraced the notion of a gap, albeit in the context of a use of force not amounting to an act of aggression. Article 2 of the Resolution on Aggression stated that the Security Council could “conclude that a determination that an act of aggression has been committed would not be justified in the light of other relevant circumstances, including the fact that the acts concerned or their consequences are not of sufficient gravity.”<sup>54</sup> In Article 3(g), it included as an example of aggression “[t]he sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein.” By this standard, there are self-evidently uses of armed force that do not rise to the level of aggression because they are insufficiently grave.

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<sup>52</sup> *Id.*, Sep. Op. Judge Higgins, para. 34; Decl. Judge Buergenthal, para. 6.

<sup>53</sup> U.N. Charter, pmbl.

<sup>54</sup> G.A. Res. 3314, Annex, Art. 2, U.N. Doc. A/???? (XXIX) (Dec. 14, 1974), annexed Definition of Aggression.

In *Nicaragua*, the International Court of Justice specifically addressed the gap when it distinguished between “the most grave forms of the use of force (those constituting an armed attack)” and other “less grave forms.”<sup>55</sup> In 2003, the Court, in *Case Concerning Oil Platforms*, referred approvingly to the “most grave forms” approach.<sup>56</sup>

The *Nicaragua* Court found that arming guerrillas and providing them logistic support might be a use of force, but did not constitute an armed attack.<sup>57</sup> As noted, it also stated that armed attacks were actions of particular “scale and effects,” distinguishing them from “mere frontier incidents[s],”<sup>58</sup> a distinction Professor Dinstein famously dismisses.

[U]nless the scale and effects are trifling, below the de minimis threshold, they do not contribute to a determination whether an armed attack has unfolded. There is certainly no cause to remove small-scale armed attacks from the spectrum of armed attacks.”<sup>59</sup>

In the context of State-on-State hostilities, there is much to recommend Professor Dinstein’s rejection of the Court’s suggestion that violence must rise above a certain level.<sup>60</sup> Yet, the Court’s scale and effects criterion makes sense in the case of non-State actors. For States, the only options in the face of attack are self-defense (including the collective variant) and Security Council enforcement action. Since the Council has a less than august record in coming to the rescue of States under attack, the notion of limiting a State’s recourse to defensive force is disquieting. By contrast, a rather robust law enforcement regime exists to deal with minor attacks by terrorists and other non-State actors.

<sup>55</sup> *Nicaragua*, *supra* note 49, para. 191.

<sup>56</sup> *Oil Platforms* (Iran v. U.S.), Merits, 2003 I.C.J. 161, para. 51 (Nov. 6).

<sup>57</sup> *Nicaragua*, *supra* note 49, para. 195.

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

<sup>59</sup> Yoram Dinstein, *WAR, AGGRESSION, AND SELF-DEFENCE* 195 (4<sup>th</sup> ed. Cambridge 2005).

<sup>60</sup> One wonders if the criticism would have been tempered had the Court included a State intent requirement. At the risk of oversimplifying, an armed attack is an intentional military attack or other intentional act resulting in, or designed to result in, immediate violent consequences (such as a computer network attack causing physical damage). For a discussion of this point, see Michael N. Schmitt, *Computer Network Attack and Use of Force in International Law: Thoughts on a Normative Framework*, 37 COLUM. J. TRANSNAT’L L. 885 (1999). Viewed in this way, the distinction between training guerrillas and sending them out to do one’s bidding makes sense. It also explains the Court’s rather curious, and certainly confusing, reference to frontier “incidents.” Frontier incidents are usually brief encounters between forces facing each other across a border. They seldom represent a conscious strategic decision to initiate international armed conflict. Rather, they tend to be unplanned or, at most, communicative in nature. In the latter case, the intent is often to *avoid* conflict by signalling the seriousness of the dispute at hand. Of course, the fact that an incident does not amount to an armed attack in the Article 51 sense does not deprive those facing the violence of their right to defend themselves in individual self-defense.

This being so, the Court's "scale and effects" requirement is far less worrisome in the case of terrorism.

The right to act in self-defense against terrorists is not unfettered. All defensive uses of force, including those directed against non-State actors, must meet three criteria – necessity, proportionality, and immediacy – that derive from the 19<sup>th</sup> century "Caroline Case" and the ensuing exchange of diplomatic notes between the United States and United Kingdom. There, Secretary of State Daniel Webster opined that defensive actions must reflect a "necessity of self-defense, instant, overwhelming, leaving no moment for deliberation."<sup>61</sup> The I.C.J. has recognized the applicability of the first two criteria on multiple occasions. In *Nicaragua*, the Court confirmed their status as customary international law.<sup>62</sup> It extended them to Article 51 self-defense in the advisory opinion, *Legality of the Threat or Use of Nuclear Weapons*.<sup>63</sup> Lest there be any doubt, the Court confirmed the requirements in its *Oil Platforms* judgment.<sup>64</sup>

### 3. The Necessity Criterion

The first of the principles, necessity, requires there to be no viable option other than force to deter or defeat the armed attack. This is a critical criterion in the context of terrorism. If law-enforcement measures (or other measures short of self-defense) will assuredly foil a terrorist attack *on their own*, forceful measures in self-defense may not be taken. The issue is not whether law enforcement officials are likely to bring the terrorists to justice, but instead whether, with a reasonable degree of certainty, law enforcement actions alone will protect the target(s) of the terrorism. For instance, if members of a terrorist cell can confidently be arrested, that action must be taken in lieu of a military attack designed to kill its members. Factors such as risk of the terrorists eluding capture and the degree of danger involved in the capture are certainly relevant.

Not only must there be confidence of success, law enforcement must alone be capable of deterring or defeating the threat (or ongoing attack) before actions in self-defense are ruled out. The attacks of September 11 triggered the most intensive international law enforcement operations in history, largely targeted at al Qaeda or its affiliates. Yet, al Qaeda remained active, launching numerous spectacular attacks in the wake of 9/11. This being so, it is plain that

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<sup>61</sup> 30 BRIT. FOREIGN ST. PAPERS 193 (1843), reprinted in Jennings, *The Caroline and McLeod Cases*, 32 AM. J. INT'L L. 82, 89 (1938).

<sup>62</sup> *Nicaragua*, *supra* note 49, para. 194.

<sup>63</sup> *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 I.C.J. 226, (July 8), at para. 41.

<sup>64</sup> *Oil Platforms*, *supra* note 56, paras. 43, 73-74, 76.

military operations launched in self-defense against the organization and its operatives met the necessity criterion.

#### 4. The Proportionality Criterion

The proportionality criterion addresses the issue of how much force is permissible in self-defense. It is widely misunderstood. Proportionality does not require any equivalency between the attacker's actions and defender's response. Such a requirement would eviscerate the right of self-defense, particularly in the terrorist context. For instance, terrorists may conduct a series of isolated bombings, yet the only way to preclude follow-on attacks, since surprise is their *modus operandi*, would be major air strikes against their base camps. Surely, it would be absurd to suggest that the greater use of force by the victim State is unlawful.

Instead, proportionality limits defensive force to that required to repel the attack. This may be less or more than used in the armed attack that actuated the right to self-defense; in essence, the determination is an operational one. The availability of other options, especially law enforcement, would in part determine the permissible quantum and nature of the force employed. To the extent that law enforcement is likely to prevent follow-on attacks, the acceptability of large-scale military operations drops accordingly.

#### 5. The Immediacy Criterion

The third criterion, immediacy, imposes a temporal limitation on self-defense, both in advance of an attack and following one. The first issue is when does the right to act in self-defense mature? Professor Dinstein has conspicuously criticized notions of a right to anticipatory self-defense, i.e., defensive actions in anticipation of an attack. Instead, he asseverates that such actions may be "interceptive" at most. Professor Dinstein explains that "an interceptive strike counters an armed attack which is in progress, even if it is still incipient: the blow is 'imminent' and practically 'unavoidable.'"<sup>65</sup>

Professor Dinstein's view of "in progress" is markedly broad:

The crux of the issue, therefore, is not who fired the first shot but who embarked upon an apparently irreversible course of action, thereby crossing the legal Rubicon. The casting of the die, rather than the actual opening of fire, is what starts the armed attack. It would be absurd to require that the defending State should sustain and absorb a

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<sup>65</sup> Dinstein, *supra* note 59, at 191.

devastating (perhaps a fatal) blow, only to prove the immaculate conception of self-defence.<sup>66</sup>

It is so broad, that it embraces many actions that other scholars might well label “anticipatory.”

Ascertaining when the “die has been cast” in instances of terrorism will prove far more challenging than in the cases of attacks launched by States. With attacks by States, there are often transparent activities of indications and warnings value: heightened political tensions, call-up of reserve forces, movement of forces towards the border, stand-down of air units, warships putting to sea, etc. Although it may be impossible to know the precise moment the blow will fall, the opponent will usually have a rough sense of when the attacker might cross the Rubicon. This is especially true in an era of global mass media, instant communications, and commercially available satellite imagery.

Terrorism affords no such transparency. On the contrary, a defining characteristic of terrorist attacks is the absence of warning. As the target State usually enjoys a dramatic advantage in force capabilities, surprise is typically the only option available to counter the terrorist group’s asymmetrical disadvantage. Ominously, given growing terrorist access to weapons of mass destruction, miscalculation as to when a terrorist group is entering the Rubicon’s waters may prove catastrophic.

This was a point expressly made in the U.S. National Security Strategy of 2002. In that document, President Bush argued that the confluence of transnational terrorism and weapons of mass destruction necessitated a rethinking of the concept of anticipatory self-defense:

For centuries, international law recognized that nations need not suffer an attack before they can lawfully take action to defend themselves against forces that present an imminent danger of attack. Legal scholars and international jurists often conditioned the legitimacy of preemption on the existence of an imminent threat—most often a visible mobilization of armies, navies, and air forces preparing to attack.

We must adapt the concept of imminent threat to the capabilities and objectives of today’s adversaries. Rogue states and terrorists do not seek to attack us using conventional means. They know such attacks would fail. Instead, they rely on acts of terror and, potentially, the use

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

of weapons of mass destruction—weapons that can be easily concealed, delivered covertly, and used without warning...

The United States has long maintained the option of preemptive actions to counter a sufficient threat to our national security. The greater the threat, the greater is the risk of inaction—and the more compelling the case for taking anticipatory action to defend ourselves, even if uncertainty remains as to the time and place of the enemy's attack. To forestall or prevent such hostile acts by our adversaries, the United States will, if necessary, act preemptively.<sup>67</sup>

As a practical matter, the President was, of course, correct. In the unique circumstances of 21<sup>st</sup> century terrorism, target States will seldom know where and when an attack is to occur until it is too late. Yet, it would be foolhardy to wait until the launch of a particular terrorist strike before acting in self-defense.

How, then, should the legality of interceptive (anticipatory) counter-terrorist actions be measured? International law must always be interpreted in light of the context to which it is being applied and with sensitivity to the underlying purpose of the norm in question. In particular, as a form of self-help, self-defense has to be construed in a way that renders it meaningful; self-help must help.

In the context of terrorism, it is essential to bear the very *raison d'être* of terrorist groups—conducting violent attacks on States and/or societies—in mind when assessing the propriety of anticipatory action. Even though the timing and location of an attack may be uncertain, there is near certainty that an attack will be conducted since that is the group's very purpose. This fact distinguishes armed attacks conducted by States from those mounted by terrorists. States perform useful functions in the international system; indeed, the global architecture relies on States. That being so, a *rebuttable* presumption that States will act in accordance with international norms, especially those governing the use of force, attaches; hence the normative concerns about acting precipitously in self-defense.

Such presumptions cannot logically attach to terrorist groups. On the contrary, an *irrebuttable* presumption that the organization will act outside the law should be at play. This reality shapes the interpretation of what it means to say a terrorist group has crossed the Rubicon. Under such circumstances, it is reasonable to characterize the convergence of two factors as the “launch” of a

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<sup>67</sup> The White House, THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA (Sept. 2002), at 15 [hereinafter The White House, NATIONAL SECURITY STRATEGY OF 2002].

terrorist attack justifying interceptive (anticipatory) action: 1) formation of a group with an avowed purpose of carrying out attacks, and 2) acquisition (or material steps towards the acquisition) of the means to carry out such an attack. A combination of will and capability must coincide.

Lest there be concern this standard sets the threshold for action in self-defense too low, recall that immediacy is but one of the three criteria applicable in defensive actions. In particular, necessity, with its requirement that law enforcement not suffice to prevent terrorist acts, serves as a brake on precipitous actions by the State. Combining these requirements, interceptive (anticipatory) self-defense against terrorists is appropriate and lawful when a terrorist group harbors both the intent and means to carry out attacks, there is no effective alternative for preventing them, and the State must act now or risk missing the opportunity to thwart the attacks. It is action during the last viable window of opportunity a State has to defend itself. In the shadowy and secretive world of transnational terrorism, that window can close long before a terrorist strike takes place. Stated bluntly, when the opportunity presents itself, it may be necessary, and lawful, to kill a terrorist that you cannot capture, even though you do not know precisely when and where he or she will strike.

The other side of the coin is the question of when terrorists may be struck *after* they act. This is an important query, for in most terrorist acts, the attackers escape. When they do not, as in the case of suicide bombings, the organization of which they are members lives on.

Professor Dinstein has sagely contended that although “[w]ar may not be undertaken in self-defense long after an isolated armed attack,” “a war of self-defence does not have to commence within a few minutes, or even a few days, from the original attack . . . . [E]ven when the interval between an armed attack and a recourse to war of self-defence is longer than usual, the war may still be legitimate if the delay is warranted by the circumstances.”<sup>68</sup> In other words, he reasonably suggests a test of reasonableness in light of the circumstances prevailing at the time.

But this is a State-centric analysis. It presumes that at a certain point, self-defense is inappropriate because States should defer to non-forceful means of settling their disputes. Such a presumption does not apply to cases of transnational terrorism; the terrorist group would disband if it did not intend to continue the violence. Unlike States, and by definition, the mere existence of the group means the dispute between it and the State(s) will remain violent. The

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<sup>68</sup> Dinstein, *supra* note 59, at 242-243.

one exception is a terrorist group that morphs into a political organization, as some have suggested (rather optimistically) Hamas is doing.

This being so, it does not make sense to treat multiple terrorist strikes by the same terrorist organization (or network such as al Qaeda) as isolated acts to which the law of self-defense applies separately. Rather, it is more appropriate to characterize them as a continuous attack, much as individual and distinct tactical engagements coalesce into a military campaign. Just as there are tactical pauses in military campaigns, so related terrorist attacks are often separated by periods during which the terrorist regroup and plan their next attack. For instance, experts trace attacks by al Qaeda against U.S. assets back at least to the early 1990s.<sup>71</sup> Sadly, they will likely stretch some distance into the future.

Considered in this way, the immediacy criterion applies only to the first in an anticipated series of attacks. The remainder comprise a continuing terrorist campaign entitling the State to an extended period of self-defense. The criteria of necessity and proportionality continue to apply, for measures such as law enforcement may remain viable and useful. In this sense, a defensive “war” against a terrorist group differs from an all-out “war” of self-defense in response to, e.g., a major invasion by the military forces of a neighbouring State. In the latter case, the application of the criteria of necessity and proportionality differs, for necessity is self-evident once the attacker crosses the border and concerns about proportionality recede as the State’s survival is placed at risk.<sup>72</sup>

#### 6. The Situs of Counter-Terrorist Operations

More sensitive than the issue of when counterterrorist operations may be mounted, is that of where they may occur. Obviously, a State may conduct them on its own territory or the territory of another State that has consented. Thus, for instance, the 2002 strike against al Qaeda operatives in Yemen with the consent and cooperation of Yemeni intelligence was lawful, at least as to its venue.<sup>73</sup> Counter-terrorist operations may also occur on the high seas, for it is accepted customary international law that States may engage in military action beyond the territorial waters of neutral States, so long as they act with due regard to the rights of others.<sup>74</sup>

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<sup>71</sup> Schmitt, *supra* note 6, at 56.

<sup>72</sup> The International Court of Justice hinted at this point in its *Nuclear Weapons* Advisory Opinion: “[T]he Court is led to observe that it cannot reach a definitive conclusion as to the legality or illegality of the use of nuclear weapons by a State in an extreme circumstance of self-defence, in which its very survival would be at stake.” *Nuclear Weapons*, *supra* note 63, para. 97.

<sup>73</sup> See text accompanying footnotes 94-95, *infra*.

<sup>74</sup> NWP 1-14M, *supra* note 4, para. 2.6.3.

But when can such operations be mounted *without* the consent of the State on which they take place? The dilemma is that the question involves two conflicting international law rights, self-defense on the part of the victim State and the right of territorial integrity enjoyed by the State in which the terrorists are located. Territorial integrity is a core principle of international law, one expressly codified in Article 2(4)'s prohibition on the use of force. The sanctity of borders precludes any non-consensual penetration of another sovereign's territory.<sup>75</sup> On the other hand, self-defense is also a core right in international law codified in the Charter. It is deemed so central to the State-based paradigm that States are allowed to use force to effectuate it.

In assessing these two relevant aspects of international law, it is useful to recall that when international law rights collide, one need not prevail over the other. Rather, an accommodation should be sought between them that best maximizes and balances their respective underlying purposes.

Assume for the sake of analysis that the State where the terrorists are located is not so complicit in the terrorism that it may be treated as having conducted the armed attacks itself, an issue that will be dealt with later. Rather, it either lacks the means to put an end to the terrorist activities on its soil or does not have the will to do so. In the latter case, the "host" State may sympathize with the group's aims, benefit from its presence,<sup>76</sup> or fear retaliation if it moves against the organization. Whatever the case, if the "host" State's territory is unqualifiedly inviolable, the victim State might be deprived of any effective defense. This is particularly so with terrorism. Due to the secretive planning, surprise launch, and at times suicidal execution that characterize it, pre-emptive action may be the only viable defense.

Professor Dinstein labels such actions "extra-territorial law enforcement." He explains it thusly:

Extra-territorial law enforcement is a form of self-defence, and it can be undertaken by Utopia against terrorists and armed bands inside Arcadian territory only in response to an armed attack unleashed by

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<sup>75</sup> See also Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations: "Every State has a duty to refrain in its international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the purposes of the United Nations. Such a threat or use of force constitutes a violation of international law and the Charter of the United Nations and shall never be employed as a means of settling international issues." G.A. Res. 2625 (XXV), Annex, ¶ 1, U.N. Doc A/8082 (Oct. 24, 1970). The resolution was adopted by acclamation. There are several possible exceptions, such as rescue of nationals abroad and humanitarian intervention.

<sup>76</sup> As in the case of al Qaeda, which supported the Taliban in its conflict with the Northern Alliance.

them from that territory. Utopia is entitled to enforce international law extra-territorially if and when Arcadia is unable or unwilling to prevent repetition of that armed attack.<sup>77</sup>

As he correctly notes, the assertion of such a right is far from exceptional. Quite to the contrary, the Caroline incident, the touchstone of the law of self-defense,<sup>78</sup> involved extra-territorial self-defense. Forces under British command crossed into New York from Canada when British official protestations that rebels were being supported from U.S. territory during the Mackenzie Rebellion of 1837 fell on deaf American ears. As noted by Lord Ashburton, who was negotiating with U.S. Secretary of State Daniel Webster regarding the affair:

I might safely put it to any candid man, acquainted with the existing state of things, to say whether the military commander in Canada had the remotest reason, on the 29th day of December, to expect to be relieved from this state of suffering by the protective intervention of any American authority. How long could a Government, having the paramount duty of protecting its own people, be reasonably expected to wait for what they had then no reason to expect?<sup>79</sup>

A contemporary example of “taking the battle to the enemy” in foreign territory without the consent of the territorial sovereign was, of course, Operation Enduring Freedom. For the sake of analysis, put aside the issue the Taliban’s involvement in the attacks against the United States and whether it justified military action directly against the Taliban. That issue will be addressed in due time. Instead, and somewhat artificially, consider only the penetration of Afghan territory to attack al Qaeda.

The Security Council had, on repeated occasions prior to 9/11, demanded that the Taliban police its own territory. In Resolution 1267 of October 1999, for instance, it insisted that the Taliban “cease the provision of sanctuary and training for international terrorists and their organizations, take appropriate effective measures to ensure that the territory under its control is not used for terrorist installations and camps, or for the preparation or organization of terrorist acts against other States or their citizens, and cooperate with efforts to bring indicted terrorists to justice.” Included was a specific demand that the

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<sup>77</sup> Dinstein, *supra* note 59, at 247.

<sup>78</sup> For instance, the International Military Tribunal at Nuremberg cited the standard when rejecting the argument that Germany invaded Norway in self-defense in 1940. International Military Tribunal at Nuremberg, Judgment, 1 I.M.T. 171, 207 (1946).

<sup>79</sup> R.Y. Jennings, *The Caroline and McLeod Cases*, 32 AM. J.INT’L L. 82, 82 (1938) (quoting Lord Ashburton to Mr. Webster, July 28, 1842, Parliamentary Papers (1843), Vol. LXI; British & Foreign State Papers, vol. 30, at 195).

Taliban turn over Usama bin Laden.<sup>80</sup> It reiterated its demands in December 2000.<sup>81</sup>

Once attention focused on al Qaeda as the culprit in the September 11 attacks, the United States insisted on Taliban cooperation in eradicating the al Qaeda presence in Afghanistan. Some demands were conveyed through Pakistan, which had maintained relations with the Taliban and thereby served as a useful intermediary. Others were made publicly, such as that expressed by President Bush during an address to a joint session of Congress: “Close immediately and permanently every terrorist training camp in Afghanistan, and hand over every terrorist and every person in their support structure to appropriate authorities. Give the United States full access to terrorist training camps, so we can make sure they are no longer operating.”<sup>82</sup> Following a final ultimatum on October 6,<sup>83</sup> the President ordered U.S. forces into action the next day.

The overture to OEF illustrates a further facet of the requisite balancing between self-defense and territorial integrity. As in the Caroline case, the aggrieved party, now the United States, conveyed demands that the territorial State take action to put an end to the threat emanating from its territory. The U.S.-led coalition, like the British over 160 years earlier, only attacked once it had afforded the “host” State, Afghanistan, ample opportunity to rectify the intolerable situation. This approach represents a fair accommodation of that State’s right to territorial integrity. A State taking defensive action cannot be deprived of its right to defend itself, but at the same time must allow the host State a reasonable opportunity to remedy matters before suffering a non-consensual violation of its territory.

Lest it seem overly aggressive to allow a victim State to violate another’s borders, recall that States have an obligation to police their territory, ensuring it is not used to the detriment of others. In the classic 1927 Permanent Court of Justice case, *S.S. Lotus*, John Basset Moore, writing in dissent (on other grounds), noted that “it is well settled that a State is bound to use due diligence to prevent the commission within its dominions of criminal acts against another

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<sup>80</sup> S.C. Res. 1267, ¶ 2, U.N. Doc. S/RES/1267 (Oct. 15, 1999). The previous year it had also demanded that the “Taliban stop providing sanctuary and training for international terrorists and their organizations, and that all Afghan factions cooperate with efforts to bring indicted terrorists to justice.” S.C. Res. 1214, ¶ 13, U.N. Doc. S/RES/1214 (Dec. 8, 1998). *See also* S.C. Res. 1193, U.N. Doc. S/RES/1193 (Aug. 28, 1998).

<sup>81</sup> S.C. Res. 1333, U.N. Doc. S/RES/1333 (Dec. 19, 2000).

<sup>82</sup> Address Before a Joint Session of the Congress on the United States, Response to the Terrorist Attacks of September 11, 37 WEEKLY COMP.PRES. DOC.S 1347, 1348 (Sept. 20, 2001).

<sup>83</sup> President’s Radio Address, 37 WEEKLY COMP. PRES. DOC. 1429 (Oct. 6, 2001).

nation or its people,”<sup>84</sup> citing for support the 1887 U.S. Supreme Court case *United States v. Arjona*.<sup>85</sup>

In 1949, in its first case, *Corfu Channel*, the International Court of Justice addressed the issue head on.<sup>86</sup> The facts are pertinent. In May 1946, Albanian shore batteries fired on two British cruisers transiting the Corfu Strait, in Albanian waters. The U.K. claimed the ships were entitled to pass through the strait in innocent passage, a contention contested by the Albanians. The British sent word that in the future they would return fire if fired upon. That October, four British warships transited the Corfu Strait. Although previously swept, two struck mines, resulting in the loss of 45 lives. When London transmitted a Diplomatic Note stating it intended to sweep the channel, Tirana replied that doing so would violate Albania's sovereignty. In November, the British Navy swept the channel, cutting 22 mines, all of German make.

The Court faced two questions: 1) Is Albania responsible for the explosions, such that it has a duty of compensation, and 2) Did the U.K. violate international law through its naval actions in October and November? As to the first, the Court concluded that since the mines could not have been laid without Albania's knowledge, it bore responsibility based on “certain general and well recognized principles,” including “every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of others.”<sup>87</sup> With regard to the second, the October passage need not detain us. However, the November action was styled by the British as, in part, self-help. The Court rejected the argument, noting, “respect for territorial sovereignty is an essential foundation of international relations,” but qualifying this finding with the caveat that Albania's “failure to carry out its duties after the explosions, and the dilatory nature of its diplomatic notes” were “extenuating circumstances.”<sup>88</sup>

The Court's opinion is relevant in two regards. First, it makes clear that State A has a duty to prevent its territory from being used in a manner that negatively affects an international law right of State B. Applied to terrorism, State A must not allow its territory to serve as a terrorist base of operations or sanctuary, or be used in any other manner that would facilitate terrorism against State B. Second, although highlighting the centrality of territorial sovereignty, the Court's reference to extenuating circumstances demonstrates that the right is conditional. Although less than obvious in the written opinion, in *Corfu Channel* the Court balanced competing rights by determining that the right of

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<sup>84</sup> S.S. *Lotus* (Fr. v. Turk.) 1927 P.C.I.J. (ser. A) No. 10, at 4, 88 (Moore, J., dissenting).

<sup>85</sup> 120 U.S. 479 (1887).

<sup>86</sup> *Corfu Channel* (U.K. v. Alb.), 1949 I.C.J. 4.

<sup>87</sup> *Id.* at 22.

<sup>88</sup> *Id.* at 55.

innocent passage must yield to the right of territorial sovereignty, at least to the extent that force may not be used to secure the former.

The International Court of Justice again turned to the issue of responsibility in *United States Diplomatic and Consular Staff in Tehran*.<sup>89</sup> The facts are notorious and well known. In November 1979, Iranian radicals seized the U.S. Embassy in Tehran and the Consulates in Tabriz and Shiraz, taking hostage American diplomats and other U.S. citizens. Although the United States requested assistance from the Iranian government, none was forthcoming. On the contrary, the Iranian government soon expressed support for the seizure. The United States mounted a failed rescue attempt in April 1980. After 444 days in captivity, the Iranians released the hostages on the day President Ronald Reagan was sworn in as President.

The Court held that Iran's failure to protect the diplomatic premises and subsequently take action to free the hostages violated not only the 1961 and 1963 Vienna Conventions on Diplomatic Relations and Consular Relations respectively, but also "obligations under general international law."<sup>90</sup> As to the failed rescue attempt, it expressed concern that the United States had acted despite the existence of a provisional order directing no action be taken by either side that might aggravate tensions. However, it noted that the U.S. action had no bearing on Iran's responsibility for failure to protect the diplomatic facilities and staff. Thus, again we see the Court emphasizing that States shoulder a legal obligation to safeguard the interests of other States against acts committed from their soil, at least when they have the means to do so.

Aside from the ICJ opinions, a number of other sources support the obligation to police one's own territory. Article 2(4) of the International Law Commission's 1954 Draft Code of Offences against the Peace and Security of Mankind, for instance, provides that "[t]he organization, or the encouragement of the organization, by the authorities of a State, of armed bands within its territory or any other territory for incursions into the territory of another State, or the toleration of the organization of such bands in its own territory, or the toleration of the use by such armed bands of its territory as a base of operations or as a point of departure for incursions into the territory of another State, as well as direct participation in or support of such incursions," is an offense

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<sup>89</sup> *United States Diplomatic and Consular Staff in Tehran* (U.S. v. Iran), 1980 I.C.J. 3 (May 24).

<sup>90</sup> *Id.*, para. 62. Vienna Convention on Consular Relations, Apr. 23, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261; Vienna Convention on Diplomatic Relations, Apr. 18, 1961, 23 U.S.T. 3227, 500 U.N.T.S. 95.

against “the peace and security of mankind.”<sup>91</sup> Note the depiction of mere “toleration” as a crime in international law.

The same proscription appears in the 1970 General Assembly Resolution, Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations. It provides that “Every State has the duty to refrain from organizing, instigating, assisting or participating in acts of civil strife or terrorist acts in another State or acquiescing in organized activities within its territory directed towards the commission of such acts, when the acts referred to in the present paragraph involve a threat or use of force.”<sup>92</sup> In 1994, the Assembly addressed the subject of terrorism directly in its Declaration on Measures to Eliminate Terrorism. By the terms of the resolution, States may not “acquiesce” in “activities within their territories directed towards the commission of [terrorist] acts.” More to the point, they have affirmative “obligations under the Charter of the United Nations and other provisions of international law with respect to combating international terrorism and are urged to take effective and resolute measures in accordance with the relevant provisions of international law and international standards of human rights for the speedy and final elimination of international terrorism.”<sup>93</sup> The resolution goes on to delineate specific measures to achieve these aims. Although “soft law,” these instruments plainly evince a broad consensus that States bear a duty to act against terrorists located on their territory.

Recall that the Security Council also spoke to the issue, for example, when it directed the Taliban to take action against al Qaeda and other terrorist groups operating from Afghanistan. In a more general sense, Resolution 1373, drafted in the immediate aftermath of 9/11, amounted to a watershed in terms of imposing requirements on States to combat terrorism. In particular, States are now prohibited from providing “any form of support, active or passive, to entities or persons involved in terrorist acts, including by suppressing recruitment of members of terrorist groups and eliminating the supply of weapons to terrorists” and obligated to, *inter alia*, “[t]ake the necessary steps to prevent the commission of terrorist acts, including by provision of early warning to other States by exchange of information; [d]eny safe haven to those who finance, plan, support, or commit terrorist acts, or provide safe havens; and [p]revent those who finance, plan, facilitate or commit terrorist acts from using

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<sup>91</sup> Draft Code of Offences Against the Peace and Security of Mankind, (1954) 2 Y.B. INT’L L. COMM’N 150, U.N. Doc. A/CN.4/SER.A/1954/Add.1.

<sup>92</sup> Declaration of Friendly Relations, *supra* note 75.

<sup>93</sup> G.A. Res. 49/60 U.N. Doc A/RES/49/60 (Dec. 9, 1994), annexed Declaration, paras. 4-5.

their respective territories for those purposes against other States or their citizens.”<sup>94</sup>

Thus, an assessment of the lawfulness of penetrating borders to conduct anti-terrorism operations involves more than a “simple” balancing of two conflicting international law rights. It also entails breach (whether intentional or due to an inability to comply) of a duty owed other States by the State on whose territory the terrorism-related activities are occurring. Analysis will soon turn to the issue of when the actions of the “host” State merit treating that State as if it had itself conducted an “armed attack.” But the inaction of that State in policing its territory is relevant to determining when its borders may be crossed to conduct counter-terrorist operations.

#### 7. Limits on Cross-Border Operations

The understandable hesitancy to sanction violation of another State’s territorial integrity must be tempered by the fact that doing so in self-defense is only permissible once that State has failed in its duty to police that territory, either volitionally or unavoidably. Given the serious affront to territorial integrity, the “right” to cross the border must be interpreted very narrowly. The victim State must make a demand on the “host” State to satisfactorily cure the situation (i.e., comply with the duty described above), and the latter must be afforded sufficient opportunity to do so, at least to an extent consistent with the realities the victim State’s effective defense. It may not strike any targets of the “host” government, nor anything else unconnected with the terrorist activity. Indeed, if it does so, it will have committed an armed attack against the host State, which would in turn allow that State to lawfully use force against the intruders in self-defense. Of course, since the State conducting the operation is, to the extent it remains within the limitations, exercising a legitimate international law right, the host State may not interfere with said operations. If it does, that State commits an armed attack, thereby permitting the counterterrorist operation to expand to government personnel and facilities constituting military objectives under international humanitarian law (since an international armed conflict now exists in light of the interstate hostilities).

Further, the intrusion must be limited in time, space, and purpose. As soon as the menace has effectively been quashed, the counterterrorist units must withdraw. Further, the operation must be limited geographically to the minimum territorial infringement consistent with mission success. Both requirements derive from the principle of proportionality in the law of self-defense. Finally, the operation must be intended solely to accomplish a counter-

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<sup>94</sup> S.C. Res. 1373, U.N. Doc. S/RES/1373 (Sept. 28, 2001).

terrorist purpose. It cannot, for instance, be a subterfuge designed to assist one side in a civil war, intimidate the “host” State, etc. Of course, if such a result is the concomitant consequence of the action, so be it; but it cannot be the underlying purpose.

The United States is conducting operations along these lines. At times, it does so with the cooperation, or at least blessing, of the State on whose territory they are mounted. For instance, and as briefly mentioned earlier, in 2002, a CIA-operated Predator unmanned aerial vehicle launched a Hellfire missile to destroy a vehicle in which Qaed Senyan al-Harhi, a senior al-Qaeda member, was riding. Al-Harhi had been involved in the bombing of the USS *Cole* in 2000 and, given his role in the organization, was a key player in current and future operations.<sup>95</sup> Yemeni intelligence cooperated in the strike.<sup>96</sup> Given Yemeni consent and the clear need to act defensively, the operation met the criteria outlined above. Al-Harhi was complicit in previous terrorist attacks and surely intended to continue operations against the United States; in that sense, he was engaged in an ongoing campaign, thereby rendering the U.S. strike legitimate under the immediacy criterion. It was necessary in that lesser alternatives such as law enforcement were not viable at the time and there was no certainty that later law enforcement actions would have put him behind bars before he could attack again. Finally, it was proportionate, for no lesser use of force would have sufficed to kill or neutralize al-Harhi, nor was any practically possible in the circumstances.

More recently, the United States conducted air strikes in Pakistan targeting Ayman al-Zawahiri, al-Qaeda’s second in command. The unsuccessful January 2006 operations, which killed 18 civilians, sparked nationwide protests. Pakistan’s President, Pervez Musharraf, condemned the operation, stating, “It is an issue of our sovereignty and of our people’s sensitivities . . . . We’re against such attacks.” He also denied that Pakistan had provided the intelligence necessary to conduct them.<sup>97</sup>

Such claims must be taken with a grain of salt. Musharraf is conducting a delicate balancing act between support for U.S. counterterrorism efforts and avoidance of domestic unrest and isolation in the Muslim world. Of course, although Pakistan’s intelligence agencies and military have been cooperating closely with their U.S. counterparts in the war on terror, “plausible

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<sup>95</sup> *Profile: Ali Qaed Senyan al-Harhi*, BBC News World Report, Nov. 5, 2002, available at [http://news.bbc.co.uk/2/hi/middle\\_east/2404443.stm](http://news.bbc.co.uk/2/hi/middle_east/2404443.stm).

<sup>96</sup> Anthony Dworkin, *The Yemen Strike*, Nov. 14, 2002, available at <http://www.crimesofwar.org/onnews/news-yemen.html>.

<sup>97</sup> Katrin Bennhold, *Musharraf Condemns U.S. Strikes in Pakistan*, INT’L HERALD TRIB., Jan. 27, 2006, at 7.

deniability” is often an integral component of such involvement. Indeed, recall that President Bush visited Pakistan in March 2006, in part to demonstrate appreciation for Musharraf’s support. This would have been a strange visit to have made if the United States had in fact brazenly violated Pakistani territory.

However, taking President Musharraf’s public stance at face value, the attack would nevertheless have arguably fallen within the normative framework set forth. Al Zawahiri is a highly elusive linchpin in the continuing al Qaeda campaign against the United States. Opportunities to “take him out” rarely present themselves and, given the remoteness of the Banjur region, the prospects of a mounting a successful operation to capture him were slim to non-existent. Had the United States taken the time to coordinate its operations with Pakistan (assuming for the sake of analysis that it did not), it would have risked missing the opportunity to act, which, apparently, it did in any event. Pakistan’s security forces lacked the assets to mount a timely attack with high confidence. As Musharraf himself noted when commenting on the affair: “We cannot compare our capabilities with the U.S.” Finally, the use of a CIA-controlled Predator to conduct the attack was certainly the least invasive option available.<sup>98</sup>

That the operation was unsuccessful is of only slight relevance. In assessing the lawfulness of military operations, the crux of the issue is the reasonableness of having acted in the circumstances based on information reasonably believed reliable at the time. There has been no convincing evidence that the United States’ belief that it had al Zawahiri in the cross-hairs was precipitous or ill-reasoned. Of course, there is the matter of the resulting 18 civilian deaths. Civilian deaths are always tragic, but the international humanitarian law principle of proportionality acknowledges that they can be unavoidable. In the conduct of hostilities context, proportionality requires that collateral damage to civilian objects and incidental injury to civilians caused during military operations not to be excessive in relation to the concrete and direct military advantage anticipated to result from the attack.<sup>99</sup> Al Zawahiri constituted a target of enormous value in the war on terrorism, and although civilian deaths are tragic, State practice has countenanced levels of incidental injury in excess of this in operations directed against lesser objectives. Proportionality in this context must not be confused with the *jus ad bellum* principle (discussed above) that is one criterion for self-defense.

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<sup>98</sup> Carlotta Gall & Douglas Jehl, *Strike Aimed at Qaeda Figure Stirs More Pakistan Protests*, N.Y. TIMES, Jan 16, 2006, at 3.

<sup>99</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), June 8, 1977, 1125 U.N.T.S. 3, at arts. 51.5(b) & 57.2(a)(iii).

Critics will assert, fairly, that the framework suggested for cross-border counterterrorist operations is subjective and, therefore, ripe for abuse. While they are correct, the alternative, elevating territorial integrity to a position of unconditioned supremacy over the right to self-defense, is inconsistent with the realities of a 21<sup>st</sup> century beset by transnational terrorism in which the prospect of the use of weapons of mass destruction (WMD) by terrorists grows steadily. Lest it be rendered obsolete, law must be interpreted in light of the context in which it is to be applied, and with fidelity to its core purpose, in this case global order. The normative framework outlined above does just that without undue violence to the received understanding of the law of self-defense.

#### 8. Operations Against State-Sponsors

A more difficult endeavour is determining when a victim State may treat the actions of terrorist group as an armed attack not only by the group, but also by a State that has in some way provided it support. Until recently, the generally cited, albeit not universally accepted, standard was that enunciated in the *Nicaragua* case.<sup>100</sup> There, the Court opined that “an armed attack must be understood as including not merely action by regular armed forces across an international border, but also ‘the sending by or on behalf of a state of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to’ (*inter alia*) an actual armed attack conducted by regular forces, ‘or its substantial involvement therein.’”<sup>101</sup> It drew on the Definition of Aggression annexed to General Assembly Resolution 3314 (XXIX) for the quoted text,<sup>102</sup> arguing that the definitional extract reflected customary international law. However, according to the Court, the activities of the guerrilla force, to qualify as an armed attack, should be of a “scale and effects” equivalent to those that would qualify as an armed attack if conducted by regular forces, citing “acts by armed bands where such attacks occur on a significant scale,” but explicitly excluding a “mere frontier incident.”<sup>103</sup> The Court went on to determine that providing “weapons or logistical or other support” did not suffice. Such activities might amount to a threat or use of force, or wrongful intervention in the external or internal affairs of the target State, but not armed attacks.

This latter point is key. Whether an armed attack has occurred is a different matter than that of a State’s responsibility (under international law) for the commission of acts to which it is in some way connected. States undoubtedly shoulder a degree of international responsibility for support to

<sup>100</sup> See, e.g., the dissenting opinion of Judge Schwebel in the *Nicaragua* case, esp. para. 154 ff.

<sup>101</sup> *Nicaragua*, *supra* note 49, at para. 195.

<sup>102</sup> G.A. Res. 3314 (XXIX), *supra* note 54.

<sup>103</sup> *Nicaragua*, *supra* note 49, para.195.

terrorists or other armed groups.<sup>104</sup> Recall the soft law texts cited above, as well as the General Assembly's 1996 Declaration to Supplement the 1994 Declaration on Measures to Eliminate International Terrorism, which reiterated the obligation of States to refrain from "financing, encouraging, providing training for or otherwise supporting terrorist activities."<sup>105</sup>

The issue at hand, however, is the point at which a State stands in the shoes of the terrorist group it backs. By the *Nicaragua* yardstick, the supporting State must send the terrorists, effectively control them, or be substantially involved in the execution of their attack before being deemed to have committed an armed attack itself.<sup>106</sup> The Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia rejected the effective control test in its 1999 *Tadic* decision. Considering whether an international armed conflict existed in Bosnia-Herzegovina by virtue of the Federal Republic of Yugoslavia's control over Bosnian Serb forces, the Chamber adopted a more relaxed standard: "overall control going beyond mere financing and equipping of such forces and involving also participation in the planning and supervision of military operations" for acts of an "organized and hierarchically structured group."<sup>107</sup> Although the precise issue was not armed attack, the Appeals Chamber was commenting on the International Court of Justice's standard in that regard.

In the case of the 9/11 attacks, Taliban support of al Qaeda rose to neither the *Nicaragua* level, nor that of *Tadic*. Whilst true that the Taliban

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<sup>104</sup> According to Article 8 of the International Law Commission's Articles of State Responsibility, "conduct of a person or group shall be considered an act of State under international law if the person or group of persons is in fact acting on the instruction of, or under the direction or control of, that State in carrying out the conduct." International Law Commission, Articles on Responsibility of States for Internationally Wrongful Acts (2001), with Commentary, at [http://untreaty.un.org/ilc/texts/instruments/english/commentaries/9\\_6\\_2001.pdf](http://untreaty.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf). The Commentary to the article explains:

More complex issues arise in determining whether conduct was carried out under the direction or control of a State. Such conduct will be attributable to the State only if it directed or controlled the specific operation and the conduct complained of was an integral part of that operation. The principle does not extend to conduct which was only incidentally or peripherally associated with an operation and which escaped from the State's direction or control.

*Id.* at 104.

<sup>105</sup> G.A. Res. 51/20 (Dec. 17, 1996).

<sup>106</sup> On an analogous basis, the International Court of Justice in *Nicaragua* rejected assertions of U.S. responsibility for the Contras' actions in violation of international humanitarian law. The Court stated that such activities "would not in themselves mean, without further evidence, that the United States directed or enforced the perpetration of the acts....For this conduct to give rise to legal responsibility of the United States, it would in principle have to be proved that the State had effective control of the military or paramilitary operations." *Nicaragua*, *supra* note 49, at para. 115.

<sup>107</sup> *Prosecutor v. Tadic*, Case IT-94-1, ¶ 145, 120 (1999).

tolerated the presence of al Qaeda, and arguably offered sanctuary, they exercised no meaningful control over the organization. Nor has any evidence been produced that the Taliban were accomplices in the 9/11 attacks. Indeed, they did not even provide financing, training, or materiel to al Qaeda, standards which both the ICJ and ICTY rejected as meeting the armed attack threshold. Quite the contrary, the Taliban was in the dependency relationship to some extent, for al Qaeda supported them in their fight with the Northern Alliance, both in terms of financing and fielding the 055 Brigade.

Nevertheless, as discussed, the international community fully supported the strikes on the Taliban. Indeed, over a month after Operation Enduring Freedom began, the Security Council condemned the Taliban for “for allowing Afghanistan to be used as a base for the export of terrorism by the Al-Qaida network and other terrorist groups and for providing safe haven to Usama Bin Laden, Al-Qaida and others associated with them” and expressed its support for “the efforts of the Afghan people to replace the Taliban regime.”<sup>108</sup> This is significant, for the Coalition’s participation turned the tide in the civil war between the Taliban and Northern Alliance. Thus, to the extent that the Council supported regime change, it implicitly also supported Coalition military operations against the Taliban.

What does this mean for the *jus ad bellum*? The general principle that States can technically commit an armed attack through association with non-State actions (that would constitute an armed attack if committed by a State’s armed forces) remains intact. What appears to have changed is the level of support that suffices. It would seem that in the era of transnational terrorism, very little State support is necessary to amount to an armed attack; at least in this one case, merely harbouring a terrorist group was enough. This is a far cry from *Nicaragua*’s “sending by or on behalf” or *Tadic*’s “overall control.”

Has the law changed? In a sense, no. Instead, normative interpretation appears to have shifted in the face of changed circumstances. Such shifts are entirely appropriate, for international law exists to serve global needs for security and other common goods. We should not be surprised when the normative expectations of the international community evolve in the face of new threats. This is particularly so in the absence of *lex scripta* directly on point, as is the case with regard to attributing actions of non-State actors to States.

The international community has naturally reacted very aggressively to both transnational terrorists intent on mass casualty attacks and those States that facilitate their activities. As any threat to the community evolves, so too must

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<sup>108</sup> S.C. Res. 1378, pmb, U.N. Doc S/RES/1378 (Nov. 14, 2001).

the operational code governing responses thereto designed to preserve common interests and values. The demise of Cold War bipolarity renders such aggressiveness less disruptive to global order. During the Cold War, many violent non-State actors enjoyed some degree of backing from one of the opposing camps. Reacting forcefully to client States that supported terrorism risked superpower conflict. Thus, the international community, through State practice and judicial pronouncement, set the legality threshold for such responses very high.

That paradigm has been turned on its head. Today, failure to take strong action against either terrorists (perhaps armed with weapons of mass destruction) or their sponsors risks catastrophe. Moreover, it is in the battle against transnational terrorism that we see perhaps the greatest degree of meaningful cooperation between powerful States, thereby limiting the risk that forceful reactions will escalate into major interstate armed conflict.

The extent to which the “armed attack” bar has been lowered remains to be seen. Was the Taliban case unique? After all, the Taliban were international pariahs, condemned widely for horrendous human rights abuses and isolated in the international community. The almost audible sigh of relief upon their ouster from power was not only the product of angst over their willingness to allow al Qaeda to operate freely within Afghanistan, but also of near universal contempt resulting from their domestic behavior towards the long-suffering Afghan people. It is irrefutable that both community order and global values were advanced by their defeat. This reality begs the question of whether States meant to relax normative understandings on the use of force against States tied to terrorism or they were simply celebrating a legitimate, albeit unlawful, regime change.

#### *The Case of Iraq*

The case of Iraq sheds a bit of light on the issue of when State sponsors may be deemed to have themselves committed an armed attack. It does so through negative inference because although discussions of Iraqi support of terrorism prominently occupied pre-attack discourse, self-defense was notably absent in the legal justification proffered for Operation Iraqi Freedom (OIF).

In Resolution 1441 of November 2002, the Security Council stated that it “deplored” the fact that Iraq had not complied with its obligations regarding terrorism.<sup>109</sup> Those obligations had been set forth in Resolution 687 of April 1991, which captured the terms of the 1990-91 Gulf War cease fire.<sup>110</sup> In 687,

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<sup>109</sup> S.C. Res. 1441, U.N. Doc S/RES/1441 (Nov. 8, 2002).

<sup>110</sup> S.C. Res. 687, U.N. Doc S/RES/687 (Apr. 3, 1991).

the Council condemned threats made by Iraq during the conflict to “make use of terrorism against targets outside Iraq” and required Iraq to formally inform the Council that “it will not commit or support any act of international terrorism or allow any organization directed towards the commission of such acts to operate within its territory and to condemn unequivocally and renounce all acts, methods, and practices of terrorism.”<sup>111</sup>

The extent and nature of Iraq’s ties to terrorism prior to OIF have proven murky at best. However, a glimpse of what the United States believed regarding Iraqi involvement came in February 2003 when Secretary of State Colin Powell briefed the Security Council in the unsuccessful effort to secure a use of force resolution.<sup>112</sup> The broadest accusation was that “Iraq . . . harbours a deadly terrorist network headed by Abu Musab al-Zarqawi, an associate and collaborator of Osama bin Laden and his Al Qaeda lieutenants.” Powell asserted that al-Zarqawi had moved a training camp from Afghanistan to northeastern Iraq when the Taliban fell. Although the area was under the control of the Ansar al-Islam movement, not the Iraqi government, Saddam Hussein reportedly had an agent in the organization that was providing safe haven to some of Zarqawi’s lieutenants and other members of al Qaeda. Further, al Qaeda affiliates based in Baghdad were reportedly directing operations throughout the country. Powell stated that the United States had transmitted information on Zarqawi’s whereabouts to the Iraqis through a friendly intelligence service, but that Iraq did nothing to capture him. Finally, Powell asserted a detainee had admitted during interrogation that Iraq had provided training in chemical and biological weapons to two Al Qaeda operatives, an admission since discredited.

An intensive search throughout Iraq during the occupation turned up very little additional evidence of Iraqi support to terrorism. However, as a matter of law, the question is whether the level of support that the United States and its Coalition partners *believed* Iraq was providing at the time they launched OIF rose to the “armed attack” level. The United States was apparently uncertain it could credibly make such a case, for, having failed to convince the Security Council to mandate military action on the basis of Iraqi ties to terrorism and weapons of mass destruction, it refrained from formally asserting any claim of self-defense when it did attack. Instead, the United States and United Kingdom proffered a highly legalistic justification— material breach of the 1991

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

<sup>112</sup> Address by Secretary of State Colin Powell to the Security Council, U.N. Doc. S/PV.4701 (5 February 2003), at 14-17.

cease-fire terms.<sup>113</sup> Indeed, in their formal letters to the Security Council setting forth the legal basis for military action, neither country mentioned terrorism, not even in the context of a breach of the cease-fire obligations vis-à-vis terrorism.<sup>114</sup> That the partners chose a highly technical (albeit correct) justification certain to generate international political and legal controversy rather than self-defense—the always preferred justification for action without Security Council mandate—demonstrates they understood a claim of self-defense against State support to terrorism would likely prove unconvincing.

While the community reaction to OEF suggests a modified operational code for when support to terrorists may be treated as an “armed attack,” the reticence of the United States and United Kingdom to use the principle to justify OIF reveals its limits. The Afghanistan case suggests that knowingly and willingly allowing territory to serve as a base of terrorist operations may now represent a degree of complicity sufficient to amount to an “armed attack.” Iraq, on the other hand, seems to illustrate that the scale and scope of terrorist operations occurring on the territory in question must be significant; convincing evidence of the activities, as well as of the willingness of the host State to allow them to take place, must exist; and the host State must be warned to put an end to terrorist operations on its soil and provided ample opportunity to do so before a forceful response in self-defense is permitted.

### III. THE CASE OF PRE-EMPTIVE SELF-DEFENSE

The issues discussed above have coalesced into formal strategy pronouncements by the United States and other nations. Most significant in this regard is the pre-emption doctrine, enunciated by the U.S. National Security Strategy 2002 (2002 NSS) in the extract cited earlier.<sup>115</sup> The 2002 NSS also reflected the U.S. conviction that it was at war with terrorists and would, as it had a year earlier, deal harshly with States complicit in terrorist activity:

The war against terrorists of global reach is a global enterprise of uncertain duration. America will help nations that need our assistance in combating terror. And America will hold to account nations that are

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<sup>113</sup> For a discussion of this point, see Michael N. Schmitt, *The Legality of Operation Iraqi Freedom under International Law*, 32 J. MIL. ETHICS 82 (2004).

<sup>114</sup> Letter dated 20 March 2003 from the Permanent Representative of the United States of America to the United Nations addressed to the President of the Security Council, U.N. Doc. S/2003/351 (March 21, 2003); Letter dated 20 March 2003 from the Permanent Representative of the United Kingdom of Great Britain and Northern Ireland to the United Nations addressed to the President of the Security Council, U.N. Doc. S/2003/350 (March 21, 2003).

<sup>115</sup> The White House, NATIONAL SECURITY STRATEGY OF 2002, *supra* note 67, at 15 (see text accompanying footnote 67 *supra*); see also The White House, STRATEGY FOR COMBATING TERRORISM (February 2003), at 2.

compromised by terror, including those who harbor terrorists—because the allies of terror are the enemies of civilization. The United States and countries cooperating with us must not allow the terrorists to develop new home bases. Together, we will seek to deny them sanctuary at every turn.<sup>116</sup>

Yet despite the ominous timing of its issuance as events in Iraq cascaded towards war, and although it purported to be a new adaptation of the law of self-defense in the face of rogue states and terrorists, ultimately the United States chose not to assert pre-emption as the legal basis for OIF.

In March 2006, the United States issued a new National Security Strategy (2006 NSS), one retaining all of the key elements of its predecessor. One interesting point is that the discussion of pre-emption occurs primarily in the section on weapons of mass destruction, whereas in the 2002 version it was prominent vis-à-vis both terrorism and WMD. In relevant part, the new strategy provides:

Our strong preference and common practice is to address proliferation concerns through international diplomacy, in concert with key allies and regional partners. If necessary, however, under long-standing principles of self defense, we do not rule out the use of force before attacks occur, even if uncertainty remains as to the time and place of the enemy's attack. When the consequences of an attack with WMD are potentially so devastating, we cannot afford to stand idly by as grave dangers materialize. This is the principle and logic of preemption . . . . We will always proceed deliberately, weighing the consequences of our actions. The reasons for our actions will be clear, the force measured, and the cause just.<sup>117</sup>

Whether this placement represents a subtle change in approach or merely reflects the current strategic context, one in which the war on terrorism is well underway and Iran's nuclear ambitions have moved to the forefront of global attention, is unclear. The document itself asserts that "The place of preemption in our national security strategy remains the same."<sup>118</sup>

The new NSS comes out even more strongly than the 2002 version against State support for terrorism, making "deny terrorist groups the support and sanctuary of rogue states" one of its four short term objectives.

<sup>116</sup> The White House, NATIONAL SECURITY STRATEGY OF 2002, *supra* note 67 at 3-4.

<sup>117</sup> The White House, THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES (March 2006), at 23 [hereinafter The White House, NATIONAL SECURITY STRATEGY OF 2006].

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

The United States and its allies in the War on Terror make no distinction between those who commit acts of terror and those who support and harbor them, because they are equally guilty of murder. Any government that chooses to be an ally of terror, such as Syria or Iran, has chosen to be an enemy of freedom, justice, and peace. The world must hold those regimes to account.<sup>119</sup>

Although the 2002 NSS evoked a firestorm of controversy, nothing regarding terrorism strategy in either it or its successor runs counter to any of the legal norms analyzed above. As the former Legal Adviser to the Department of State correctly noted in 2003,

In the end, each use of force must find legitimacy in the facts and circumstances that the state believes have made it necessary. Each should be judged not on abstract concepts, but on the particular events that gave rise to it. While nations must not use preemption as a pretext for aggression, to be for or against preemption in the abstract is a mistake. The use of force preemptively is sometimes lawful and sometimes not.<sup>120</sup>

So long as the State is acting in the likely last window of opportunity to defend itself effectively against a future terrorist attack in circumstances where alternatives such as law enforcement are not certain to suffice, the preemptive operation is available as a matter of law. If the State acts prior to the maturation of these conditions, it is acting preventively, not preemptively.<sup>121</sup> The distinction is crucial, for the *preventive* use of force is unlawful. For instance, if State A attacks WMD storage facilities in State B because it has hard intelligence that B is about to transfer WMD to a terrorist group which has previously carried out attacks against A, the action is preemptive in nature. However, if it strikes in the absence of actionable intelligence, but simply out of concern that B may effect a transfer to terrorists one day, it has acted preventively. Preventive action is based solely on a potential opponent's capability to carry out an attack (or imminent acquisition of such capability). Preemption requires both capability *and* intent.<sup>122</sup>

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<sup>119</sup> *Id.* at 12.

<sup>120</sup> William H. Taft IV & Todd F. Buchwald, *Future Implication of the Iraq Conflict: Preemption, Iraq, and International Law*, 97 AM. J. INT'L L. 557, 557 (2003).

<sup>121</sup> The confusion and controversy resulting from release of the 2002 NSS was in part caused by use of the word "prevent" in the title of both the terrorism and WMD chapters.

<sup>122</sup> Of course, the preemptive action must comply with the other requirements of self-defense.

In December 2004, a High Level Panel appointed by the U.N. Secretary-General issued *A More Secure World: Our Shared Responsibility*. In part, the report addressed self-defense and its relationship to actions under Chapter VII of the U.N. Charter. Although the panel avoided use of the controversial term “preemption,” it embraced the notion, while rejecting that of preventive attack.

A threatened State, according to long established international law, can take military action as long as the threatened attack is *imminent*, no other means would deflect it and the action is proportionate. The problem arises where the threat in question is not imminent but still claimed to be real: for example the acquisition, with allegedly hostile intent, of nuclear weapons-making capability.

Can a State, without going to the Security Council, claim in these circumstances the right to act, in anticipatory self-defence, not just preemptively (against an imminent or proximate threat) but preventively (against a non-imminent or non-proximate one)?...

The short answer is that if there are good arguments for preventive military action, with good evidence to support them, they should be put to the Security Council, which can authorize such action if it chooses to. If it does not so choose, there will be, by definition, time to pursue other strategies, including persuasion, negotiation, deterrence and containment — and to visit again the military option.<sup>123</sup>

In other words, the panel adopted the approach advanced in this article.

There is one aspect of the U.S. preemptive doctrine, though, that has proven contentious—the commitment to act “even if uncertainty remains as to the time and place of the enemy’s attack.” The 2002 statement in this regard was retained in the 2006 NSS.<sup>124</sup> If the statement implies that the United States might act without knowing *whether* a potential enemy will strike, then a proposed action would be preventive and, therefore, unlawful. On the other hand, if, as the plain text denotes, the United States knows the attack is coming, but does not know precisely *when and where*, then the action would be judged by the criteria outlined earlier, particularly those of acting in the last window of opportunity and the absence of viable alternatives.

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<sup>123</sup> *A More Secure World: Our Shared Responsibility*, Report of the High Level Panel on Threats, Challenges, and Change, U.N. Doc. A/59/565, at 54-55 (Dec. 12, 2004).

<sup>124</sup> The White House, NATIONAL SECURITY STRATEGY OF 2006, *supra* note 117, at 23.

It cannot be otherwise in an era of weapons of mass destruction that can be unleashed by groups who often pay no heed to their own survival. Authorities seldom know where and when a terrorist strike will occur. After all, discovery of a prospective attack usually foils it. Consequently, the terrorist *modus operandi* involves doing everything possible to foster uncertainty as to time and place. To impose a burden of certainty on a potential victim State would be ludicrous. The only bearing that knowledge as to time and place has on the lawfulness of an action in self-defense is in assessing whether alternatives to the use of military force are available and whether the proposed defensive action may be the last opportunity to thwart whatever attack is coming.

The uncertainty reference could also be interpreted as comment on the quality of the evidence upon which action is based, in other words, as an assertion that the United States will act on less than fully reliable information given the stakes involved with terrorism and WMD. This is an incorrect characterization, for the uncertainty refers to time and place of the attack, not to whether an attack will occur. However, in an abundance of analytical caution, let us assume the former is the case. Since uncertainty often shrouds international security matters, how good must the evidence be before a State may act in self-defense?

Recall criticism of the 1998 strike into Sudan. Also recall the extent to which failure to discover the “smoking gun” linking Iraq to WMD or terrorism resulted in widespread criticism of the decision to go to war and left the Bush administration scrambling for other grounds on which to denounce the Iraqi regime, such as its appalling human rights record. Both incidents evidence an operational code that requires counterterrorist operations to be based on dependable evidence.

Unfortunately, international law contains no express evidentiary standard governing the quality of the information upon which States may resort to force in self-defense. However, a useful standard is that articulated by the United States in its notification to the Security Council that it was acting in self-defense when attacking Al Qaeda and the Taliban. In the letter of notification, Ambassador John Negroponte stated that “my Government has obtained clear and compelling information that the Al-Qaeda organization, which is supported by the Taliban regime in Afghanistan, had a central role in the attacks.”<sup>125</sup> NATO Secretary General Lord Robertson used precisely the same term when announcing that the attack against the United States fell within the terms of

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<sup>125</sup> Letter dated 7 October 2001 from the Permanent Representative of the United States of America to the United Nations Addressed to the President of the Security Council, U.N. Doc. S/2001/946 (Oct. 7, 2001).

Article V of the North Atlantic Treaty.<sup>126</sup> In light of the near universal characterization of OEF as lawful, it appears that the international community accepts “clear and compelling” as an appropriate evidentiary standard in self-defense cases.

Clear and compelling is a term borrowed from in part from American jurisprudence, although, when assessing evidence, “clear and convincing” is more typically employed. Clear and convincing evidence is a level more probative of the issue at hand than “preponderance of the evidence,” which simply means that the evidence makes the matter more likely than not. It is, on the other hand, less probative than the “beyond a reasonable doubt” standard typically required for a guilty finding in a criminal case. Used in the context of justifying a use of force, clear and convincing evidence of a forthcoming armed attack is evidence that would convince a reasonable State to act defensively in same or similar circumstances. Reasonable States do not act precipitously, nor do they remain idle as indications that an attack is forthcoming become deafening.

Since the United States proffered the phrase in a self-defense context, it is reasonable to impose such a standard upon it. Thus, if the 2006 NSS’ use of the term “uncertainty” is interpreted as alluding to the quality of evidence, that uncertainty may not rise to a level that would cause the basis for the action to be less than clear and compelling.

#### IV. CONCLUSIONS

In a sense, the 2006 National Security Strategy represents the maturation of counterterrorism strategy and law. The horrendous events of 9/11 shocked the international community into reconsidering the normative framework governing terrorism. Resultantly, the premise that terrorism was more than mere criminality, that it rises to the level of armed attack, has garnered wide acceptance. This acceptance is reflected in the fact that the most powerful country in the world has chosen to make counterterrorism the centerpiece of its national security strategy.

Operation Enduring Freedom also fundamentally altered notions of the sanctions to which States that support terrorism are subject. An operational code that generally rejected the use of force against States for involvement falling below some degree of control shifted in the course of less than a month to one permitting the forcible ouster of a regime that had done little more than allow a terrorist group to freely use its territory. This shift is reflected brightly

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<sup>126</sup> Statement by NATO Secretary General Lord Robertson, NATO Headquarters (Oct. 2, 2001), available at <http://www.nato.int/docu/speech/2001/s011002a.htm>.

in the 2006 NSS' refusal to distinguish between terrorists and the States that support or harbor them.

The operational code has evolved in other ways responsive to the new context. For instance, imminency can no longer be seen in purely temporal terms; in the 21<sup>st</sup> century the issue is opportunity, not time. And territorial sovereignty has necessarily yielded a bit to the practical needs of self-defense. As the difficulty of combating a territory-less enemy became apparent, States which cannot or will not police their own territory must surrender a degree of their border's legal impenetrability. Again, although not completely new, these issues were highlighted by the attacks of 9/11, with transformations in the operational code revealing themselves as the United States and its global partners responded to this and subsequent acts of transnational terrorism. They are all reflected in the NSS.

But the Operation Iraqi Freedom interlude demonstrated that we were witnessing an evolution of the normative framework, not its dismantling. The United States and its allies, despite the fact that the Security Council itself had condemned Iraq for failing to comply with its obligations regarding terrorism, was incapable of making the case that the situation merited action in self-defense (or a Council use of force mandate). In the end, it resorted to a legal justification that, albeit appropriate as a matter of law, continues to mystify many. Moreover, the failure to produce the "smoking gun" and the negative impact it (wrongly) had on perceptions of the legality of the operation, demonstrate that even in cases of terrorism, States will be held to high standards. Bearing this in mind, the current normative vector of the law of counterterrorism appears sound.



# A COMFORTABLE SOFA: THE NEED FOR AN EQUITABLE FOREIGN CRIMINAL JURISDICTION AGREEMENT WITH IRAQ

**Lieutenant Commander Ian Wexler, JAGC, USN\***

Among its more vociferous opponents, the American project in Iraq is characterized as a classic colonial adventure. ... Proponents, on the other hand, argue the inherent benevolence of American empire - the export of democracy and egalitarianism in contrast to the transparent racist imperialism of yore. One possible way to arbitrate this dispute is by observing the dispensation of justice with regard to American servicemen accused of the "unlawful killing" (in military parlance) of Iraqi civilians. In this area, as with the infamous cases of torture in Abu Ghraib and elsewhere, impunity is the rule of thumb for both the rank and file and their superiors. In the overwhelming majority of cases over the course of the war, prosecutions have either not taken place, or if court-martials [sic] have occurred, there have been acquittals or token sentences dispensed.<sup>1</sup>

## I. INTRODUCTION

On May 23, 2003, after a brief, highly successful invasion of Iraq by U.S.-led forces, the Coalition Provisional Authority (CPA), a successor organization to the Office of Reconstruction and Humanitarian Assistance

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<sup>1</sup>Ashraf Fahim, *The Perils of Colonial Justice in Iraq*, ASIA TIMES, July 6, 2005, available at [www.atimes.com/atimes/Middle\\_East/GG06Ak02.html](http://www.atimes.com/atimes/Middle_East/GG06Ak02.html).

(ORHA), issued its first order intended to govern a defeated Iraq.<sup>2</sup> CPA was initially empowered to provide all legislative, executive and judicial powers necessary in order to provide security and stability to the people and institutions of Iraq.<sup>3</sup> To further those lofty goals and pursuant also to relevant United Nations Security Council resolutions,<sup>4</sup> CPA issued a series of regulations and orders that attempted, in part, to install the framework for an effective administration of the nation.<sup>5</sup> Of the many orders and regulations issued by CPA, one in particular, Coalition Provisional Authority Order Number 17 [hereinafter CPA Order 17], has served as a crucial and sometimes controversial reminder that Coalition Forces operating in Iraq are essentially free from any and all Iraqi legal processes.<sup>6</sup>

This unilateral provision, signed by Ambassador L. Paul Bremer in his final days as Administrator of the CPA, and specifically intended to substitute for a formal Status of Forces Agreement (SOFA),<sup>7</sup> effectively pre-empted the use of the Iraqi Penal Code in favor of the Uniform Code of Military Justice (UCMJ) for prosecution of U.S. service members for all crimes committed in Iraq.<sup>8</sup> Accordingly, with the signing of CPA No. 17, it was solely the U.S.

<sup>2</sup> COALITION PROVISIONAL AUTHORITY REGULATION NO. 1 (23 May 2003) [hereinafter CPA Order No. 1].

<sup>3</sup> *Id.* CPA was created with the intention of providing an interim Coalition-led government to take control of the government of Iraq. *Id.* at § 1.

<sup>4</sup> S.C. Res. 1511, U.N. Doc. S/RES/1511 (Oct. 11, 2003) (authorizing multinational force in Iraq to maintain security and stability while re-affirming the temporary nature of the Coalition Provisional Authority); S.C. Res. 1546, U.N. Doc. S/RES/1546 (June 8, 2004) (declared the end of the occupation of Iraq and endorsed a fully sovereign interim government that served from June 30, 2004, until elections held in January 2005. The resolution deferred the issue of the status of forces agreement (SOFA) to an elected Iraqi government); U.N. Doc. S.C. Res. 1790, S/RES/1790 (Dec. 18, 2007) (acknowledged the request by the Prime Minister of Iraq for and then extended the U.N. mandate authorizing multinational forces in Iraq until Dec. 31, 2008). Currently, the legal protections enshrined in CPA Order 17 through the framework of United Nations Security Council Resolutions 1511, 1546 and 1790, effectively provide a complete blanket of jurisdictional protections for Multi-National Force Personnel (including U.S. military forces) who commit crimes in the sovereign territory of Iraq.

<sup>5</sup> CPA Order No. 1, *supra* note 2 at § 1.

<sup>6</sup> COALITION PROVISIONAL AUTHORITY ORDER NO. 17 (27 June 2004) [hereinafter CPA ORDER 17]. CPA Order 17 defined Multi-National Personnel as those non-Iraqi military and civilian persons assigned under the command of Multi-National Forces Commander operating in Iraq. The definition includes civilian contractors accompanying the military force. *Id.* CPA Order 17 specifically excludes those personnel, among others, from the Iraqi legal process. *Id.* Specifically, CPA Order 17 also provides that all “[s]ending States of MNF [Multi-National Forces] shall have the right to exercise within Iraq any criminal and disciplinary jurisdiction conferred on them by the law of that Sending State over all persons subject to the military law of that Sending State.” *Id.*

<sup>7</sup> See Section III *infra*.

<sup>8</sup> CPA ORDER 17, *supra* note 6; Alissa J. Rubin and Paul von Zielbauer, *Blackwater Case Highlights Legal Uncertainties*, N.Y. TIMES, Oct. 11, 2007, at A1 (“‘The order was intended as a substitute for a status of forces agreement, which can be made only with a sovereign country,’ Mr. Bremer said.”).

military courts that had effective jurisdiction over U.S. service members for any and all crimes committed against Iraqi citizens.<sup>9</sup>

This paper begins with an exploration of a series of high profile crimes committed or alleged to have been committed by U.S. service members both inside and outside the scope of duty while deployed to Iraq during Operation Iraqi Freedom (OIF). This section will also deal with the complex relationship between the criminal misconduct committed by U.S. forces; the publication of these reports in the media; the role of the UCMJ process in those investigations; and the perception that the military justice system has failed to hold U.S. service members accountable for their criminal actions in Iraq against Iraqi citizens.

Next, the paper will give a brief historical overview and discuss the role of foreign criminal jurisdiction as a policy tool of the United States government, and analyze foreign criminal jurisdiction in Korea, Japan and the Philippines in order to compare policy and legal considerations with those found in Iraq. Next, the paper will take an in-depth look at the Iraqi criminal justice system, focusing on some of the apparent and perceived flaws and capabilities that perpetuate serious concerns over the appropriateness of subjecting U.S. service members to Iraqi jurisdiction.

Finally, this paper will analyze the advantages and disadvantages of negotiating a SOFA with a limited waiver of criminal jurisdiction for U.S. service members who commit offenses against Iraqi citizens that are outside the scope of duty. Ultimately, this paper argues that such a limited waiver of criminal jurisdiction for U.S. service members is indeed necessary and proposes that a hybrid court composed of both U.S. and Iraqi legal personnel should be constituted in Iraq in order to prosecute the relatively few high profile cases that would arise under this waiver of immunity.

## II. HIGH PROFILE INCIDENTS IN IRAQ

Since the invasion of Iraq in 2003, a relatively small handful of U.S. service members are alleged to have committed a small number high profile and egregious crimes against Iraqi citizens.<sup>10</sup> While such incidents are not unusual

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<sup>9</sup> UCMJ, art. 2 (2008). Article 2 governs the jurisdictional requirements necessary for prosecution of military members, reservists and civilians under the UCMJ.

<sup>10</sup> Tim Whitmire, *Wartime Prosecutions Come Under Scrutiny*, ASSOCIATED PRESS, June 5, 2005, available at <http://www.kgw.com/sharedcontent/iraq/topstories/060505cjrwwiraqmilitaryprosecutions.2e5a8ee42.html>; Colin H. Kahl, *How We Fight*, FOREIGN AFFAIRS, Nov.-Dec. 2006, at 99 (suggesting that from 2003 through 2006, 16 Marines and soldiers were charged with the deaths of Iraqi civilians compared to over 100 Marines and soldiers during Vietnam).

during wartime, particularly during a prolonged counter-insurgency,<sup>11</sup> due to the attendant and overwhelming press coverage, these episodes have had a profound and unfortunate effect on the image of the United States in the international community.<sup>12</sup>

Perhaps the most powerful and damaging of these incidents to the prestige of the U.S. government involved the humiliating treatment of Iraqi detainees by a number of U.S. soldiers at the Abu Ghraib detention facility located west of Baghdad, Iraq in November 2003.<sup>13</sup> Though the photographs of Iraqi prisoners in painful and sexually humiliating positions engendered outrage throughout the world, ultimately, after four years of investigations and courts-martial, “no officers or civilian leaders [were] held criminally responsible for the prisoner abuse that embarrassed the U.S. military and inflamed the Muslim world.”<sup>14</sup>

The disturbing events at Abu Ghraib<sup>15</sup> were followed by the alleged unlawful killings of Iraqi civilians by U.S. Marines at Haditha in November 2005.<sup>16</sup> At Haditha, a Marine squad allegedly killed twenty-four Iraqi civilians in a house-to-house engagement that went awry. Their legal defense was centered on either the theory that the Marines were following the rules of engagement or that the killings were lawfully committed in self-defense.<sup>17</sup> For

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<sup>11</sup> Kahl, *supra* note 10, at 98.

<sup>12</sup> Michael Ignatieff, *Mirage in the Desert*, N. Y. TIMES MAG., June 27, 2004 available at <http://query.nytimes.com/gst/fullpage.html?res=9907E7D71339F934A15755C0A9629C8B63> (“Abu Ghraib and the other catastrophes of occupation have cost America the Iraqi hearts and minds its soldiers had patiently won over since victory.”); Kahl, *supra* note 10, at 84 (showing that in a June 2003 poll of Muslims, over 90% believed that the U.S. did not “try very hard” to avoid civilian casualties in Iraq).

<sup>13</sup> Peter Grier and Faye Bowers, *Abu Ghraib Picture Fills In*, CHRISTIAN SCI. MONITOR, Aug. 24, 2004, available at <http://www.csmonitor.com/2004/0824/p01s01-usju.html> (“The worst aspects are obvious - the abuses themselves. The pictures of laughing Americans manipulating Iraqis for their apparent amusement have done incalculable damage to US prestige in Muslim countries, if not the world at large.”).

<sup>14</sup> *Abu Ghraib Officer: Probe Was Incomplete*, ASSOCIATED PRESS, Jan. 11, 2007 available at [http://www.usatoday.com/news/world/2008-01-11-abu-ghraib-probe\\_N.htm](http://www.usatoday.com/news/world/2008-01-11-abu-ghraib-probe_N.htm) [hereinafter *Probe Was Incomplete*].

<sup>15</sup> Interview with Zuhair Al-Maliki, Senior Investigative Judge, Central Criminal Court of Iraq in Baghdad, Iraq (Jun. 2004). Interestingly, some Iraqi judicial officials believed that the conduct uncovered at Abu Ghraib was something less than torture. In fact, while certainly disturbing, the point made to this author was that much worse had been done to Iraqi detainees at the same facility during the rule of Saddam Hussein. At least one Iraqi judge believed the conduct, while not condoned, was blown out of proportion by the international press..

<sup>16</sup> Josh White, *Marine Says Rules Were Followed: Sergeant Describes Hunt for Insurgents in Haditha, Denies Coverup*, WASH. POST, June 11, 2006, at A1.

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

the most part, these defenses were received sympathetically in the U.S. military justice system.<sup>18</sup>

In 2006, in Hamdania, a Marine unit was alleged to have kidnapped and killed an unarmed and disabled Iraqi suspected of being an insurgent. Additionally, several Marines were alleged to have planted evidence at the crime scene.<sup>19</sup> In both Haditha and Hamdania, the UCMJ was extensively utilized to investigate each allegation. The results of the Hamdania courts-martial were decidedly mixed, however.<sup>20</sup>

While these aforementioned incidents involved serious misconduct immediately before, during or after combat operations and its attendant stress, perhaps the most disturbing and chilling incident of alleged egregious conduct against Iraqi citizens by U.S. service-members involved the rape, mutilation, and murder of a young Iraqi girl and her family by five U.S. soldiers in the village of Mahmoudiya on July 9, 2006.<sup>21</sup> At Mahmoudiya, U.S. soldiers, several of whom were intoxicated, raped a fourteen-year-old Iraqi girl, burned her body to cover up the evidence and murdered her family.<sup>22</sup>

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<sup>18</sup> Adam Tanner, *U.S. Officer Charges Dismissed in Haditha Killings*, REUTERS, Sept. 18, 2007, available at <http://www.reuters.com/article/topNews/idUSN1845602020070918> (charges dismissed against four out of eight Marines, recommendation also made to drop charges against a fifth Marine).

<sup>19</sup> Ellen Knickmeyer, *Iraqis Accuse Marines in April Killing Of Civilian*, WASH. POST., June 5, 2006 at A1.

<sup>20</sup> Teri Figueroa and Mark Walker, *Marine Trial Results Show Leniency*, N. COUNTY TIMES, Aug. 16, 2007 available at [http://www.nctimes.com/articles/2007/08/17/news/top\\_stories/22\\_33\\_898\\_16\\_07.txt](http://www.nctimes.com/articles/2007/08/17/news/top_stories/22_33_898_16_07.txt). (while eight Marines were convicted, the adjudged sentences were relatively lenient. A former Marine prosecutor thinks sentences were well below expectations); Paul von Zielbauer, *Marine Corps Squad Leader Is Guilty of Unpremeditated Murder in Killing of an Iraqi Man*, N. Y. TIMES, Aug. 3, 2007, at A10 (five of the eight members of the Marine squad convicted for their actions at Hamdania, received sentences ranging from one to eight years in prison); Thomas Watkins, *Legal Actions Highlight General's Power*, ASSOCIATED PRESS, Aug. 16, 2007. Eight Marines were convicted of misconduct in Hamdania. Sgt. Hutchens was convicted of unpremeditated murder and received the most severe sentence to date: fifteen years. Two Marines were granted clemency by the commanding general. *Id.*

<sup>21</sup> *Five soldiers charged in Iraq rape-murder case*, CNN, July 9, 2006 available at [www.cnn.com/2006/LAW/07/09/soldiers.charged/index.html](http://www.cnn.com/2006/LAW/07/09/soldiers.charged/index.html).

<sup>22</sup> *Id.*; *US soldier jailed for Iraq murder*, BBC News, available at <http://news.bbc.co.uk/2/hi/americas/6388585.stm>; *Court-Martial to Begin in Iraqi Girl Rape-Killing*, ASSOCIATED PRESS, July 30, 2007 available at <http://cbs3.com/national/Fort.Campbell.soldier.2.287166.html> (four soldiers received 90 years, 100 years, 110 years, and twenty seven months respectively as a result of various courts-martial); *Ex-soldier Charged with Rape, Murder May Soon Have Trial Date*, ASSOCIATED PRESS, Nov. 13, 2007, available at <http://www.chron.com/disp/story.mpl/ap/tx/5297721.html> (explaining that the defendant, Steven D. Green, was no longer on active duty at the time of his arrest, has been arraigned in federal court, and faces the possibility of the death penalty).

Other highly publicized incidents generally involved the alleged unlawful killing of civilians or “mercy killings” of wounded Iraqi insurgents by U.S. forces.<sup>23</sup> Subsequent court-martial sentences for combat related killings were correspondingly light, did not make it to trial, or ended in acquittal.<sup>24</sup>

### A. Press Coverage

The types of incidents detailed above have had several profound ramifications on the perception of the U.S. military internationally. First and foremost, both the domestic and foreign press has not been shy in publicizing the alleged unlawful killings and the attendant prosecutions (or perceived lack thereof) by U.S. forces.<sup>25</sup> Despite the relatively small numbers of actual perpetrators and victims,<sup>26</sup> the international furor, stoked in large measure by the news media, has created a significant deterioration of the U.S. position with respect to the government of Iraq and perhaps with the Iraqi people.<sup>27</sup>

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<sup>23</sup> Whitmire, *supra* note 10. A series of cases stemming from the execution of gravely wounded Iraqis have resulted in sentences of three years or less. Defendants and their lawyers have described the slayings as “mercy killings,” though the Geneva Convention expressly forbids the execution of the wounded. *Id.*; CBS News: *6 Months For GI In Iraqi Drowning* (CBS television broadcast Jan. 8, 2005) available at [www.cbsnews.com/stories/2005/01/05/iraq/main664951.shtml](http://www.cbsnews.com/stories/2005/01/05/iraq/main664951.shtml). (“In January 2004, two Iraqis in the custody of U.S. soldiers were thrown from a bridge over the Tigris River in Samarra, Iraq. One man drowned and one survived. The lieutenant who directed the action was tried by court-martial and received 45 days confinement. Another soldier who carried out the orders received six months confinement.”).

<sup>24</sup> Whitmire, *supra* note 10.

<sup>25</sup> *Id.* The Associated Press devoted a lengthy article listing a case-by-case analysis of all U.S. soldiers and Marines prosecuted in connection with deaths of Iraqi civilians since the beginning of the Iraq war in March 2003 up to June 2005. *Id.* “Since the Iraq war began, at least 10 U.S. military personnel have been convicted of a wide array of charges stemming from the deaths of Iraqi civilians. ... But only one sentence has exceeded three years, and last month two men - a Marine lieutenant and an Army sergeant - were cleared entirely of murder charges.” *Id.*; Kahl, *supra* note 10, at 99; Colin H. Kahl, *In the Cross-Fire or Crosshairs?*, 32 INT’L SECURITY 34-35 (Summer 2007) (noting that between 2003 and early 2006, only twenty-six U.S. service members were charged with violent crimes resulting in the death of Iraqi citizens. Of those twenty-six, only twelve served any confinement.).

<sup>26</sup> Whitmire, *supra* note 10.

<sup>27</sup> Howard LaFranchi, *Iraq’s Tougher Stance Toward US, The Prime Minister Takes a Hard Line on the Haditha Case – Which May Complicate US Relations*, CHRISTIAN SCI. MONITOR, June 7, 2006, available at [www.csmonitor.com/2006/0607/p01s03-usfp.html](http://www.csmonitor.com/2006/0607/p01s03-usfp.html) (positing that a SOFA would remedy the weakness the current Al-Maliki-led Iraqi Government has in the face of investigations of similar incidents). *Id.*

## B. The Efficacy of the UCMJ as an Investigative Tool

The efficacy of the UCMJ as an investigative and judicial tool has been put to the test as these cases wind their way through the military justice system.<sup>28</sup> Once reported by the unit or reported as a result of press attention, virtually all of the service members involved have been subject to some form of administrative or prosecutorial intervention by the U.S. military through the use of administrative remedies, non-judicial punishment or criminal charges under the UCMJ.<sup>29</sup> That said, there appears to be a significant preference for initiating administrative rather than criminal investigations into civilian deaths caused by U.S. forces.<sup>30</sup> Through mid-2006, the Pentagon claims to have initiated over 600 investigations into allegations of misconduct by U.S. forces against Iraqi citizens. The vast majority of the investigations related to the abuse of detainees, while correspondingly few related to the murder of Iraqi civilians in non-detention situations.<sup>31</sup>

One scholar questions the number of military investigations initiated into civilian deaths as inadequate overall and overwhelmingly administrative vice criminal in nature.<sup>32</sup> Aside from the relatively few courts-martials resulting from these incidents, there appear to be “numerous” Iraqi civilian deaths in which the military failed to open investigations at all despite direct U.S. involvement.<sup>33</sup>

Further, the sentences of the relatively small handful of U.S. service members convicted at courts-martial has varied greatly.<sup>34</sup> As a result of this perceived disparity, some observers have taken note of the relatively light sentences and concluded that the U.S. military judicial system has little regard

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<sup>28</sup> See generally U.S. DEP'T OF ARMY, FIELD MANUAL 3-19.13, LAW ENFORCEMENT INVESTIGATIONS (Jan. 2005) (Army Criminal Investigations Division's law enforcement guide). See also U.S. DEP'T OF ARMY, REG. 15-6, PROCEDURE FOR INVESTIGATION OFFICERS OR BOARDS OF OFFICERS (2 Oct. 2006) (detailing the U.S. Army procedures that relate to formal and informal Army investigations).

<sup>29</sup> See generally Whitmire, *supra* note 10; Kahl, *supra* note 10, at 99.

<sup>30</sup> Kahl, *supra* note 10, at 99.

<sup>31</sup> *Id.* Interestingly, few investigations relate to Iraqi civilians “killed or injured at checkpoints or alongside convoys or during combat.” The majority of the investigations pertain to detainee abuse and are not directly combat related.

<sup>32</sup> *Id.* at 99; see also *Probe Was Incomplete*, *supra* note 14.

<sup>33</sup> Kahl, *supra* note 10, at 99 (“Of the investigations that have occurred many appear to have been administrative inquiries meant to determine whether U.S. forces acted with the confines of their ROE – and most have concluded that they had.”); see also Kahl, *In the Cross-Fire*, *supra* note 25, at 35 (noting that General Petraeus, the current Commanding General of Multi-National Forces Iraq, has emphasized the importance of protecting civilians in counterinsurgency operations and has ordered aggressive investigations into wrongdoing committed by U.S. forces). *Id.*

<sup>34</sup> See generally Whitmire, *supra* note 10.

for Iraqi victims in its own courts and that its military forces operate with apparent impunity.<sup>35</sup>

### C. Perceived Disparity in Justice

There are several legitimate reasons for the disparity in courts-martial sentences. Foremost among them is the opportunity that military accused have of being judged by sympathetic fellow combat veterans who almost certainly have an appreciation of the particular stressors that accompany combat, particularly in an urban setting against an insurgent enemy.<sup>36</sup> Second, critics often omit or fail to appreciate the often fruitless search for and collection of evidence needed to convict deployed U.S. service members of misconduct beyond a reasonable doubt, particularly when the local population is unwilling or unable to help.<sup>37</sup>

For the vast majority of reported incidents, it appears the U.S. military has provided the full spectrum of administrative and criminal remedies, rights and procedures available under the UCMJ, as the legal jurisdictional filter to evaluate the wrongfulness of the conduct of U.S. service members involved with alleged unlawful killings. Further, it appears senior military leaders have recognized the long-term implications of a failure to adequately and aggressively investigate wrongdoings committed by U.S. forces and have attempted to remedy the process by emphasizing the importance of protecting civilians in counter-insurgency operations [COIN].<sup>38</sup> However, it also appears that military commanders still have a clear preference for handling these incidents in an administrative vice criminal manner --- a preference that by its

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<sup>35</sup> Fahim, *supra* note 1 (“With the infamous cases of torture in Abu Ghraib and elsewhere, impunity is the rule of thumb for both the rank and file and their superiors.” Mr. Fahim further asserts that “Over the course of the war, prosecutions have either not taken place, or if court martials have occurred, there have been acquittals or token sentences dispensed.”); *See also* Whitmire, *supra* note 10. According to Gary D. Solis, a retired Marine who teaches at the U.S. Military Academy, “There have been some convictions in which the sentences are amazingly light.” *Id.*

<sup>36</sup> Whitmire, *supra* note 10 (“Prosecuting cases within an all-military judicial system ensures that defendants are held to military standards - but also allows defense lawyers to tailor arguments for judges and jurors who may be more sympathetic than the general public to defendants making decisions in a war zone.”) *Id.*; *see* Kahl, *In the Cross-Fire*, *supra* note 25, at 34-35 (noting that between 2003-2006, only twenty-six U.S. service members were charged with violent crimes resulting in death of Iraqi citizens. Of those twenty-six, only twelve served any confinement).

<sup>37</sup> Whitmire, *supra* note 10.

<sup>38</sup> Kahl, *In the Cross-Fire*, *supra* note 25, at 34-35 (suggesting that since 2006, U.S. military leaders in Iraq have taken significant steps to remedy the lack of adequate investigations, including ordering refresher training on the law of war and by implementing new guidance directing investigations into all incidents involving the serious wounding or death of Iraqi civilians caused by U.S. forces. General Petraeus, the current commander of U.S. forces in Iraq, has emphasized the importance of protecting civilians in counterinsurgency operations [COIN] and has ordered aggressive investigations into wrongdoing).

own nature inevitably leads to lesser forms of punishment, administrative action or dismissal of charges.<sup>39</sup>

Unfortunately, despite the UCMJ's historical track record for fairness in investigating and prosecuting U.S. service members,<sup>40</sup> it may be the perception of the process that ultimately matters most.<sup>41</sup> At least one U.S.-based Iraqi scholar believes that the perception of American soldiers operating with impunity within Iraq may have severe consequences for the long-term stabilization of the state.<sup>42</sup>

Despite the unbalanced perception of the U.S. military justice system in many quarters, this paper does not advocate prosecuting U.S. service members in Iraqi courts in connection to alleged combat-related killings. Despite intense criticism, the UCMJ appears to be a sufficient tool to prosecute those types of alleged crimes. Rather, this paper advocates prosecuting offenses, similar to the crimes that occurred at Mahmoudiya, committed by U.S. service members outside the scope of duty that are not necessarily combat-related but also have a profound impact on the Iraq public perception of U.S. forces.

#### **D. Pressure Mounting for SOFA with Iraq**

Since the invasion of Iraq in May 2003, and partly as a result of the aforementioned incidents of criminal conduct by U.S. forces against Iraqi citizens, there have been continued calls for the U.S. government to negotiate an

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<sup>39</sup> See Jamie M. Gher, Comment, *Status of Forces Agreements: Tools to Further Effective Foreign Policy and Lessons To Be Learned from the United States-Japan Agreement*, 37 U.S.F. L. REV. 227, 240 (2002) (discussing unpredictability of UCMJ based upon discretion of commanding officer, leniency of courts-martial sentences overseas, and availability of administrative discharges).

<sup>40</sup> Editorial, *Towards Responsible Military Justice*, ST. PETERSBURG TIMES (July 5, 2006) available at [http://www.sptimes.com/2006/07/05/Opinion/Toward\\_responsible\\_mi.shtml](http://www.sptimes.com/2006/07/05/Opinion/Toward_responsible_mi.shtml).

<sup>41</sup> James Ross, Letter to the Editor, DAILY TELEGRAPH (London), June 6, 2005 at 21. Mr. Ross, a member of Human Rights Watch, admonishes the track record of the U.S. in prosecuting cases under the UCMJ in Iraq and believes that it has had a deleterious effect on the situation in Iraq. "Continued unpunished crimes by coalition forces in Iraq will only add to the ranks of the insurgents (regardless of their own far worse criminal acts) and undermine efforts to promote the rule of law among the general population." *Id.*

<sup>42</sup> Fahim, *supra* note 1. According to Professor M. Cherif Bassiouni, an American-based Middle East scholar:

American soldiers are perceived by Iraqis as being above the law ... [this has] serious implications for the US-Iraqi relationship. It feeds Iraqi cynicism about the legitimacy of the transitional government and reinforces assumptions that Americans are the ultimate arbiters of Iraq's purported sovereignty. ... [Iraqis] have absolutely no illusions that the present government has very little ability to exercise sovereignty ... Thirty years under Saddam's regime brought people a certain type of realism. Power, control - corrupt absolutely. Saddam controlled absolutely, now the Americans are controlling absolutely.

*Id.* See also Kahl, *In the Crossfire*, *supra* note 24, at 35 (effect the perception of inadequate prosecutions may have on prolonging counter-insurgency operations).

agreement with the sovereign state of Iraq regarding jurisdiction over crimes committed by United States forces against Iraqi civilians.<sup>43</sup>

It appears the position of the U.S. government has shifted in recent months towards negotiating a comprehensive SOFA with Iraq.<sup>44</sup> Clearly, the U.S. military hierarchy is in favor of a criminal jurisdiction SOFA in order to continue to protect U.S. troops in light of the expiration of U.N. Security Council Resolution 1790 at the end of 2008.<sup>45</sup> While it remains to be seen whether a binding agreement regarding criminal jurisdiction will be signed in 2008,<sup>46</sup> in the interim, the U.S. will continue to rely upon CPA No. 17 to shield itself from the Iraqi legal process.

### E. Brief Overview of Status of Forces Agreements

The U.S. has a long and rich tradition of stationing large numbers of service members in overseas nations, particularly since the end of World War II.<sup>47</sup> Usually, a formal SOFA is entered into between the U.S. and the host nation that contains language clarifying criminal jurisdictional issues.<sup>48</sup>

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<sup>43</sup> THE INDEPENDENT COMMISSION ON THE SECURITY FORCES OF IRAQ, REPORT OF THE INDEPENDENT COMMISSION ON THE SECURITY FORCES OF IRAQ 129 (2007) [hereinafter INDEPENDENT COMMISSION REPORT] (“Formal status of forces agreement should be pursued with the Iraqi government.”); Press Release, Representative Steve Israel, et al., Introduce Legislation That Calls on the President to Begin Negotiations on a Status of Forces Agreement in Iraq (Dec. 7, 2006) (on file with author).

<sup>44</sup> Tom Vanden Brook, *U.S., Iraq Set Stage For Talks on Ties*, USA TODAY, Nov. 27, 2007, at A1; Thom Shanker and Cara Buckley, *U.S. and Iraq to Negotiate Pact on Long-Term Relations*, N.Y. TIMES, Nov. 27, 2007, at A1 (in a tacit acknowledgement of the importance that such a formal SOFA would have on the international perception that Iraq truly is a sovereign nation); see also IRAQ STUDY GROUP, IRAQ STUDY GROUP REPORT: THE WAY FORWARD – A NEW APPROACH 9 (Dec. 6, 2006) [hereinafter IRAQ STUDY GROUP REPORT] available at <http://www.usip.org/isg/index.html> (advocating SOFA with Iraq).

<sup>45</sup> Shanker and Buckley, *Long-Term Relations*, supra note 44, at A1.; Peter Baker and Ann Scott Tyson, *Bush, Maliki Sign Pact on Iraq’s Future*, WASH. POST, Nov. 27, 2007, at A12; Editorial, *Don’t Tie the Next President’s Hands*, N.Y. TIMES, Jan. 17, 2008 available at <http://www.nytimes.com/2008/01/17/opinion/17thu1.html>; Thom Shanker and Steven Lee Myers, *U.S. Asking for Wide Rights on War*, N.Y. TIMES, Jan. 25, 2007 at A1 (the Executive Branch draft proposal was believed to include the position that the U.S. forces continue to be given full immunity from prosecution in Iraqi criminal courts).

<sup>46</sup> See Kenneth Katzman, *Post-Saddam Governance and Security*, Cong. Res. Service Rep. to Cong. 15 (Nov. 7, 2006); *Don’t Tie the Next President’s Hands*, supra note 45.

<sup>47</sup> John W. Egan, *The Future of Criminal Jurisdiction Over the Deployed American Soldier: Four Major Trends in Bilateral U.S. Status of Forces Agreements*, 20 EMORY INT’L REV. 291 (2006).

<sup>48</sup> Major Steven J. Lepper, *A Primer on Foreign Criminal Jurisdiction*, 37 A.F. L. REV. 169 (1994). For the U.S. government’s definition of a SOFA see Defense Technical Information Center, Status of Forces Agreement, <http://www.dtic.mil/doctrine/jel/doddict/data/s/05148.html> (last visited on Mar. 16, 2008) (“[A SOFA is] an agreement that defines the legal position of a visiting military force deployed in the territory of a friendly state. Agreements delineating the status of visiting military forces may be bilateral or multilateral. Provisions pertaining to the status of visiting forces

To clarify the legal protections governing its overseas troops, the U.S. currently has SOFAs and Visiting Forces Agreements (VFA) with over ninety countries in which either significant numbers of U.S. forces are permanently stationed or visit with regularity.<sup>49</sup> These agreements provide the U.S. with carefully negotiated limits of exposure to the host nation's criminal justice system.<sup>50</sup> The U.S. historically attempts to retain sole exclusive jurisdiction in situations involving long-term stationing of troops in overseas locations.<sup>51</sup> In both Iraq and Afghanistan the U.S. retains sole exclusive jurisdiction.<sup>52</sup> In Afghanistan, as in Iraq, this has created a certain amount of anxiety in light of the perceived excesses and potential criminal conduct of a minority of U.S. forces against the domestic population in that country.<sup>53</sup>

As a result of the absence of a negotiated bilateral SOFA between Iraq and the U.S., the obvious question remains: at this point in the history of Iraq, is it in the best interest of the United States to have a more equitable foreign criminal jurisdictional agreement with Iraq?<sup>54</sup>

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may be set forth in a separate agreement, or they may form a part of a more comprehensive agreement." *Id.*

<sup>49</sup> Global Security, GlobalSecurity.org, Status of Forces Agreement (SOFA), <http://www.globalsecurity.org/military/facility/sofa.html>, (last visited on Mar. 12, 2008). *See also* North Atlantic Treaty: Status of Forces, June 19, 1951, 4 U.S.T. 1792 [hereinafter NATO SOFA]; Treaty of Mutual Cooperation and Security, U.S.-Japan, Jan. 19, 1960, 11 U.S.T. 1652 [hereinafter Japan SOFA]; Facilities and Areas and the Status of United States Armed Forces in Korea, July 9, 1966, U.S.-S.Korea, 17 U.S.T. 1677 [hereinafter the Korea SOFA]; Agreement Between the Government of the Republic of the Philippines and the Government of the United States of America Regarding the Treatment of United States Armed Forces Visiting the Philippines, Feb. 10, 1998 [hereinafter Philippines VFA].

<sup>50</sup> Lepper, *supra* note 48, at 171.

<sup>51</sup> *Id.* at 172.

<sup>52</sup> CPA ORDER 17, *supra* note 6; Agreement Regarding the Status of United States Military and Civilian Personnel of the United States Department of Defense present in Afghanistan in Connection with Cooperative Efforts in Response to Terrorism, Humanitarian and Civic Assistance, Military Training and Exercises and Other Activities, May 28, 2003 [hereinafter Afghanistan Diplomatic Note].

<sup>53</sup> Peter Bergen and Katherine Tiedemann, *Losing Afghanistan, One Civilian at a Time*, WASH. POST, Nov. 18, 2007 at B4 ("Afghan President Hamid Karzai has repeatedly urged NATO and the U.S. military to act with greater restraint. ... Our innocent people are becoming victims of careless operations of NATO and international forces ... that could put the entire Afghan mission in peril.").

<sup>54</sup> INDEPENDENT COMMISSION REPORT, *supra* note 43, at 129 (a U.S.-Iraq SOFA would have the effect of codifying the U.S. relationship with Iraq while reinforcing Iraq's sovereignty and independence. Moreover, it would be consistent with our negotiating position vis-à-vis other nations where we have our military forces stationed).

### III. OVERVIEW OF THE SOFA POLICY OF THE U.S.

Foreign criminal jurisdiction over U.S. service members is comprised of elements of international law and domestic U.S. law as well as Defense Department regulations.<sup>55</sup> In order to properly lay the groundwork in understanding the current U.S. position regarding foreign criminal jurisdiction overseas, it is important to dissect the history of foreign criminal jurisdiction as interpreted by the U.S. Supreme Court and as perceived, negotiated and enforced by the Executive Branch.

#### A. Foreign Criminal Jurisdiction in the Receiving State

During much of its history, the U.S. government has been extremely reluctant to allow foreign nations to prosecute U.S. service members residing overseas for any reason.<sup>56</sup> However, in the early 1950s, upon the signing of the NATO SOFA, the United States “conceded that the principle of sovereignty demanded that visiting forces be subject to the receiving state’s criminal jurisdiction in most circumstances.”<sup>57</sup> The purpose of this section is to understand the policy implications of this change of position by the U.S. government and to apply these policy considerations in a more current context.

##### 1. Law of the Flag

An historical query involving foreign criminal jurisdiction in early American history usually begins with a carefully scrutiny of Chief Justice Marshall’s opinion in *The Schooner Exchange v. McFaddon*.<sup>58</sup> *Schooner Exchange* involved a civil lawsuit filed in United States District Court by the American owners of the ship Exchange who sought to recover the vessel after it had been seized by the French during the Napoleonic Wars.<sup>59</sup> The previous American owners filed suit after Exchange, now a converted warship, entered Philadelphia harbor for repairs.<sup>60</sup>

In *Schooner Exchange*, the Court decided that an armed vessel of a foreign power, not then at war with the United States, was not subject to the ordinary civil or criminal tribunals of the host nation based on the principle of

<sup>55</sup> Lepper, *supra* note 48, at 170; U.S. DEP’T OF DEFENSE, DIR. 5525.1, STATUS OF FORCES POLICY AND INFORMATION (2 Jul.1997) [hereinafter DEP’T OF DEFENSE DIR. 5525.1]

<sup>56</sup> Lepper, *supra* note 48, at 170.

<sup>57</sup> Lepper, *supra* note 48, at 170. Nevertheless, Department of Defense policy has been to take jurisdiction whenever possible. See DEP’T OF DEFENSE DIR. 5525.1, *supra* note 55, at Encl. 2.

<sup>58</sup> *The Schooner Exchange v. McFaddon*, 11 U.S. 116, 7 Cranch 116 (1812) (hereinafter *Schooner Exchange*). Lepper, *supra* note 48, at 170; Egan, *supra* note 47, at 295.

<sup>59</sup> *Schooner Exchange*, 11 U.S. 116, 7 Cranch 116 (1812).

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

sovereign immunity.<sup>61</sup> As a result of the decision in *Schooner Exchange*, the principle that “a military force operating on foreign soil is in no way subject to the territorial sovereign and exercises an exclusive right of jurisdiction over its members”<sup>62</sup> became known as “the law of the flag”<sup>63</sup> and was used to support U.S. foreign and military policy concerning foreign criminal jurisdiction for successive U.S. governments for close to 150 years.<sup>64</sup> Strictly adhering to “the law of the flag,” through the course of both world wars, the U.S. retained exclusive criminal jurisdiction over the millions of U.S. service members deployed overseas.<sup>65</sup>

World War II (WWII) marked the apex of the principle of sovereign immunity, however.<sup>66</sup> In the post-WWII years, the principle of absolute sovereignty came under increasing attack.<sup>67</sup> After WWII, many nations began to experience a powerful undercurrent of nationalism<sup>68</sup> that asserted itself in the need to protect and promote sovereignty within individual nations.<sup>69</sup> Those factors contributed in part to the signing of the NATO SOFA in 1951,<sup>70</sup> providing that jurisdiction over foreign forces no longer rested exclusively with the sending state.<sup>71</sup>

## 2. Post-World War II Agreements (NATO SOFA)

With the advent of the Cold War, the United States generally found itself with large numbers of U.S. service members stationed in allied nations all over the world, and particularly in Europe.<sup>72</sup> Out of strategic necessity, large numbers of both U.S. troops and bases were permanently required on the European continent to serve as a deterrent to the forces of the Soviet Union.<sup>73</sup> Thus, in part due to an immediate strategic necessity, a NATO SOFA was

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<sup>61</sup> *Id.* Despite this principle of absolute territorial sovereignty, Chief Justice Marshall argued that any two sovereign nations could, by agreement, relax this absolute and complete jurisdiction. *Id.*

<sup>62</sup> Lepper, *supra* note 48, at 171.

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

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

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

<sup>66</sup> *Id.*; Egan, *supra* note 47, at 296.

<sup>67</sup> Lepper, *supra* note 48, at 171; Egan, *supra* note 47, at 296 (quoting David J. Bederman, INTERNATIONAL LAW FRAMEWORKS 188 (2001) (“[T]he concept of the state changed after World War II and consequently the principle of absolute sovereign immunity came under attack.”)).

<sup>68</sup> Lepper, *supra* note 48, at 171; Egan, *supra* note 47, at 296.

<sup>69</sup> Lepper, *supra* note 48, at 171.

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

<sup>71</sup> NATO SOFA, *supra* note 49, Art. VII. The term “sending state” means the Contracting Party to which the force belongs; the term “receiving state” means the Contracting Party in the territory of which the force or civilian component is located, whether it be stationed there or passing in transit. *Id.* at Art. I.

<sup>72</sup> Egan, *supra* note 47, at 297.

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

signed by European nations allied to the United States in 1951.<sup>74</sup> Henceforth, the NATO SOFA would be considered the world standard for SOFAs<sup>75</sup> and marked a significant doctrinal shift away from “law of the flag.”<sup>76</sup>

### 3. NATO SOFA – Art. VII. Foreign Criminal Jurisdiction

The twenty articles of the NATO SOFA address not only foreign criminal jurisdiction,<sup>77</sup> but also comprehensively cover issues ranging from the acceptance of foreign driver’s licenses,<sup>78</sup> to passport requirements<sup>79</sup> and foreign claims.<sup>80</sup> Article VII of the NATO SOFA provides a comprehensive, yet simplified decision making process to determine foreign criminal jurisdiction issues.<sup>81</sup>

Article VII, paragraph 1, links the determination of criminal jurisdiction to the nature of the crime committed.<sup>82</sup> Article, VII, paragraph 2 continues by defining the exact circumstances under which the sending and receiving states can operate within the purview of exclusive jurisdiction.<sup>83</sup> This provision is commonly interpreted to provide exclusive jurisdiction where service members “violate the laws of only the sending or receiving state” – in which case only the offended state may prosecute.<sup>84</sup> For the most part, the U.S. frequently finds itself in the position of exercising exclusive jurisdiction primarily due to the nature of the crimes committed as well as to adhere to the Department of Defense policy to seek maximum jurisdiction over its forces deployed overseas.<sup>85</sup>

The two classes of jurisdiction contemplated above are relatively straightforward. The most difficult foreign criminal jurisdiction issues arise

<sup>74</sup> NATO SOFA, *supra* note 49; Egan, *supra* note 47, at 296.

<sup>75</sup> Gher, *supra* note 39, at 236.

<sup>76</sup> Lepper, *supra* note 48, at 171.

<sup>77</sup> NATO SOFA, *supra* note 49, Art. VII.

<sup>78</sup> *Id.* at Art. IV.

<sup>79</sup> *Id.* at Art. III.

<sup>80</sup> *Id.* at Art. VIII.

<sup>81</sup> *Id.* at Art. VII; Lepper, *supra* note 48, at 172.

<sup>82</sup> NATO SOFA, *supra* note 49, Art. VII.

<sup>83</sup> *Id.* at Art. VII, para. 2.

<sup>84</sup> Lepper, *supra* note 48, at 173.

<sup>85</sup> Lepper, *supra* note 48, at 171 (unauthorized absence, desertion, orders violations, etc. have no comparable civil counterparts in foreign nations. Thus, the U.S. must exercise exclusive jurisdiction in cases that are exclusively a product of military discipline infractions, or the crime would go unpunished); DEP’T OF DEFENSE, DIR. 5525.1, *supra* note 55, at Encl. 2 (stating that it is the policy of the Department of Defense to protect, to the maximum extent possible, the rights of United States personnel who may be subject to criminal trial by foreign courts and imprisonment in foreign prisons).

when assessing concurrent criminal jurisdiction as defined under Article VII, paragraph 3.

As a general rule, Article VII, paragraph 3 authorizes the receiving state to take primary jurisdiction over any member of the armed forces of the sending state subject to three important exceptions.<sup>86</sup> The first exception recognizes that the sending state retains jurisdiction where the offending service member commits a crime against the sending state, its property or personnel.<sup>87</sup> In other words, if no harm of any appreciable effect has occurred vis-à-vis the host nation, prosecution is not likely to be in the host nation's interest.<sup>88</sup>

The second exception involves offenses occurring while service members are in the performance of official duties.<sup>89</sup> The performance of duty exception has its roots in the notion that military members operating under the legitimate orders of their military hierarchy are simply carrying out the wishes of their own sovereign government and should not be punished as a result.<sup>90</sup> Procedurally, sending state jurisdiction is asserted under this "official duty" exception through the commander's issuance of an "official duty certificate" to the host nation.<sup>91</sup> In the vast majority of cases, this is enough to satisfy the terms of the NATO SOFA under Article VII.<sup>92</sup>

Unfortunately, the term "official duty" is subject to much controversy and disagreement between the signatories to the NATO SOFA.<sup>93</sup> The United States has taken a very broad view of the term "official duty" and has continuously asserted since signing the NATO SOFA in 1951 that the sending state and no other party should determine whether a service member was in the performance of "official duty" during an alleged criminal act. This aggressive

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<sup>86</sup> NATO SOFA, *supra* note 49, Art. VII, para. 3.

<sup>87</sup> *Id.* at Art. VII, para 3(i) (otherwise known as the *Inter Se* exception).

<sup>88</sup> Lepper, *supra* note 48, at 174 ("This recognizes the idea that the sending state generally has a greater interest in prosecuting crimes that occur entirely within its military communities.").

<sup>89</sup> NATO SOFA, *supra* note 49, Art. VII, para 3(ii).

<sup>90</sup> Lepper, *supra* note 48, at 171. "Because his government is generally immune from liability for its public official acts, it does not require a great leap of logic to confer a similar status to its actors." *Id.* This has been construed as the last vestige of "the law of the flag." *Id.*

<sup>91</sup> *Id.* at 176 (quoting SNEE & PYE, STATUS OF FORCES AGREEMENT: CRIMINAL JURISDICTION 53 (1957)).

<sup>92</sup> SNEE & PYE, STATUS OF FORCES AGREEMENT: CRIMINAL JURISDICTION 53 (1957) (this presumption of "official duty" has become a rebuttable one, however, in several instances).

<sup>93</sup> Lepper, *A Primer on Foreign Criminal Jurisdiction*, 37 A.F. L. REV. 169, 176 (1994) quoting SNEE & PYE, *supra* note 91, at 46 (1957) (notably, during the NATO SOFA negotiations, the U.S. was opposed to a restricted definition of "official duty" while the European nations acting predominately in the category of receiving states wanted one. The definition as listed in the NATO SOFA became intentionally vague as a result).

stance in protecting U.S. service members from foreign jurisdiction has led to a number of problems with other nations with whom we have had SOFAs.<sup>94</sup>

The third provision that has a role in determining primary jurisdiction between NATO SOFA signatories is known as the waiver exception.<sup>95</sup> Article VII, paragraph 3(c) of the NATO SOFA is a clause that creates an *ad hoc* change mechanism that allows either the receiving state or the sending state to waive its primary jurisdiction in important or otherwise significant cases.<sup>96</sup> Generally, this provision is invoked where either the receiving or sending state has a particularly important reason for prosecuting the offending service member.<sup>97</sup> While most NATO states routinely waive primary jurisdiction in favor of the United States, the United States, in contrast, “rarely waives its primary jurisdiction.”<sup>98</sup> The U.S. position of securing individual prosecution rights over U.S. service members overseas is driven, in part, by the position of the U.S. Senate that the U.S. government must, to the extent practicable, exercise primary jurisdiction whenever possible.<sup>99</sup>

#### 4. U.S. Department of Defense Directive 5525.1

The Department of Defense has developed guidance on when, where, and how to subject U.S. service members to foreign criminal jurisdiction.<sup>100</sup> Defense Department Directive 5525.1 provides a designated commanding officer with a comprehensive framework for evaluating the appropriateness of

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<sup>94</sup> Lepper, *supra* note 48, at 175 (the U.S. construes the definition as broadly as “reason and persuasion will allow”); Yoon-Ho Alex Lee, *Criminal Jurisdiction Under the U.S.-Korea Status of Forces Agreement: Problems to Proposals*, 13 J. TRANSNAT’L L. & POLICY 213, 240 (2003) (discussing whether two U.S. soldiers who ran over two Korean girls with their armored vehicle were properly acting under official duty status); Kimberly C. Priest-Hamilton, Comment, *Who Really Should Have Exercised Jurisdiction over the Military Pilots Implicated in the 1998 Italy Gondola Accident?*, 65 J. AIR. L. & COM. 605 (2000); *Wilson v. Girard*, 354 U.S. 524 (1957) (Specialist Girard was accused, while on guard duty, of firing a round from his rifle that hit and killed a Japanese national. The U.S. argued that it was an act or omission while on “official duty.”).

<sup>95</sup> NATO SOFA, *supra* note 49, Art. VII, para. 3(c).

<sup>96</sup> *Id.* at Art. VII, para. 3(c); See Lepper, *supra* note 48, at 176.

<sup>97</sup> Lepper, *supra* note 48, at 176.

<sup>98</sup> *Id.* (“This is due, for the most part, to the fact that [the United States’] primary jurisdiction is already narrowly limited to cases in which it always has important prosecution interests. The Senate’s admonition to maximize jurisdiction also weighs heavily against United States waivers.”). See DEP’T OF DEFENSE, DIR. 5525.1, *supra* note 55, at Encl. 2.

<sup>99</sup> Senate Advising and Consenting to Ratification of the NATO SOFA, S. Res. Executive T, 82nd Cong. (1952) [hereinafter Senate Advice] (The Senate advised that the commanding officer should evaluate the laws of the foreign states to determine whether comparable constitutional rights enjoyed in the United States were present. If these factors are not present, the commanding officer should request waiver of the host nation’s jurisdiction. If a waiver is not granted by the host nation, the Department of State should take appropriate action and the Senate need be notified).

<sup>100</sup> DEP’T OF DEFENSE, DIR. 5525.1, *supra* note 55.

allowing U.S. service members to be subjected to foreign criminal jurisdiction under any scenario contemplated by an applicable SOFA or other agreement or understanding with the host nation.<sup>101</sup>

To aid the designated commanding officer in evaluating the way ahead in cases involving foreign criminal jurisdiction, Department of Defense Directive 5525.1 provides a listing of "fair trial" safeguards or guarantees that are considered to be applicable to U.S. state court criminal proceedings by virtue of the 14th Amendment, as interpreted by the U.S. Supreme Court.<sup>102</sup>

Based upon these fair trial safeguards, the designated commanding officer has independent discretion to evaluate whether a case should or should not be turned over to the receiving state for prosecution. The commander's evaluation of the fair trial safeguards is not the end of the analysis. Even if a comparison indicates a favorable opinion towards allowing the receiving state to retain jurisdiction, "Military authorities overseas will not grant a waiver of U.S. jurisdiction without the prior approval of the Judge Advocate General of the accused's Service."<sup>103</sup>

5. Department of State Backgrounder Memorandum of April 12, 1996

On April 12, 1996 the Department of State published a background memorandum that gave a brief summary of the U.S. foreign policy position relating to SOFAs.<sup>104</sup> In its introduction, the memorandum opines that: "In every foreign country where substantial numbers of American troops are stationed for any appreciable length of time the United States will have a Status of Forces Agreement (SOFA) with the host country."<sup>105</sup>

Significantly, the memorandum also takes note of the "growing misperception by almost every country that the SOFA in that country favors the

<sup>101</sup> *Id.*; U.S. DEP'T OF NAVY, SEC'Y OF THE NAVY INSTR. 5820.4G (15 Dec. 1989); U.S. DEP'T OF ARMY, REG. 27-50 (15 Dec. 1989); U.S. DEP'T OF AIR FORCE, REG., 110-12 (Jan. 1990) (The U.S. Army, Air Force and Navy have issued joint regulations governing foreign criminal jurisdiction in compliance with DoD Directive 5525.1. These regulations give broad latitude to designated commanding officers to evaluate the receiving state's legal system and compare the rights afforded by that system to the protections normally received under the U.S. Constitution.).

<sup>102</sup> DEP'T OF DEFENSE, DIR. 5525.1, *supra* note 55, at Encl. 2 (listing seventeen factors for the designated commanding officer to consider in determining the appropriateness of allowing foreign criminal jurisdiction in a criminal case involving a U.S. service member).

<sup>103</sup> *See* U.S. DEP'T OF NAVY, SEC'Y OF THE NAVY INSTR. 5820.4G, para. 1-7C (15 Dec. 1999).

<sup>104</sup> BACKGROUND: STATUS OF FORCES AGREEMENTS, A SUMMARY OF U.S. FOREIGN POLICY ISSUES (Apr. 12, 1996) [hereinafter BACKGROUND MEMORANDUM].

<sup>105</sup> *Id.* at 1. Despite this statement, there has yet to be a negotiated long-term agreement in either Iraq or Afghanistan.

United States, particularly vis-à-vis SOFA agreements in other countries.”<sup>106</sup> While admittedly released by the Department of State prior to the advent of the Global War on Terror, the memorandum does give credence to this paper’s argument that the position of the Executive Branch ought to be to promote and sign these agreements wherever U.S. troops are stationed.<sup>107</sup>

## B. U.S. SOFA/VFAs in East Asia

There are several current U.S. SOFA/VFAs currently governing the criminal jurisdictions of U.S. service members stationed in various East Asian countries that offer particularly interesting lessons for the applicability of certain provisions that could ostensibly be used in a future U.S.-Iraq SOFA. An analysis of the original agreement and subsequent periodic changes provide the necessary and relevant context in discussing any future agreement governing foreign criminal jurisdiction in Iraq.

### 1. U.S. SOFA with the Republic of South Korea

On July 9, 1966, well after the end of direct hostilities on the Korean peninsula, the United States and the Republic of South Korea entered into a SOFA.<sup>108</sup> The Korean SOFA, comprising thirty-one articles, governs the use and location of U.S. military facilities as well as the jurisdictional status of U.S. service members within South Korea.<sup>109</sup> Article XXII provides a three-part framework for determining foreign criminal jurisdiction, including: exclusive jurisdiction of the sending state (U.S.), concurrent jurisdiction of both states, and exclusive jurisdiction of receiving state (S. Korea).<sup>110</sup>

The three categories for exercising jurisdiction are, in fact, the same basic categories that are included in Article VII of the NATO SOFA.<sup>111</sup> In both agreements, the U.S. retains exclusive jurisdiction over offenses that violate U.S. but not the receiving states’ laws.<sup>112</sup> Both agreements also provide that when a U.S. service member is potentially subject to concurrent jurisdiction, the U.S. retains primary jurisdiction in cases arising out of conduct committed while on “official duty” or when the alleged offenses are against either U.S. property

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<sup>106</sup> *Id.* at 2. The author of the memorandum asserts that, “The truth is that although SOFAs may vary, they are even-handed in the treatment of the sovereignty of the host country.” *Id.*

<sup>107</sup> *Id.* at 1 (“[The] United States recognizes that as threat perception *diminishes* around the world, so too does general tolerance for the presence of foreign troops.”) [emphasis added].

<sup>108</sup> Korea SOFA, *supra* note 49.

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

<sup>110</sup> *Id.* at Art. XXII.

<sup>111</sup> NATO SOFA, *supra* note 49, Art. VII.

<sup>112</sup> *Id.* at Art. VII, para. 2; Korea SOFA, *supra* note 49, Art. XXII, para. 2. Strictly military offenses such as Article 92, of the UCMJ (dereliction of duty) for example, are prosecuted by the U.S.

or personnel.<sup>113</sup> Furthermore, the term “official duty” is left undefined under either compact.<sup>114</sup> While on their face the agreements appear to be similar in scope, the U.S. has subsequently negotiated addenda (termed Agreed Minutes and Agreed Understandings) to the Korea SOFA that at times have enhanced and at times diminished the authority of the U.S. to retain jurisdiction over U.S. forces in Korea.<sup>115</sup>

Under the terms of the Korea SOFA, the U.S. exclusively determines “official duty” for purposes of retaining primary jurisdiction.<sup>116</sup> While U.S. authorities must determine whether the conduct was a “substantial departure” from military duties to be considered outside the scope of employment, the U.S. has no obligation to consult the Korean government in making this initial determination.<sup>117</sup> The Korean government may formally “discuss, question, or object” to the basis of this certification of official duty issued by U.S. authorities, but the U.S. is ultimately not bound to relinquish jurisdiction to Korea in cases involving official duty determinations.<sup>118</sup>

The Agreed Minutes of 1966 further limited Korea’s right to exercise primary jurisdiction under Article XXII, paragraphs 3(b) and 3(c), by requiring Korea to waive primary jurisdiction upon request by the U.S., except in cases of particular importance to Korea.<sup>119</sup> While these provisions were subsequently

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<sup>113</sup> NATO SOFA, *supra* note 49, Art. VII., para. 3; Korea SOFA, *supra* note 49, Art. XXII, para. 3.

<sup>114</sup> NATO SOFA, *supra* note 49; Korea SOFA, *supra* note 49.

<sup>115</sup> See Agreed Minutes to the Agreement under Article IV of the Mutual Defense Treaty Between the United States of America and the Republic of Korea Regarding Facilities and Areas and the Status of United States Armed Forces in the Republic of Korea and Related Minutes, July 9, 1966, 17 U.S.T. 1677 [hereinafter Agreed Minutes of 1966]; Understandings on Implementation of the Agreement under Article IV of the Mutual Defense Treaty Between the United States of America and the Republic of Korea Regarding Facilities and Areas and the Status of United States Armed Forces in the Republic of Korea and Related Minutes, Feb. 1, 1991, 17 U.S.T. 1677, 1813 [hereinafter Agreed Understandings of 1991].

<sup>116</sup> Agreed Understandings of 1991, *supra* note 115, at Re: para. 3(a)(1).

<sup>117</sup> Agreed Understandings to the Agreement under Article IV of the Mutual Defense Treaty Between the United States of America and the Republic of Korea, Regarding Facilities and Areas and the Status of United States Armed Forces in the Republic of Korea, July 9, 1966, 17 U.S.T. 1677 [hereinafter Agreed Understandings of 1966] at Re: para. 3(a).

<sup>118</sup> Agreed Understandings to the Agreement under Article IV of the Mutual Defense Treaty Between the United States of America and the Republic of Korea, Regarding Facilities and Areas and the Status of United States Armed Forces in the Republic of Korea, Feb. 1, 1991, 17 U.S.T. 1677, 1813 [hereinafter Agreed Understandings of 1991] at Re: para. 3(a)3(a) (under the terms of the Agreed Understandings of 1991, U.S. must issue certificate of official duty to South Korean authorities to retain primary jurisdiction.)

<sup>119</sup> Agreed Understandings of 1966, *supra* note 117, at Re: para. 3(b); see Youngjin Jung and Jun-Shik Hwang, *Where Does Inequality Come From? An Analysis of the Korea-United States Status of Forces Agreement*, 18 AM. U. INT’L L. REV. 1129 (2003) (noting that through 1999, Korea granted U.S. requests for waiver of primary jurisdiction at least 97% of the time -- one of the highest rates compared to other nations).

modified in Korea's favor in 1991,<sup>120</sup> and 2001,<sup>121</sup> some critics note that the U.S. continues to maintain effective jurisdiction despite these modifications.<sup>122</sup>

Finally, in those situations involving a delineated crime such as murder or rape of a Korean citizen, the U.S. must give "sympathetic consideration" to relinquishing jurisdiction and "shall exercise utmost restraint in requesting waivers of exclusive jurisdiction."<sup>123</sup> If the U.S. does not request jurisdiction, it is required to turn over custody of the U.S. service member upon request by the Korean government prior to indictment.<sup>124</sup>

In June 2002, this imbalanced relationship between the receiving and sending state was put into stark contrast when a fifty-seven-ton U.S. armored vehicle en route to a U.S. training site ran over and killed two Korean girls near a village in rural South Korea.<sup>125</sup> At the time of the incident, the U.S. asserted that both U.S. service members in the armored vehicle were operating in their "official duty" capacity and not subject to Korean law.<sup>126</sup> Pursuant to the Korea SOFA and the Amended Minutes of 2001, Korea requested waiver of primary jurisdiction.<sup>127</sup> The request was denied.<sup>128</sup> Both U.S. service members were prosecuted under the UCMJ for negligent homicide and acquitted by military juries.<sup>129</sup>

Both the refusal to waive jurisdiction in favor of the South Korean Government and the subsequent acquittals of the two service members were the focus of violent and prolonged protests against the U.S. military presence in Korea.<sup>130</sup> One prominent Korean newspaper editorialized at the time that the

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<sup>120</sup> Agreed Understandings of 1991, *supra* note 118, Art. XXII, Re:3(c)3(c).

<sup>121</sup> Understandings to the Agreement Minutes of July 9, 1966 to the Agreement Under Article IV of the Mutual Defense Treaty Between the United States of America and the Republic of Korea, Regarding Facilities and Areas and then Status of United States Armed Forces, As Amended, U.S.-Korea, Agreed Minutes, Article XXII, Re: para. 5(c), Jan. 18, 2001 [hereinafter 2001 Amendments to Agreed Minutes of 1966].

<sup>122</sup> Lee, *supra* note 94, at 228 ("Put simply, the United States reserves the right to delineate its primary jurisdiction as it sees fit."). See Jung & Hwang, *supra* note 119, at 1129.

<sup>123</sup> 2001 Amendments to Agreed Minutes of 1966, *supra* note 121, Article XXII, Re: para. 1(a) and 1(b).

<sup>124</sup> *Id.* at Article XXII, Re: para 5(c).

<sup>125</sup> Don Kirk, *Road Accident Galvanizes the Country : Deaths in Korea Ignite Anti-American Passion*, INT'L HERALD TRIB., July 31, 2002, available at <http://news.bbc.co.uk/2/hi/asia-pacific/2097137.stm>.

<sup>126</sup> *Korean Anger as US soldiers Cleared*, BBC News, Nov. 22, 2002, available at <http://news.bbc.co.uk/2/hi/asia-pacific/2497947.stm>.

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

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

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

<sup>130</sup> Lee, *supra* note 94, at 216 (Demonstrations included hunger strikes, attacks on Korean police guarding U.S. bases and numerous candlelight vigils.); *US Soldiers Charged for Korean Deaths*,

U.S. was reluctant to expose its military members to Korean courts because of a lack of trust in the Korean criminal court system.<sup>131</sup> The paper further argued that without “rightful disposition” of these types of cases, “mutual trust is impossible between the two allies.”<sup>132</sup> Interestingly, these same perceptions of mistrust have also found their way into the dialogue regarding Iraq’s criminal justice system.<sup>133</sup>

There has been speculation that South Korea’s “dire post-war situation led to the country’s willingness to agree to arrangements that were less than ideal and more stringent than the prevailing norms (e.g. the NATO SOFA).<sup>134</sup> In comparing both sets of agreements, the Korea SOFA has been characterized as “expressly restricting South Korea’s primary jurisdiction to a minority of cases” while the NATO SOFA is seen as respecting the receiving state’s legal regimes.<sup>135</sup>

Others have argued that the perceived imbalance in the initial strategic relationship between Korea and the U.S. that provided for such a one-sided relationship regarding foreign criminal jurisdiction has slowly dwindled -- a phenomenon which has ultimately led to a rectification of the imbalance in the original Korea SOFA.<sup>136</sup> Ultimately, despite the perception that there continues to be an imbalanced power dynamic between the U.S. and Korea, there is evidence that the relationship has given way in some measure to the “gradual expansion of host jurisdiction and increased reliance [on] the NATO model.”<sup>137</sup>

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*supra* note 126 (“The protesters ... said the drivers of the vehicle had deliberately killed the girls and demanded the soldiers be handed over to local police.”); *Korean Anger*, *supra* note 126.

<sup>131</sup> Gwyn Kirk and Carolyn Bowen Francis, *Redefining Security: Women Challenge U.S. Military Policy and Practice in East Asia*, 15 *BERKELEY WOMEN’S L.J.* 229, 257 (2000) (citing *Offenses Involving U.S. Soldiers*, *KOREA TIMES*, May 24, 1995, at 6).

<sup>132</sup> *Id.* See also Lee, *supra* note 94, at 216 (as a direct result of the public outrage in Korea, several prominent U.S. governmental officials, including President George Bush, Secretary of State Colin Powell and Secretary of Defense Donald Rumsfeld apologized for the incident).

<sup>133</sup> Rubin & von Zielbauer, *supra* note 8, at A1 (“legal specialists say that the [U.S.] government would probably be reluctant to throw the cases into the Iraqi courts, because there is little confidence that trials would be fair and defendants in those courts have few of the legal protections that are mandatory in the United States.”). See also *infra* Part IV.

<sup>134</sup> Lee, *supra* note 94, at 221. See also Gher, *supra* note 39, at 241 (East Asian countries have less bargaining power because they depend so much on the U.S. politically, militarily and economically).

<sup>135</sup> Lee, *supra* note 94, at 229. *But see* Egan, *supra* note 47, at 319-20 (Korea SOFA has emerged, through various amendments, on a par with those rights received by NATO countries in the NATO SOFA).

<sup>136</sup> Egan, *supra* note 47, at 319-20.

<sup>137</sup> *Id.* at 320.

2. U.S. SOFA with Japan

a. *History of Japan SOFA*

Upon the conclusion of WWII, U.S. forces occupied Japan<sup>138</sup> and remained in part to “rebuild the internal structure of the defeated state.”<sup>139</sup> As time progressed, and as Japan rebuilt its shattered economy, U.S. forces remained.<sup>140</sup> On January 19, 1960, the United States and Japan signed both a Mutual Defense Treaty and a SOFA.<sup>141</sup> Both the SOFA and the mutual defense treaty codified “the pre-existing daily working relationship of the U.S. presence and contained a wide variety of provisions that delineate the working relationship between the two governments.”<sup>142</sup>

b. *Article XVII of the Japan SOFA*

Article XVII of the Japan SOFA, similar to Article VII of the NATO SOFA, provides the necessary framework for analyzing foreign criminal jurisdiction questions involving U.S. service members alleged to have committed crimes in Japan.<sup>143</sup> Article XVII describes the different types of jurisdiction available to the either the receiving or sending state under the SOFA.<sup>144</sup> Its provisions on exclusive and concurrent jurisdiction are nearly identical on their face to those of the NATO and Korea SOFA.<sup>145</sup>

Similar to the provisions of the NATO SOFA, both the U.S. and Japan have the ability to exercise exclusive jurisdiction over persons punishable only under the laws of their respective state.<sup>146</sup> As a result, if a U.S. service member commits a crime that only violates Japanese law, Japan has the exclusive right to take jurisdiction of the case.<sup>147</sup> If a U.S. service member commits a uniquely U.S. military offense, however, the U.S. military is given the primary

<sup>138</sup> Steven G. Hemmert, Peace-Keeping Mission SOFAs: U.S. Interests in Criminal Jurisdiction, 17 B.U. INT'L L. J. 215, 235-36 (1999).

<sup>139</sup> Gher, *supra* note 39, at 227.

<sup>140</sup> *Id.* at 227; Hemmert, *supra* note 138, at 235-36.

<sup>141</sup> Treaty of Mutual Cooperation and Security, U.S.-Japan, Jan. 19, 1960, 11 U.S.T. 1652 [hereinafter Mutual Defense Treaty]; Japan SOFA, *supra* note 49.

<sup>142</sup> Lieutenant Commander Timothy D. Stone, *U.S.—Japan SOFA: A Necessary Document Worth Preserving*, 53 NAVAL L. REV. 229, 234-5 (2006). *See also* Egan, *supra* note 47, at 327 (2006). The NATO SOFA served as a model for the Japan SOFA based primarily on Japan’s insistence that as a major ally of the U.S., it should receive treatment similar to those nations already under the NATO SOFA umbrella. *Id.*

<sup>143</sup> Japan SOFA, *supra* note 49, Art. XVII.

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

<sup>145</sup> *Id.* at Art. XVII; NATO SOFA, *supra* note 49, Art. VII; Korea SOFA, *supra* note 49, Art. XXII; *see* Egan, *supra* note 47, at 327 (2006).

<sup>146</sup> Japan SOFA, *supra* note 49, Art. XVII, para. 2(a) and (b).

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

opportunity to prosecute.<sup>148</sup> In such cases where either the U.S. or Japan is not considered the primary jurisdictional authority under the SOFA, the other party must give “sympathetic consideration” to a request for waiver of jurisdiction if so requested.<sup>149</sup>

*c. Pre-Indictment Custody*

The most controversial Japan SOFA provision involves the pre-indictment custody arrangement of U.S. service members alleged to have committed crimes against Japanese civilians.<sup>150</sup> Prior to 1996, the U.S. was only required to relinquish physical control of a U.S. service member after indictment by the Japanese authorities.<sup>151</sup> Since this provision “directly undercuts the [Japanese] police’s most important tool for garnering a confession, critics claim it frustrates police investigations and obstructs justice.”<sup>152</sup>

Due in part to this criticism of the U.S. pre-indictment custody position, the Japan SOFA was amended in 1996 and 2004<sup>153</sup> to give “sympathetic consideration” to requests to transfer custody of U.S. military personnel to Japanese authorities, prior to indictment, in cases involving certain heinous crimes including rape, arson and murder.<sup>154</sup> These custody provisions are virtually identical to those found in the understandings to the Korea SOFA.<sup>155</sup> Despite these amendments, “even if confronted by a rape allegation, the U.S. authorities can still deny the request [for turnover to the Japanese authorities]” if the service member is in U.S. custody.<sup>156</sup>

*d. Scope of Duty Determination under the Japan SOFA*

The U.S. and Japan have agreed that the U.S. will be the sole determiner of whether a service member was in the “performance of official duty” and will issue a certificate to the Japanese authorities in any relevant

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<sup>148</sup> Japan SOFA, *supra* note 49, Art. XVII, para. 2(a) and (b); Stone, *supra* note 142, at 246.

<sup>149</sup> Japan SOFA, *supra* note 49, Art. XVII, para. 3(c).

<sup>150</sup> Stone, *supra* note 142, at 234-35 (the perception is that the custodial provision of paragraph 5(c) of the Japan SOFA is the subject of the greatest outrage in Japan).

<sup>151</sup> *Id.* at 252.

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

<sup>153</sup> *Id.* The Japan SOFA was amended due in large measure to the fallout from a high profile rape of a 12-year-old Japanese girl in 1995 by three U.S. service members on Okinawa.

<sup>154</sup> *Id.* at 252-53.

<sup>155</sup> Agreed Views Pertaining to the Agreement Under Article IV of the Mutual Defense Treaty Between the United States of America and the Republic of Korea, Regarding Facilities and Areas and then Status of United States Armed Forces, Jan. 18, 2001, Agreed View No. 21, Article XXII, Re: para. 5(c) [hereinafter Agreed View No. 21].

<sup>156</sup> Stone, *supra* note 142, at 252 (through 2004, the U.S. had rarely granted pre-indictment turnover).

situation.<sup>157</sup> While the certificate appears to be subject to appeal by the receiving state, the certificate creates a strong presumption that the certificate is valid, effectively placing a U.S. service member beyond the grasp of the Japanese criminal justice system.<sup>158</sup>

There have been a number of high profile incidents involving U.S. service-members alleged to have committed crimes against Japanese nationals since World War II.<sup>159</sup> The vast majority of these incidents did not, however, require a scope of duty determination as required under the Japan SOFA.<sup>160</sup> Rather, they involved crimes of sexual assault and murder perpetrated without an obvious duty connection.<sup>161</sup>

*e. Public Pressure and Foreign Criminal Jurisdiction*

While the overall relationship of the United States-Japan alliance has been characterized as “positive and promising” alleged U.S. service member misconduct in Japan underscores the main source of contention between the two nations: foreign criminal jurisdiction.<sup>162</sup> Japanese critics have alleged that the U.S. intentionally delays transfer of U.S. service members to Japanese custody, thereby impeding Japanese investigations.<sup>163</sup> Critics also assert that the U.S. policy of protecting U.S. service-members from Japanese authorities fails to

<sup>157</sup> Agreed Minutes to Article VI of Treaty of Mutual Cooperation and Security, U.S.-Japan, Jan. 19, 1960, 11 U.S.T. 1652 at Art. XVII, Re: 3(a)(ii) [hereinafter Agreed Minutes of 1960].

<sup>158</sup> *Id.* at Art. XVII, Re: 3(a)(ii); E-Mail from Lieutenant Commander Justin B. Clancy, Department Head, International and Operational Law Department, Naval Justice School (22 Feb. 2008, 15:55 EST) (on file with author) (“[According to] the Japan SOFA the CO’s determination of official duty can only be rebutted by the Japanese through a grievance to the Joint Committee.”). *See also* U.S. DEP’T OF THE NAVY, COMMANDER, UNITED STATES NAVAL FORCES JAPAN INSTR. 5820.16D, FOREIGN CRIMINAL JURISDICTION, para. 0704b (16 June 1992) (U.S. claims official duty status for all U.S. military personnel operating privately owned vehicles traveling directly between off base residence and U.S. military duty station); Stone, *supra* note 142, at 249.

<sup>159</sup> Gher, *supra* note 39, at 228-29 (in 1955, a six-year-old child was raped and murdered by a U.S. service member; sleeping woman beaten to death by G.I. in 1974; three U.S. service members abducted and raped a 12-year-old girl on Okinawa in 1995; Marine Lance Corporal arrested for sexual assault of a Japanese woman in 2000).

<sup>160</sup> *But see* Wilson v. Girard, 354 U.S. 524 (1957) (Specialist Girard was accused, while on guard duty, of firing a round from his rifle that hit and killed a Japanese national. The U.S. authorities argued Specialist Girard committed this shooting while on “official duty” and should not be subject to Japanese prosecution); *see also* SNEE & PYE, *supra* note 47, at 58. Ultimately, in a very controversial decision that led to Congressional hearings on the matter, the Department of Defense ultimately bowed to Japanese pressure and waived jurisdiction in favor of Japanese authorities. *Id.*

<sup>161</sup> Gher, *supra* note 39, at 228-9; *see also* Clancy, *supra* note 158 (noting several close calls on scope of duty determinations in cases where U.S. naval forces in Japan were alleged to have violated Japanese environmental and criminal laws during U.S. Naval air and sea operations. LCDR Clancy was the Command Judge Advocate for U.S. Naval Air Facility, Atsugi, Japan from 1999-2001 and Deputy Force Judge Advocate for U.S. Naval Forces Japan from 2003-2006).

<sup>162</sup> Gher, *supra* note 39, at 228-29.

<sup>163</sup> *Id.* at 229.

“deter the abhorrent behavior of American servicemen and women.”<sup>164</sup> As noted in this paper’s introduction, the criminal behavior of a minority of U.S. service members is also an impetus for the call for a SOFA in Iraq.<sup>165</sup>

*f. Criticisms of the Japanese Legal System*

Much of the reluctance of the U.S. military to turn over U.S. service members to Japanese authorities is based upon the alleged deficiencies in the Japanese legal system as compared to the “American ideal of due process and an individual’s right to defend themselves.”<sup>166</sup> Both the “near absolute”<sup>167</sup> power of the Japanese prosecutor and the basic orientation of the Japanese criminal system towards rehabilitation and reintegration instead of punishment have been fodder for critics who argue that the Japanese system’s effect is to treat foreigners unfairly.<sup>168</sup> Certainly, confessions are highly encouraged as the first step towards rehabilitation and figure to a large degree in the Japanese prosecutor’s decision to go forward.<sup>169</sup>

Furthermore, Japanese prosecutors have the authority to submit summary statements rather than verbatim statements taken from the accused.<sup>170</sup> Since the prosecutor cannot be cross-examined, the substance of the summary can go unchallenged. Moreover, detentions in Japan can last as long as twenty-three days without access to an attorney, and physical abuse and food deprivation are not uncommon.<sup>171</sup> Not surprisingly, at least one critic has characterized the Japanese legal system as “abnormal, diseased, and really quite hopeless.”<sup>172</sup>

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<sup>164</sup> *Id.* at 228-9.

<sup>165</sup> LaFranchi, *supra* note 27. *Infra* Part I.

<sup>166</sup> Stone, *supra* note 142, at 238 (citing United Nations Report, 64th Session of the Human Rights Committee, 4, Nov. 19, 1988, available at [www.debito.org/CCPR1998.html](http://www.debito.org/CCPR1998.html)).

<sup>167</sup> Stone, *supra* note 142, at 238.

<sup>168</sup> *Id.* at 238-41.

<sup>169</sup> *Id.* at 240. See U.S. FORCES JAPAN, INSTR. 51-701, JAPANESE LAWS AND YOU (1 June 2001) (strongly recommending that U.S. military service members being interrogated by Japanese authorities do not sign statements in Japanese if requested).

<sup>170</sup> Stone, *supra* note 142, at 243.

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

<sup>172</sup> *Id.* at 238 quoting DAVID T. JOHNSON, THE JAPANESE WAY OF JUSTICE: PROSECUTING CRIME IN JAPAN 3 (2002). But see Clancy, *supra* note 158 (LCDR Clancy was not aware of any detained U.S. military service member that alleged physical abuse by the Japanese police. “Most of the interrogations involved mind games and sleep deprivation, but they aren’t fed a 3,000 calorie a day diet that’s for sure.”).

g. *Comparison of Japanese and Iraqi Legal Systems*

An interesting parallel can be drawn between the Iraqi criminal justice system and the concerns that the U.S. has with the Japanese system. Both the Iraqi and Japanese criminal justice systems operate under the inquisitorial civil-law system and have been accused of being at times either “merely paper proceedings”<sup>173</sup> or flat out “corrupt.”<sup>174</sup> Both have been alleged to have a history of a bias against foreigners<sup>175</sup> and have been accused of using violence to obtain confessions.<sup>176</sup> Both systems rely heavily on summarized, rather than verbatim statements, taken during the investigatory stage of the proceedings.<sup>177</sup> Due to the historical and ingrained lack of an adversarial relationship between the defense attorney and the government during the investigatory and subsequent phases of the criminal trial, it is unfortunately common in both the Iraqi and Japanese systems for the governments’ version of events to go virtually unchallenged.<sup>178</sup>

While some observers have validly criticized the ability of the Iraqi court system to function and have questioned the lack of procedural safeguards inherent in Iraq’s criminal justice system,<sup>179</sup> it is interesting to note the U.S. government’s ability to ignore similar characteristics in Japan. While this paper is not suggesting that the baseline level of due process safeguards is the same in both nations, it will be interesting to see whether the U.S. engenders to

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<sup>173</sup> Stone, *supra* note 142, at 239 (“The vast majority of trials in Japan are little more than rituals for ratifying police and prosecutorial decisions.”).

<sup>174</sup> *Id.* at 244; Michael J. Frank, *U.S. Military Courts and the War in Iraq*, 39 VAND. J. TRANSNAT’L L. 645, 715 (2006) (imposing law and order has been a difficult battle after decades of corrupt rule and “a deep-seated culture giving gifts for favors.”).

<sup>175</sup> Stone, *supra* note 142, at 241 (“Debate exists whether this benevolence is equally applied to foreigners prosecuted in Japan.”); Frank, *supra* note 174, at 714-26 (noting Iraqi Central Criminal Court of Iraq judges’ habit of blaming foreign insurgents rather than Iraqi insurgents for attacks on Coalition Forces. Also referencing CCCI judges’ common discounting of beliefs of non-Muslims in evaluating testimony taken from U.S. forces against Muslim defendants).

<sup>176</sup> Stone, *supra* note 142, at 242-43 (even the U.S. Department of State has admitted that credible evidence exists that Japanese police use violence to obtain confessions when necessary during pre-trial detention periods); Michael J. Frank, *Trying Times: The Prosecution of Terrorists in the Central Criminal Court of Iraq*, 18 F. J. INT’L L. 1, 92 (2006) (citing U.S. DEPARTMENT OF STATE, 2004 COUNTRY REPORT ON HUMAN RIGHTS PRACTICES: IRAQ, available at <http://www.state.gov/g/drl/rls/hrrpt/2004/41722.htm>. Department of State reports the existence of hundreds of pending cases involving coerced confessions and interrogations by Iraqi police in 2004 alone).

<sup>177</sup> Stone, *supra* note 142, at 243; Frank, *supra* note 174, at 40.

<sup>178</sup> Stone, *supra* note 142, at 244; Frank, *supra* note 174, at 104-8 (noting Iraqi defense attorneys’ general lack of ability or desire for cross-examination).

<sup>179</sup> Rubin & von Zielbauer, *supra* note 8, at A1.

compromise its foreign criminal jurisdiction legal requirements<sup>180</sup> to the same extent in Iraq as it has done in Japan.

3. U.S.-Philippines Visiting Forces Agreement

a. *Military Base Agreement of 1947*

The United States military has had a lengthy, complicated and often stormy relationship with basing its forces in the Republic of the Philippines.<sup>181</sup> From 1898 to 1946, the U.S. ruled the Philippines as a colonial possession.<sup>182</sup> Upon the Philippines gaining their independence in 1946, the U.S. concluded a military basing agreement that included foreign criminal jurisdiction provisions highly favorable to the U.S.<sup>183</sup> In general, this initial military basing agreement recognized the principles of primary and concurrent jurisdiction also found in the NATO SOFA. The similarities between the two agreements end there, however.

In the Military Bases Agreement of 1947, the U.S. received “near exclusive” jurisdiction over all crimes committed on U.S. bases in the Philippines, even over those crimes with Philippine victims.<sup>184</sup> Considered an imbalanced agreement by many Philippine officials, it was the subject of much bitterness and “clearly represented a controversial topic for Filipinos.”<sup>185</sup> This expansion of U.S. sovereignty at the expense of the Philippine government was perceived as being symptomatic of an unequal bargaining relationship. Essentially, many Filipino critics felt that the “disparity of military power between the Philippines and the United States clearly created a situation in which the United States could – and arguable did – ‘coerce’ the Philippines into permitting the establishment of military bases in its territory.”<sup>186</sup>

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<sup>180</sup> DEP’T OF DEFENSE, DIR. 5525.1, *supra* note 55, at Encl. 2 (listing fair trial factors that the commanding officer can consider before recommending a waiver of jurisdiction for a U.S. service-member).

<sup>181</sup> Rafael A. Porrata-Doria, Jr., *The Philippine Bases and Status of Forces Agreement: Lesson for the Future*, 137 MIL. L. REV. 67, 69 (1992).

<sup>182</sup> Egan, *supra* note, 47, at 321.

<sup>183</sup> Agreement between the United States of America and the Republic of the Philippines Concerning Military Bases, U.S.-Phil., art. XIII, Mar. 14, 1947, T.I.A.S. 1775; Egan, *supra* note 47, at 321.

<sup>184</sup> Egan, *supra* note 47, at 321 (additionally, the U.S. had exclusive jurisdiction over crimes directed against the security of the Philippines).

<sup>185</sup> Porrata-Doria, Jr., *supra* note 181, at 74.

<sup>186</sup> *Id.* at 89.

*b. Philippine SOFA of 1965*

As a result of political pressure exerted by the Philippine government, a formal SOFA was concluded in 1965 after years of negotiations.<sup>187</sup> The Philippine SOFA of 1965 formally replaced the previous military basing agreement and was very similar in appearance and effect to the NATO SOFA.<sup>188</sup> The controversial provisions of the previous military basing agreement were replaced with new provisions that gave the Philippine government broader jurisdiction over offenses committed by Philippine nationals on U.S. bases.<sup>189</sup>

*c. Failed SOFA Renegotiations*

The Philippine SOFA of 1965 was eventually the subject of further negotiations between the two governments. Amidst more public protests and severe political turmoil over the U.S. military presence in the Philippines, an attempt was made during the 1990s to formally renegotiate the existing foreign criminal jurisdiction agreement.<sup>190</sup>

During the course of the negotiations, the Philippine government proposed jurisdictional provisions that were more favorable than those contained in the NATO SOFA. Specifically, Philippine negotiators proposed that the Philippine courts rather than U.S. military authorities determine “official duty” questions; that the U.S. allow Philippine investigators open access to U.S. bases; that the U.S. guarantee the indefinite retention of U.S. defendants in the Philippines; and that the U.S. extend receiving state jurisdiction to cases involving chastity and honor.<sup>191</sup> The U.S. disagreed with these proposals. Instead, the Philippine government submitted a SOFA to the Philippine Senate for ratification based almost entirely upon the NATO SOFA model.<sup>192</sup> The new agreement was rejected<sup>193</sup> and U.S. military forces left the Philippines soon thereafter.<sup>194</sup>

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<sup>187</sup> Military Bases in the Philippines: Criminal Jurisdiction Arrangements, U.S.-Phil., Aug. 10, 1965, 16 U.S.T. 1090 [hereinafter 1965 Philippine SOFA].

<sup>188</sup> Egan, *supra* note 47, at 323-24.

<sup>189</sup> 1965 Philippine SOFA, *supra* note 188. In an important change, the U.S. no longer had jurisdiction over Philippine citizens committing crimes on U.S. military bases.

<sup>190</sup> Porrata-Doria, Jr., *supra* note 181, at 90.

<sup>191</sup> Egan, *supra* note 47, at 325.

<sup>192</sup> Porrata-Doria, Jr., *supra* note 181, at 99.

<sup>193</sup> *Id.* at 100.

<sup>194</sup> Egan, *supra* note 47, at 325.

*d. Philippine VFA of 1998*

Eventually, as a result of a mutual desire for the U.S. military to routinely visit and train with Philippine military forces in the Philippines, a visiting forces agreement was consummated in 1998.<sup>195</sup> The Philippine VFA, comprising nine articles in total, essentially mirrors the primary and concurrent jurisdiction format of the NATO SOFA. It gives the U.S. primary right to prosecute U.S. service members for “official duty” and “inter se” offenses while the Philippine government retains primary jurisdiction over all other offenses.<sup>196</sup> The major difference between the NATO SOFA and the Philippine VFA relates to the custody provision for U.S. service members. Under the Philippine VFA, the U.S. may retain custody over U.S. military forces prosecuted in Philippine courts “until completion of all judicial proceedings.”<sup>197</sup> As noted previously, in contrast to the Philippine VFA, the NATO SOFA, Korea SOFA and Japan SOFA all allow for pre-trial custody by the receiving state in certain situations.<sup>198</sup>

*e. Comparisons to the Current Political Situation in Iraq*

The long and turbulent history of the foreign criminal jurisdiction experience in the Philippines is comparable on many levels to the current political vagaries experienced by the U.S. in Iraq. The Philippines has gone through a lengthy and uncomfortable occupation by a foreign power for much of its modern history while Iraq has had significant numbers of U.S. forces stationed in its territory since 2003. Upon its emergence as a sovereign nation, the Philippine government was saddled with an agreement that many felt was forced upon it by the U.S. who had, at the time of the agreement, an overwhelming economic, political and military influence already embedded in the Philippines. In comparison, the CPA asserted its jurisdictional immunity for U.S. forces by imposing CPA No. 17 unilaterally on Iraq. In both nations, these perceived imbalances have led to periodic but powerful political protests that have negatively affected the strategic nature of the relationship that the U.S. has with each country.

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<sup>195</sup> Philippine VFA, *supra* note 49.

<sup>196</sup> *Id.* at Art. V, § 3(a).

<sup>197</sup> *Id.* at Art. V, § 6.

<sup>198</sup> See generally NATO SOFA, *supra* note 49; Japan SOFA, *supra* note 49; Korea SOFA, *supra* note 49. See also *US marine still waiting appeal in Philippine rape case*, AGENCE FRANCE-PRESSE, Jan. 3, 2008, available at <http://www.inquirer.net/specialfeatures/subicrapecase/archive.php>. On December 4, 2006, a visiting Marine was convicted of rape in a Philippine court, sentenced to forty years and taken into Filipino custody. Eventually, after much high-level discussion pursuant to the Philippine VFA, he was remanded to U.S. custody at the U.S. Embassy in Manila pending his appeal. *Id.*

#### IV. OVERVIEW OF THE IRAQI CRIMINAL JUSTICE SYSTEM

The education Iraqi lawyers received in the last 25 years is not on a par with the legal education in countries where there is a true legal profession. ... You have a lawless country in which the rule of law means nothing. How can you expect from that state of affairs to truly have a profession arise? This is going to take a generation to rebuild.<sup>199</sup>

##### A. Recent History of Iraqi Judicial System

Twenty-first century Iraqi criminal law is “an amalgam incorporating elements from Islamic, Ottoman, French, English, Egyptian, and Roman law, none of which were adopted in its purest form.”<sup>200</sup> The Iraqi judicial system and penal code are primarily based upon the French civil law inquisitorial system first introduced to Iraq via the Ottoman Empire in the middle of the 19th century.<sup>201</sup> Due to these non-religious outside influences, the Iraqi system has a long secular history and is thus influenced by, but not directly derived from Islamic law.<sup>202</sup>

##### 1. Inquisitorial System

Traditionally, under the inquisitorial civil law system, cases are controlled by judges, not prosecutors or defense counsel.<sup>203</sup> In the inquisitorial system judges are considered truth seekers but need not remain impartial to pursue justice.<sup>204</sup> Rather, they are active inquisitors who are “free to seek evidence and control the nature and objectives of the inquiry.”<sup>205</sup> In Iraq, the investigative judges play the key role in criminal proceedings, eliciting testimony, reviewing evidence and referring cases to trial.<sup>206</sup> There are few technical rules of evidence and no juries.<sup>207</sup>

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<sup>199</sup> Marcia Coyle, *Toward an Iraqi Legal System, A U.S.-sponsored Plan in the Works*, NAT'L L. J., Apr. 25, 2003 available at, <http://www.law.com/jsp/article.jsp?id=1050369446809>.

<sup>200</sup> Frank, *supra* note 176, at 32.

<sup>201</sup> *Id.* at 29.

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

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

<sup>204</sup> Major W. James Annexstad, *The Detention and Prosecution of Insurgents and Other Non-Traditional Combatants – A Look at the Task Force 134 Process and the Future of Detainee Prosecutions*, ARMY. LAW., Jul. 2007, 73.

<sup>205</sup> Frank, *supra* note 176, at 13.

<sup>206</sup> Annexstad, *supra* note 204, at 73 (further noting the bifurcated investigative and trial processes); Frank, *supra* note 177, at 86-87 (the CCCI requires live testimony from two witnesses for any conviction – and generally “disdains” the use of circumstantial evidence as untrustworthy according to ancient Islamic tradition. Under this system, convictions are obviously much more challenging to obtain).

<sup>207</sup> Annexstad, *supra* note 204, at 73.

## 2. Saddam Hussein and the Baath Party

The Iraqi criminal justice system, known for its exceptional jurisprudence and legal education, was long regarded as a model legal system in the Middle East during the first half of the 20th century.<sup>208</sup> This “model” criminal justice system, however, quickly degenerated under the ruling Baath Party and the long tenure of Saddam Hussein.<sup>209</sup> Under Hussein, Iraqi courts were “tightly controlled and used to keep potential enemies in check.”<sup>210</sup> Baath Party membership was, in fact, a pre-requisite for obtaining judicial posts.<sup>211</sup> Further, judicial training consisted primarily of “a constant stream of Baath Party indoctrination”<sup>212</sup> and as a result, the professionalism and quality of the Iraqi judiciary was badly undermined. This heavy handed institutional control “helped ensure that Iraqi judges would be loyal servants of the Hussein government, rather than fair arbiters of justice, a concept completely foreign to the Baath Party.”<sup>213</sup>

## 3. Influence of the Coalition Provisional Authority

Upon the invasion and occupation of Iraq, the U.S. found the Iraqi criminal justice system in total chaos.<sup>214</sup> “Most of the court buildings and other Ministry of Justice facilities had been looted or damaged through vandalism.”<sup>215</sup> Furthermore, few members of the Iraqi Ministry of Justice remained to govern the existing system.<sup>216</sup> Those who did not quit had not been paid in months.<sup>217</sup>

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<sup>208</sup> *PBS News Hour: The New Iraq* (PBS News Hour broadcast May 13, 2003), available at [http://www.pbs.org/newshour/bb/middle\\_east/jan-june03/iraq\\_05-13.html](http://www.pbs.org/newshour/bb/middle_east/jan-june03/iraq_05-13.html) (Professor M. Cherif Bassiouni stated that before Saddam Hussein’s rise to power, Iraq had “a tradition in its various law schools and its scholarship, and in its judges and prosecutors and its legal profession. It was for all practical purposes as good a legal system as all of those in the Arab world, and many in Europe as well.”).

<sup>209</sup> Coyle, *supra* note 199 (“After decades under Saddam Hussein, the Iraqi legal profession fell into disrepair and disrepute.”).

<sup>210</sup> Frank, *supra* note 176, at 29. See also Neil MacDonald, *Baathist Purge May Stall Hussein Trial*, CHRISTIAN SCI. MONITOR, July 28, 2005, at 6 (“Practically every judge who served in the Iraqi judicial system under Hussein was a member of the Baath party.”).

<sup>211</sup> Frank, *supra* note 176, at 13.

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

<sup>213</sup> *Id.* See also IRAQ STUDY GROUP REPORT, *supra* note 44, at 21. The ISG Report indicated that as of late 2006, the Iraqi judiciary was plagued with issues. “The judiciary is weak. Much has been done to establish an Iraqi judiciary, including a supreme court, and Iraq has some dedicated judges. But criminal investigations are conducted by magistrates, and they are too few and inadequately trained to perform this function. Intimidation of the Iraqi judiciary has been ruthless.” *Id.*

<sup>214</sup> John C. Williamson, *Establishing Rule of Law in Post-War Iraq*, 33 GA. J. INT’L & COMP. L. 229, 233 (2004).

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

<sup>216</sup> *Id.* at 235.

<sup>217</sup> *Id.* at 233.

Faced with a large vacuum in the legal system, the CPA recognized the need to retain as much of the civil law tradition as possible in order to augment the occupation and restoration of law and order in Iraq.<sup>218</sup> Rather than rewrite both the entirety of the Iraqi Penal Code of 1969 and the Iraqi Criminal Procedure Code of 1971, CPA essentially re-authorized both documents, albeit with some minor changes.<sup>219</sup> In order to further aid the transition of Iraqi jurisprudence from an often “barbaric”<sup>220</sup> system into one based upon the rule of law, CPA eventually created the Central Criminal Court of Iraq (CCCI).<sup>221</sup>

## **B. Central Criminal Court of Iraq**

### **1. Jurisdiction**

Imbued with nation-wide criminal jurisdiction over all felonies and misdemeanors committed in Iraq, the CCCI was created in 2003 to help promote “the development of a judicial system in Iraq that warrants the trust, respect, and continued confidence of the Iraqi people.”<sup>222</sup> Structured as an independent court, it was specifically intended to be the primary vehicle used to prosecute the growing numbers of insurgents and terrorists committing crimes in Iraq.<sup>223</sup> The CCCI was also intended to “serve as the flagship of the new Iraqi court system, which includes a Federal Supreme Court, a Court of Cassation, Courts of Appeals, local courts, juvenile courts, and a separate court system in the Kurdish region.”<sup>224</sup> Ultimately, the CCCI was supposed to serve as an example of a

<sup>218</sup> Frank, *supra* note 176, at 28.

<sup>219</sup> COALITION PROVISIONAL AUTHORITY ORDER NUMBER 7, PENAL CODE (9 June 2003); COALITION PROVISIONAL AUTHORITY AMENDED ORDER NUMBER 13 (REVISED) (AMENDED), THE CENTRAL CRIMINAL COURT OF IRAQ (22 Apr. 2004)[hereinafter CPA No. 13]; Frank, *supra* note 176, at 11 (CPA originally established CCCI in July 2003); *See also* Williamson, *supra* note 214, at 239-40. The CPA orders that modified the Criminal Code and the Code of Criminal Procedure, were instituted to provide certain protections for defendants that had been absent in the Iraqi criminal justice system. *Id.*

<sup>220</sup> Frank, *supra* note 176, at 3 (noting that “prior to the liberation of Iraq, Iraqi courts permitted the use of torture-induced confessions as long as there was other evidence to corroborate it.”).

<sup>221</sup> CPA No. 13, *supra* note 219; Frank, *supra* note 174, at 13. The CPA also decided upon a de-Baathification policy of the Iraqi courts meant to enhance the rule of law in Iraq. *Id.*

<sup>222</sup> CPA ORDER NO. 13, *supra* note 219.

<sup>223</sup> Annexstad, *supra* note 204, at 74; *See* Frank, *supra* note 174, at 12 (noting that CCCI jurisdiction was purely discretionary in that CCCI judges were “instructed to concentrate” on cases relating to terrorism, organized crime and government corruption among other offenses. Further, prior to July 1, 2004, CPA could refer cases directly to the CCCI. After that date, the CCCI could, in theory, turn down cases brought by Coalition Forces.).

<sup>224</sup> Frank, *supra* note 176, at 3.

model court in Iraq – “free from corruption, Baath Party influence, tribal influences, and anti-American animus”<sup>225</sup> and even direct U.S. influence.<sup>226</sup>

## 2. Competency of the Judges

CPA’s overriding goal was to create a functioning national court in Iraq equipped with Iraqi judges at the top of the legal profession in terms of knowledge and legal and decision-making. “The CCCI’s judges were supposed to be the judicial elite – both in the weight of the cases handled and with respect to the judges’ legal acumen and integrity – and were to set an example of professionalism for the rest of the Iraqi judiciary.”<sup>227</sup>

To find Iraqi judges who met these idealistic standards of the CCCI, the CPA pursued a policy of purging the judiciary of Baathist influence.<sup>228</sup> CPA Order No. 13 required that all of the CCCI judges must have at least five years of judicial experience; demonstrate a “high level of legal competence”; and have had a background of either opposition to or at the most low-level membership in the Baath party.<sup>229</sup> This created quite an interesting dilemma for the CPA. Since the vast majority of judges under Saddam Hussein were required to be members of the Baath Party, this meant that the only judges with the requisite amount of experience for the CCCI were former Baathists.

Further, “judicial experience” under Hussein’s tenure meant little. Under Hussein, Iraqi courts and judges completely lacked independence.<sup>230</sup> The purpose for the entire criminal justice system was little more than persecuting and punishing enemies of the regime.<sup>231</sup> Thus, Iraqi judges gained precious little exposure to the actual rule of law,<sup>232</sup> though they became intimately familiar with graft and corruption.<sup>233</sup> To secure valued judgeships on the CCCI, many

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<sup>225</sup> *Id.* at 12 (citing Gregory H. Fox, *The Occupation of Iraq*, 36 GEO. J. INT’L L. 195, 213-14 (2005) citing David Luhnnow, *Overhauling Iraq’s Courts*, WALL ST. J., June 18, 2004, at A14). *See also* Doug Simpson, *Louisiana-Trained Lawyers Become a Legal Force in Iraqi Courtrooms*, ASSOCIATED PRESS, July 16, 2005.

<sup>226</sup> Assigned U.S. military lawyers are instructed to operate as military liaisons to the CCCI rather than prosecutors. Though they frequently provide each of the witnesses and all of the evidence for each case, they have no official role during the trial process and do not, in theory, have the capacity to refer cases to the court. In practice, however, the military liaisons are of indispensable assistance to the court and operate as de facto prosecutors. The U.S. prepares and forwards to the CCCI the majority of the cases involving insurgents accused of attacking Coalition Forces. (Information is based on the author’s professional experience.)

<sup>227</sup> Frank, *supra* note 176, at 11-12.

<sup>228</sup> *Id.* at 13.

<sup>229</sup> CPA ORDER 13, *supra* note 219.

<sup>230</sup> Frank, *supra* note 176, at 22.

<sup>231</sup> *Id.* at 13.

<sup>232</sup> *Id.* at 16.

<sup>233</sup> *Id.* at 13.

Iraqi judges may have completely fabricated their background or significantly downplayed their role in the Baath Party.<sup>234</sup> By making judicial experience a prime pre-requisite to secure judicial positions on the CCCI, the CPA more or less guaranteed a Baathist-driven judiciary that was, in many ways, pre-disposed to being sympathetic to the insurgency in Iraq rather than the rule of law.<sup>235</sup>

### 3. Endemic Corruption

Iraq's judicial system has long been considered tainted by corruption.<sup>236</sup> The CCCI, despite CPA regulations to the contrary, suffers from the same deadly malady.<sup>237</sup> Bribery, long a tenet under Hussein's regime, has been called an "essential" element of the "Iraqi politico-social system."<sup>238</sup> It has been noted that bribery, or the exchange of payoffs for favorable verdict "is a normal part of life in Iraq" both during and after Hussein's regime and that the main function of lawyers in the Iraqi criminal system is to, in fact, "facilitate bribery to the judiciary"<sup>239</sup> As a result, it is likely that at least some of the acquittals and lenient sentences handed out by the CCCI are a result of corruption.<sup>240</sup>

### 4. Insurgency Sympathies and CCCI Judges

CCCI judges are notorious for their sympathetic leanings toward the Sunni-dominated insurgency.<sup>241</sup> Since its inception, CCCI judges have been accused of basing individual verdicts on various outside influences, to include: bribery; pro-Islamic religious affiliation; pro-Sunni religious affiliation; political interference; fear of reprisal from the insurgency and a general opposition to the presence of U.S. forces in Iraq.<sup>242</sup> At least one Shia CCCI judge has directly

<sup>234</sup> *Id.* at 18 (citing Frank J. McGovern, *Rebuilding a Shattered System*, 25 PA. LAW. 35 (Oct. 2003). Only one judge out of forty interviewed appeared to be completely honest regarding Baath Party membership.

<sup>235</sup> Frank, *supra* note 174, at 18; see Frank, *supra* note 174, at 681 (CCCI judges were heavily criticized for extremely lenient sentences given to Iraqi insurgents convicted of attacking U.S. forces. On the other hand, Iraqis convicted of attacking Iraqi government officials were harshly dealt with by the same court.)

<sup>236</sup> Frank, *supra* note 174, at 714-19.

<sup>237</sup> See also Scott Peterson, *Demoted Iraqi Judge Fears for his Country's Future*, CHRISTIAN SCI. MONITOR, Nov. 1, 2004, at A1 (corruption deep-seated in Iraq culture.).

<sup>238</sup> Frank, *supra* note 174, at 716.

<sup>239</sup> *Id.*; According to one former senior Iraqi CCCI judge, the corruption amongst the Iraqi judges of the CCCI is still pervasive and well known in the legal establishment in Baghdad. Interview with a former Iraqi CCCI judge, Nov. 19, 2007 (name withheld upon request).

<sup>240</sup> Frank, *supra* note 174, at 718.

<sup>241</sup> *Id.* at 712-31.

<sup>242</sup> *Id.* at 712-31; Michael Moss, *Iraq's Legal System Staggers Beneath the Weight of War*, N.Y. TIMES, Dec. 17, 2006, at A1 ("The court acquits nearly half of the defendants, but both Americans and Iraqis involved in the process say that political interference, threats from militants and the

blamed the court's lenient treatment of insurgents on his fellow Sunni judges.<sup>243</sup> Furthermore, the targeting of CCCI judges and their families by insurgents has had an undeniable impact to the ultimate impartiality of the CCCI.<sup>244</sup> It appears the insurgents haven't cornered the market on influencing CCCI verdicts. The CCCI has also been accused of succumbing to the influence of the Shia-dominated government on several occasions, the most recent during the course of a high profile sectarian murder and corruption case involving highly placed Ministry of Health ministers.<sup>245</sup>

##### 5. Prosecutions of U.S. Service Members in Iraqi Courts

As noted in Part II of this paper, the Department of Defense has listed seventeen factors that the U.S. military must consider in properly evaluating a decision to turn over a U.S. service member to foreign criminal jurisdiction.<sup>246</sup> Among those factors, the right to an impartial trial stands out.<sup>247</sup> While perhaps some progress has been made,<sup>248</sup> the Iraqi court system does not appear to possess *any* court that is substantially free from corruption or inappropriate

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judges' fear for their lives weigh heavily in many verdicts." *But see* Press Release, Multi-National Corps Iraq, *CCCI Convicts 46: Sentences 4 to Death, 3 to Life Imprisonment*, July 2, 2007, available at [http://www.mnf-iraq.com/index.php?option=com\\_content&task=view&id=12649&Itemid=128](http://www.mnf-iraq.com/index.php?option=com_content&task=view&id=12649&Itemid=128) According to MNC-I, through June 2007, the "Central Criminal Court has held 2,255 trials for suspected criminals apprehended by Coalition Forces. The Iraqi Court proceedings have resulted in the conviction of 2,003 individuals with sentences ranging from imprisonment to death." *Id.* The source for the unusual discrepancy in total numbers and rate of conviction between both accounts is unclear. However, the discrepancies involving the conviction rate may be relatively meaningless since the CCCI has had a habit of sentencing insurgents to relatively insignificant punishments upon conviction for offenses committed against Coalition Forces.

<sup>243</sup> Frank, *supra* note 174, at 729-30. *See also* Colin Freeman, *Saddam's Old Judges Provoke US Fury with Their Lenient Sentences for Insurgents*, LONDON SUNDAY TELEGRAPH, Mar. 13, 2005, at 29 (opining that drunk drivers receive harsher sentences than insurgents subject to the jurisdiction of CCCI). *See also* Frank, *supra* note 174, at 20. Whether the lenient sentences are a result of sympathy for or fear of reprisal from the insurgency is open to debate. Many CCCI judges and their families have been targets for insurgents, while over thirty judges in Iraq have already been assassinated. Security is still a very large concern for the CCCI and its personnel.

<sup>244</sup> Frank, *supra* note 176, at 20. Whether the lenient sentences are a result of sympathy or fear of reprisal from the insurgency is open to debate. Many CCCI judges and their families have been targets for insurgents, while over thirty judges in Iraq have already been assassinated. Security is still a very large concern for the CCCI and its personnel. *Id.*

<sup>245</sup> Alissa J. Rubin, *Charges Are Dropped Against 2 Shiite Ex-Officials Accused In Sectarian Killings*, N.Y. TIMES, Mar. 4, 2008 at A1. Several senior Shia Ministry of Health officials charged with corruption and committing a series of sectarian killings against fellow Sunnis were acquitted. Witness intimidation was suspected; *Iraqi Authorities Say They Will Not Arrest Chalabi*, ASSOCIATED PRESS, Aug. 12, 2004, available at <http://www.msnbc.msn.com/id/5641431>. In 2004, the Iraqi government essentially quashed an arrest warrant issued for Ahmad Chalabi by an investigative judge of the CCCI. *Id.*

<sup>246</sup> DEP'T OF DEFENSE, DIR. 5525.1, *supra* note 55, at Encl. 2.

<sup>247</sup> *Id.* ("11. Accused is entitled to be tried by an impartial court.")

<sup>248</sup> Annexstad, *supra* note 204, at 81 (Iraq criminal justice system, while not perfect, continues to grow and will eventually establish the rule of law in Iraq).

outside influences<sup>249</sup> that would allow for an impartial trial as articulated under the Department of Defense Directive.<sup>250</sup>

As currently constituted it is difficult to conceive that any U.S. commander, or Department of State official, would consent to allow foreign criminal jurisdiction over U.S. service-members in the CCCI, particularly in light of the U.S. Senate's admonition to request a waiver of jurisdiction if there is a danger that the accused will not be protected because of the absence or denial of the constitutional rights the accused would enjoy in the United States.<sup>251</sup>

Whatever the cause for its ineffectiveness, the CCCI bears little resemblance to CPA's "flagship Iraqi court" and is currently an unreliable and ineffectual tool for prosecuting insurgents, much less American service-members.<sup>252</sup> Unfortunately, there are limited fora for prosecuting U.S. forces in Iraq. Aside from CCCI, no other Iraqi court has the nationwide personal or subject matter jurisdiction necessary to prosecute a U.S. military member.<sup>253</sup> Thus, this paper advocates establishing a *hybrid* U.S.-Iraqi CCCI, similar in many respects to the Kosovo Regulation 64 panel model, to effectuate the prosecution of U.S. service-members who have committed crimes "outside the scope of duty" against Iraqi citizens.

### C. U.S-Iraq CCCI Hybrid Panel

Within the past two decades, a new generation of international criminal tribunals – referred to as "hybrid" criminal courts – have emerged as an important alternative for prosecuting criminals who commit post-conflict atrocities in either international courts or local criminal courts of the afflicted state.<sup>254</sup> Hybrid courts have the potential to "harness the credibility of

<sup>249</sup> Ahmed Rasheed, *Saddam Prosecutor Demoted for Whistle-Blowing*, REUTERS, Jan. 18, 2008 available at <http://www.reuters.com/article/reutersEdge/idUSCOL85665920080118>. Even the Iraqi High Tribunal is not immune from corruption charges. A prosecutor for the IHT alleges that he was transferred because of a recent attempt he made to disclose ethical and financial breaches of IHT judges. *Id.*

<sup>250</sup> DEP'T OF DEFENSE, DIR. 5525.1, *supra* note 55, at Encl. 2. Other relevant factors that fall short of the U.S. standard include: the right to confront hostile witnesses; the right to have the assistance of defense counsel; the suppression of evidence procured through illegal means; and the burden of proof, among others. *See also* Senate Advice, *supra* note 99.

<sup>251</sup> Senate Advice, *supra* note 99.

<sup>252</sup> Moss, *supra* note 242, at A1.

<sup>253</sup> A former senior Iraqi CCCI judge recently stated that in his opinion neither the Iraqi High Tribunal nor the new Anti-terrorism Courts in Rusafah had either competent jurisdiction or were free enough from corruption, to take such a case. Interview with a former Iraqi CCCI judge, Nov. 19, 2007 (name withheld upon request).

<sup>254</sup> Etelle R. Higonnet, *Restructuring Hybrid Courts: Local Empowerment and National Criminal Justice Reform*, 23 ARIZ. J. INT'L & COMP. LAW 347, 352-53 (Spring 2006). International tribunals

international law and the legitimacy of international institutions” while utilizing domestic expertise, resources and connections with the local populations which can give the court the degree of authority and transparency necessary to hold perpetrators accountable.<sup>255</sup>

There are no templates or formal structures in place that define a “hybrid court” but there are several recent hybrid jurisdictions created between 1999 and 2003 that are considered part of this new wave of criminal tribunals and are relevant to the situation in Iraq.<sup>256</sup> In Kosovo, hybrid courts known as the “Regulation 64 panels” were created in 2000 that applied a blend of international and local law and allowed foreign judges to sit alongside domestic judges in existing Kosovar courts.<sup>257</sup> Further, foreign lawyers were allowed to team up with domestic lawyers to prosecute and defend all cases.<sup>258</sup>

Though the Regulation 64 panels experienced numerous problems including, but not limited to: the lack of funding, insensitivity of the international judges, lack of qualified international personnel, and inadequate training for the local judicial personnel, experts cite the panels as an improvement on the existing judicial mechanisms as well as a very valuable tool that improved the quality of justice for the cases reviewed under the panel’s jurisdiction.<sup>259</sup> The Regulation 64 panels, while far from perfect, ultimately “held effective trials of perpetrators and alleviated a massive legitimacy crisis.”<sup>260</sup>

The Iraq Special Tribunal, established in December 2003 by CPA memorandum to prosecute high level Iraqi war criminals from Hussein’s regime, is also considered to be a form of a hybrid court.<sup>261</sup> Instead of significant

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such as the International Criminal Court (ICC) were neither meant to nor were capable of prosecuting post-atrocity cases on a large scale. *Id.* at 348-49. Local criminal courts often suffer from high levels of corruption and politicization while “international courts have proven disconnected with local realities and may even be considered imperialistic.” *Id.* at 349.

<sup>255</sup> *Id.* Hybrid courts also “can be structured to tap into domestic expertise, connect with the local populations, and rebuild national judicial systems, creating a training ground for rule of law values.” *Id.*

<sup>256</sup> *Id.* at 353.

<sup>257</sup> *Id.* at 381.

<sup>258</sup> Higonnet, *supra* note 254.

<sup>259</sup> *Id.* at 382-83. The verdicts of the Regulation 64 panels alleviated some local impartiality concerns amongst the various ethnic groups. U.S. Ambassador for War Crimes Clint Williamson assessed the panels as a “mixed success” overall noting the lack of qualified international legal personnel and local intimidation. He also cited the panels as a valuable tool for Kosovo. *Id.* See M. Cherif Bassiouni, *The New Mixed Models of International Criminal Justice*, in INTRODUCTION TO INTERNATIONAL CRIMINAL LAW 557 (Diane Amann, et al. eds. 2003).

<sup>260</sup> Higonnet, *supra* note 254, at 383.

<sup>261</sup> COALITION PROVISIONAL AUTHORITY, MEMORANDUM TO THE IRAQI GOVERNING COUNCIL ON ‘THE STATUTE OF THE IRAQI SPECIAL TRIBUNAL’ (11 Dec. 2003). The IST statute was abrogated by

international involvement, however, the U.S. purposely eschewed foreign support and became the primary participant in supporting the logistical, financial and training needs of the IST.<sup>262</sup> Unlike the Kosovar model, the IST, despite the capability, has not empaneled foreign (i.e., U.S.) judges or directly utilized foreign (i.e., U.S.) prosecutors or other court personnel. Instead, the IST is composed entirely of Iraqi lawyers, judges and clerks who are able to preside over cases due to a large amount of direct and indirect support from the U.S. in the form of the Regional Crimes Liaison Office (RCLO).<sup>263</sup>

Throughout its brief history, the IST has been beset with legitimacy concerns, political interference, and security crises.<sup>264</sup> The IST has suffered from questionable dismissals of judges, resignations, murders of judicial personnel, and significant setbacks in investigation and interviews of witnesses due to the highly dangerous security situation in Iraq.<sup>265</sup> While progress has been made in several high profile trials, including that of Saddam Hussein, political interference has notably undermined the independence of the IST and remains a major challenge for the court.<sup>266</sup>

Both the Regulation 64 panels in Kosovo and the IST/SICT courts in Iraq are prime examples of creating unique solutions to unorthodox criminal jurisdiction issues. In Kosovo, both international judges and international law were successfully integrated into the Regulation 64 panels. Though the professionalism and experience of the international jurors and other legal personnel were frequently called into question, critics did note that the court was an improvement over the existing system and served to improve the overall quality and integrity of the justice rendered in Kosovo.<sup>267</sup>

In Iraq, the IST reflected the ability of Iraqi judges and lawyers to navigate fairly complex high-profile cases using their own judicial and procedural codes and interpreting international law when necessary.<sup>268</sup> Unfortunately, the IST has yet to prove that it can consistently litigate high-profile cases without destabilizing political interference from its own government.<sup>269</sup>

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the Iraqi parliament on August 10, 2005 and replaced with a similar statute defining the role of the court – but with a different name – Supreme Iraqi Criminal Tribunal (SICT). Higonet, *supra* note 254, at 399-404.

<sup>262</sup> Higonet, *supra* note 254, at 400-01.

<sup>263</sup> *Id.* at 403-05.

<sup>264</sup> Higonet, *supra* note 254, at 403.

<sup>265</sup> *Id.* at 405-06.

<sup>266</sup> *Id.* at 404-05.

<sup>267</sup> *Id.* at 383.

<sup>268</sup> *Id.* at 406.

<sup>269</sup> Ahmed Rasheed, *Saddam Prosecutor Says Demoted for Whistle-Blowing*, REUTERS, Jan. 18, 2008, available at <http://www.reuters.com/article/idUSCOL85665920080118> (former IST

Drawing from the best practices of both hybrid models, the CCCI could be transformed into a hybrid court in order to prosecute those few cases in which the Iraqi government retained jurisdiction involving U.S. service members accused of criminal conduct in Iraq that occurred outside the scope of duty. U.S. judges would occupy one or two seats on a special three-judge panel of CCCI. The new hybrid CCCI panel would incorporate U.S. due process safeguards into the trial process while basing its decisions on Iraqi penal, evidentiary and criminal procedures. U.S. prosecutors, defense counsel and other court personnel would augment the Iraqi judges and court personnel at the CCCI in order to ensure the smooth operation of these special cases. By having experienced U.S. judges and other legal officials take a direct role in these relatively few cases, the nagging questions faced in Kosovo regarding the professionalism, funding, and manning of the international jurists would be mitigated.

Ultimately, this new hybrid CCCI would be an attractive compromise between the corruption and bias of the Iraqi courts and the perception that U.S. military justice is an often arbitrary and inadequate substitute for prosecuting U.S. service members accused of committing serious offenses against Iraqi citizens while outside the scope of duty.

## V. PROPOSED SOFA WITH IRAQ

A bilateral SOFA between the U.S. and Iraq would serve to protect U.S. military personnel in the vast majority of cases involving alleged rules of engagement violations while potentially exposing a very small number of U.S. service-members to a hybrid U.S-Iraqi court for committing egregious or otherwise high profile offenses against Iraqi citizens outside the scope of duty (e.g., sexual assault and murder of 14-year-old girl and her family in Mahmoudiya).

In giving the Iraqi government an opportunity to seek justice against a very small number of U.S. service members who commit abhorrent acts against the local populace, the U.S. government would signal to critics that it does not act with impunity in Iraq; that it respects the Iraqi judicial system that it has helped to regenerate; and that the U.S. truly considers Iraq to be a sovereign nation capable of managing its affairs.<sup>270</sup> Finally, such an agreement would have an immeasurable effect on the stature of the current Iraqi government both at

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prosecutor alleging he was demoted and transferred after making ethical and financial corruption allegations against the court).

<sup>270</sup> Brief for Government at 46-47, *Geren v. Omar and Munaf v. Geren*, (U.S. Jan. 2008) (No. 07-394 and 06-1666). See also Jess Bravin, *U.S. Prisoners Fight Transfer*, WALL STREET J., Mar. 21, 2008 at 8.

home and abroad. It would send a strong message to the world that the U.S. military's conduct in Iraq has some very real self-imposed limitations and, in marked contrast to the way it is often perceived – that it is truly operating within the law.<sup>271</sup>

Ultimately, discouraging unlawful violence against the Iraqi population is a key goal of the counterinsurgency operational strategy (COIN) currently employed by U.S. forces in Iraq.<sup>272</sup> “Any human rights abuse or legal violations committed by U.S. forces quickly become known throughout the civilian populace and eventually all over the world. Illegitimate actions undermine both long and short term COIN efforts.”<sup>273</sup> As a result, the implementation and the sustainment of the rule of law could be significantly advanced by showing to the Iraqi people in a “fair, just and transparent fashion” that U.S. forces are held just as accountable as the insurgents for their criminal actions in Iraq.<sup>274</sup> Importantly, in curtailing abuse, U.S. forces would no longer be perceived as being above the law by the local Iraqi populace.

## **A. Proposed Provisions of a U.S.-Iraq SOFA**

### **1. Lessons Learned**

There are several lessons to be learned from the history of foreign criminal jurisdiction in the Philippines, Korea and Japan. First, in any SOFA negotiated with the Iraqi government, the U.S. would be wise to consider the short and long-term effects of a perception by the Iraqi government officials and citizens that the U.S. is “strong-arming” or “coercing” a lesser nation into submission. While it is apparent that the U.S. may be the same type of military, economic, and political juggernaut in Iraq circa 2008 as it was in the Philippines circa 1947 or on the Korean peninsula circa 1966, the U.S. must tread carefully in negotiating an agreement that would weigh the scales inordinately in favor of the U.S., thus serving to inflame the passions of Iraq and its citizens, and perhaps unnecessarily prolonging counterinsurgency operations.<sup>275</sup>

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<sup>271</sup> U.S. DEP'T OF ARMY, FIELD MANUAL 3-24, COUNTERINSURGENCY (15 Dec. 2006) [hereinafter FM 3-24] at section 1-131. The rule of law is an essential element to the U.S. military's counterinsurgency (COIN) strategy in Iraq. FM 3-24 recognizes the importance of curtailing abuses on the local population. *Id.* at 1-132. *See also* Kahl, *supra* note 25, at 35 (noting that General Petraeus has emphasized the importance of protecting civilians in counterinsurgency operations and has ordered aggressive investigations into wrongdoing committed by U.S. forces).

<sup>272</sup> FM 3-24, *supra* note 271, at 1-132.

<sup>273</sup> *Id.*

<sup>274</sup> *Id.* at App. D-38.

<sup>275</sup> *Id.* at 1-131.

The Philippine VFA is significant in that it is a relatively recent reinforcement of the international view that the provisions of the NATO SOFA are the normative baseline standard through which the U.S. government seeks to protect U.S. military personnel abroad.<sup>276</sup> The NATO SOFA has been frequently proposed as a model by non-NATO countries in the course of negotiating individual agreements with the U.S. Further, Korea, Japan and the Philippines have all cited the provisions of the NATO SOFA as the standard by which they ought to be treated.<sup>277</sup> Not surprisingly, it appears that the current Iraqi government has also recognized the need to study recent U.S. SOFA history and has in fact undertaken a careful evaluation of the provisions of various U.S. SOFA agreements in South Korea, Japan, Turkey and Germany.<sup>278</sup> Further, a recent spate of high profile protests against a U.S.-Iraq SOFA agreement by political and religious groups affiliated with the Shiite majority in Iraq may serve to bolster the Iraqi government's negotiating position.<sup>279</sup> Clearly, the Iraqi government is prepared to utilize all available resources at its disposal in order to properly leverage its negotiating position vis-à-vis the U.S.<sup>280</sup> – a political reality that the U.S. should be careful not to underestimate during the course of negotiating the current SOFA between the two countries.

## 2. Proposed SOFA Provisions

### a. *Confinement Provision*

The confinement provision of the Philippine VFA should be adopted in a new U.S.-Iraq SOFA, providing for continuous U.S. custody of U.S. service members from the initial charge through final appeal. This provision would allow the U.S. military to protect its own forces from the often egregious and unsafe conditions of Iraqi confinement facilities.<sup>281</sup> Finally, to make any

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<sup>276</sup> Egan, *supra* note 47, at 339-40.

<sup>277</sup> *Id.*

<sup>278</sup> Adrian Croft, *Iraq Sends Teams to Study Other U.S. Military Pacts*, REUTERS, Jun 1, 2008, available at <http://www.reuters.com/article/gc05/idUSL0113546120080601?sp=true>.

<sup>279</sup> Ned Parker and Saif Hameed, *Iraqis Protest U.S. security Pact*, May 31, 2008, available at <http://www.latimes.com/news/printedition/asection/la-fg-accord31-2008may31,0,4115911.story>.

<sup>280</sup> *Id.*; Croft, *supra* note 278. See also Robert H. Reid, *Iraq Cites Problems with US Security Pact*, ASSOCIATED PRESS, Jun. 1, 2008, available at <http://ap.google.com/article/ALeqM5gkx-3oYeFwuWKCusr2jrojs98w8wD911E6CG0> (noting that the immunity status for U.S. troops stationed in Iraq is one of the issues of contention between the two nations in the current SOFA negotiations).

<sup>281</sup> Ellen Knickmeyer and K.I. Ibrahim, *U.S. to Probe All Iraqi-Run Prisons*, WASH. POST, Nov. 18, 2005 at A17. Discovery of widespread allegations of torture in Iraq-run prisons; Frank Jordans, *UN Seeks Access to US Prisons in Iraq*, ASSOCIATED PRESS, Mar. 11, 2008, available at <http://www.washingtonpost.com/wp-dyn/content/article/2008/03/11/AR2008031102700.html>. Recent reports indicate that many detainees held in Iraqi prisons would prefer to be transferred to U.S. run prison facilities.

potential prison sentence palatable to the U.S. citizenry, convicted U.S. service-members must be given the option of serving their sentences in U.S. prisons instead of Iraqi confinement facilities.<sup>282</sup>

*b. Primary and Concurrent Jurisdiction*

A U.S.-Iraq SOFA should adhere to the NATO SOFA's exclusive and concurrent jurisdiction provisions establishing an equitable relationship between the two nations. While the relative parity contained in the NATO SOFA is generally reserved for allied nations a bit higher in the international pecking order, it also serves as a beacon to other nations who have not yet negotiated long-term agreements with the U.S. over the stationing of U.S. forces (e.g., Iraq, Afghanistan).<sup>283</sup> By negotiating terms that are perceived as less than those terms contained in the NATO SOFA, the stamp of "junior partner" will be indelibly printed on Iraq for all nations to see and would further alienate an already sensitive Iraqi public.<sup>284</sup>

In modeling the NATO SOFA, a U.S.-Iraq SOFA should reflect that the U.S. has exclusive or primary concurrent jurisdiction to retain and prosecute military service-members in Iraq who are accused of committing "inter se" offenses, strictly military offenses punishable under the UCMJ, as well as offenses committed "in the scope of military duty" (as determined by the U.S.).

*c. Waiver/Hybrid Panel*

Further, a SOFA should provide for the potential waiver of cases involving U.S. military members subject to the exclusive primary jurisdiction of Iraqi criminal laws, upon request by the Iraqi government, but only for cases deemed "significant" by the Iraqi government. On a practical level, this agreement would be invoked for a very limited number of cases<sup>285</sup> involving

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<sup>282</sup> See Convention on the Transfer of Sentenced Persons Treaty, Mar. 21, 1983, T.I.A.S., 10824, 22 I.L.M. 530 (entered into force in the U.S. on July 1, 1985); Act of Oct. 28, 1977, Pub. L. No. 95-144, 91 Stat. 1212 (codified at 18 U.S.C. §§ 3244, 4100-4115 (2008)). The Treaty and implementing legislation creates a venue for a voluntary return of a U.S. national imprisoned pursuant to the laws of a foreign state.

<sup>283</sup> Egan, *supra* note 47, at 341-2.

<sup>284</sup> Fahim, *supra* note 1.

<sup>285</sup> Memorandum, Judge Advocate General, U.S. Army, to Director, Washington Headquarters, OSD, subject: Report of United States Personnel Confined in Foreign Penal Institutions Pursuant to Sentence of Foreign Courts (24 July 2003) (from December 1, 2002 through May 31, 2003 only forty-two U.S. service members were held in foreign prisons pursuant to serve post-trial sentences *worldwide*)(emphasis added); Kahl, *supra* note 25, at 34-5 (noting that between 2003 and early 2006, only twenty-six U.S. service members were charged with violent crimes resulting in the death of Iraqi citizens. Of those twenty-six, only twelve served any confinement).

truly heinous crimes committed by U.S. service members outside the scope of duty, likely involving extreme violence and/or an aggravated sexual attack. That waiver, however, should only be accompanied by the following provision: that the U.S. agrees to waive jurisdiction in favor of a joint U.S.-Iraqi CCCI panel, based in Iraq, to decide the outcome of any case. This joint panel must, in a transparent fashion, incorporate the baseline evidentiary, due process protections recommended by the Department of Defense – protections that the Iraqi courts currently lack.

As noted previously in Part I of this paper, the benefits of having the Iraqi government taking a direct part in prosecuting U.S. service members for egregious crimes committed against Iraqis are well worth the risk. Such a court would likely pay immediate dividends by improving the international press coverage and thus the overall negative public perception of U.S. forces operating with impunity while stationed in Iraq. Despite such an agreement, the role of the UCMJ and the military justice system remains virtually unaffected. The UCMJ would retain its vital role in investigating and prosecuting the vast majority of crimes alleged to have been committed by U.S. service members in Iraq.

## **VI. CONCLUSION**

The war in Iraq has been exceptionally divisive both inside and outside of Iraq. The U.S. Government clearly could use an image makeover within the context of the international community. Understandably, the U.S.-Iraq SOFA negotiations are a perfect opportunity to enhance U.S. prestige in Iraq and the rest of the world. Thus, during the course of negotiation, the U.S. would be wise to concede jurisdiction for the handful of U.S. service members accused of crimes committed against Iraq citizens that occur outside the scope of duty. If such a provision was negotiated, Iraq would be perceived as gaining a measure of true sovereignty vis-à-vis the international community while the U.S. would be seen as having a strong faith in Iraq's independence and growth as a nation. While on its face, U.S. public opinion may be somewhat averse to having U.S. service members prosecuted in a domestic court in Iraq, the types of crimes contemplated within the jurisdiction of this new court (i.e. rape, non-combat related murders committed outside the scope of duty, etc. rather than alleged killings committed during the course of combat operations) coupled with the stability provided by U.S. judicial personnel in a U.S.-Iraq hybrid court should allay most public concerns.

Despite the significant political advantages of negotiating an Iraq SOFA that concedes jurisdiction for a very limited category of cases, the U.S. government should be extremely reluctant to subject any U.S. service members

to the Iraq criminal justice system without significant caveats. As noted in Section IV, the Iraqi legal system is vastly different from the U.S. system in terms of the fundamental protections given the accused, the lack of an adversarial process and the authority and professionalism of the judiciary. In addition, corruption, religious influence, bias against foreigners, ignorance or disdain for the rule of law amongst judges, and significant security threats are all attendant in day-to-day activities of the Iraqi courts. Unfortunately, it is a system that would be anathema to the average U.S. citizen's perception of justice.

To deflate criticisms of the CCCI track record of corruption and inexperience, a hybrid CCCI judicial panel should be created that includes a formal role for U.S. prosecutors and judges along with western-style due process protections. A properly constituted and supported hybrid panel should have the professionalism, experience and integrity necessary to act in a truly independent manner. Though this would appear to be an unorthodox solution to a unique set of foreign criminal jurisdiction problems, a SOFA is, in the end, simply a voluntary agreement between two nations – with a very wide range of negotiating options to consider.<sup>286</sup> Until the Iraqi court system has implemented accepted international norms regarding legal protections and is sufficiently free of corruption, the benefit of having this unique hybrid court implemented in Iraq for cases involving U.S. service members far outweigh the risks of exposing them to the currently suspect Iraqi judicial system.

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<sup>286</sup> Egan, *supra* note 47, at 340-41 (detailing a veritable laundry list of various provisions that have been negotiated in foreign criminal jurisdictional agreements. “American negotiators can, for example, offset potentially unfavorable criminal jurisdiction language through concessions in claims, taxes, licensing, exit and entry procedures ... the [U.S.] may offer access to lucrative domestic markets or provide [financial funding] to the prospective host country.”).

## **MAYFIELD, FISA and THE FOURTH AMENDMENT**

**Lieutenant Commander Trevor Rush, JAGC, USN\***

*The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.<sup>1</sup>*

### **INTRODUCTION**

On March 11, 2004, Islamic extremist terrorists detonated bombs on several commuter trains in Madrid, Spain, murdering almost 200 people and injuring more than 1,400 others, including three United States citizens.<sup>2</sup> This terrorist attack was one of the worst in the world since the September 11, 2001 attacks in the United States.<sup>3</sup> The horror and chaos from the scene left the survivors scarred, coping with personal losses and tragedies. The attack's effects rippled throughout Spain, and then the world, wreaking havoc on many

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<sup>1</sup> U.S. CONST. amend. IV.

<sup>2</sup> OVERSIGHT & REV. DIV., OFFICE OF THE INSP. GEN., U.S. DEP'T OF JUSTICE, A REVIEW OF THE FBI'S HANDLING OF THE BRANDON MAYFIELD CASE 21 (2006), available at [http://www.usdoj.gov/oig/special/s0601/PDF\\_list.htm](http://www.usdoj.gov/oig/special/s0601/PDF_list.htm) [hereinafter IG REPORT]; see also *Mayfield v. United States*, 504 F. Supp. 2d 1023, 1026-27 (D. Or. 2007). The facts have been gathered primarily from the court's opinion and the very thorough report prepared by the Oversight and Review Division in the Office of the Inspector General for the U.S. Department of Justice. The Office of the Inspector General (OIG) is a statutorily created, independent entity whose mission is to detect and deter waste, fraud, abuse, and misconduct involving Department programs and personnel and promote economy and efficiency in Department operations. The Oversight and Review Division blends the skills of attorneys, investigators, program analysts, and paralegals to review Department programs and investigate sensitive allegations involving Department employees and operations. See generally U.S. Dep't of Justice, Office of the Inspector General, [www.usdoj.gov/oig](http://www.usdoj.gov/oig) (last visited May 30, 2008).

<sup>3</sup> CNN.com, *Massacre in Madrid*, <http://www.cnn.com/SPECIALS/2004/madrid.bombing/> (last visited May 30, 2008).

families. One of those families touched by this nightmare was the Mayfields, who were living thousands of miles away in Oregon. Between March and May, 2004, the Mayfields were subjected to “a full-court press” of the U.S. Government’s intelligence, law enforcement, and legal machinery based on the suspicion that Brandon Mayfield, the family’s patriarch, was connected to the Madrid massacre.<sup>4</sup> The sole reason for that suspicion, at least initially, was the U.S. Government’s misidentification of Mr. Mayfield’s fingerprint. Despite evidence to the contrary, the Federal Bureau of Investigations [hereinafter FBI] declared Mr. Mayfield’s print to be a “100% positive” match with one found on the scene of the bombings.<sup>5</sup>

At the time of these events, Brandon Mayfield was an American citizen born in Oregon and reared in Kansas.<sup>6</sup> He was married with three children, a former U.S. Army officer with an honorable discharge, and a practicing Oregon lawyer.<sup>7</sup> In what became integral to the Mayfield family’s civil suit against the U.S. Government, Mr. Mayfield was also a practicing Muslim.<sup>8</sup> The Mayfield family alleged that their religion and ties to the local Muslim community caused the Government to mishandle the case and violate the family’s civil rights. These allegations had merit because the U.S. Government would ultimately pay a settlement and apologize to Brandon Mayfield, who was completely innocent of any connection to the terrible events in Madrid. However, before his innocence could be shown, the Government turned the Mayfield family’s world upside down by using all the tools of counter-intelligence, national security, criminal investigation, and prosecution.

As a result of the Mayfield family’s civil suit, a federal court declared portions of the Foreign Intelligence Surveillance Act [hereinafter FISA],<sup>9</sup> to be unconstitutional under the Fourth Amendment of the United States Constitution.<sup>10</sup> This article examines *Mayfield v. United States* and concludes that the court erred. The story of the Mayfields is the epitome of the old adage that “bad facts make bad law.” Mr. Mayfield was an innocent man that the Government accused of being a terrorist and in the process invaded his privacy and freedom. In a society that treasures both liberty and justice, it is tragic when the Government accuses an innocent person of an offense he did not commit. In this particular case, it is distressing to suspect that Mr. Mayfield’s religion

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<sup>4</sup> IG REPORT, *supra* note 2, at 35.

<sup>5</sup> *Mayfield*, 504 F. Supp. 2d at 1028.

<sup>6</sup> *Id.* at 1027.

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

<sup>8</sup> IG REPORT, *supra* note 2, at 37.

<sup>9</sup> Foreign Intelligence Surveillance Act of 1978, Pub. L. No. 95-511, 92 Stat. 1783 (codified as amended at 50 U.S.C. §§ 1801-11, 1821-29, 1841-46, 1861, 1871 (2008)) [hereinafter FISA].

<sup>10</sup> *Mayfield*, 504 F. Supp. 2d at 1042-1043.

played a role in that tragedy. The end result was that the Madrid terrorists succeeded not just in their immediate objectives of death and destruction, but also in tarnishing the criminal justice system of the United States, a country they did not directly attack. Whether through its individual agents or the totality of the justice system, the U.S. Government failed the Mayfield family, and the resulting financial settlement with the Mayfields is appropriate. Nothing in this article is meant to detract from that result.

Unfortunately, the parties' financial settlement did not resolve all the issues. Instead, they agreed that a Fourth Amendment challenge to FISA could go forward. Although FISA had previously been declared constitutional many times,<sup>11</sup> it was amended in 2001 by the Patriot Act.<sup>12</sup> The specific amendments at issue in the case allow secret search and seizures under FISA to be used for criminal investigations so long as there is a *significant* foreign intelligence purpose. Prior to the Patriot Act, foreign intelligence had to be the *primary* purpose to support FISA authorizations. Under the old regime, once criminal investigation became the primary purpose, the covert tools of FISA could no longer be used.

The Mayfields challenged the constitutionality of the FISA amendments, charging that they allowed federal agents to circumvent Fourth Amendment probable cause requirements when investigating persons suspected of crimes. The *Mayfield* court agreed with the challenge and declared the "significant purpose" amendment unconstitutional. But this ruling was in error. There is no evidence that the investigative tools of FISA were used improperly in this case, or that FISA is unconstitutional on its face, or as applied to the Mayfields. Was this judicial error? Was it an effort to punish the Government for mishandling the case? Regardless, subsequent federal court decisions have disagreed with the *Mayfield* case<sup>13</sup> and on appeal the Ninth Circuit will almost assuredly reverse the holding of the Oregon District Court.

Part I of this article discusses the factual background of the *Mayfield* case.<sup>14</sup> Part II discusses the history and development of FISA and the relevant

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<sup>11</sup> However, the Supreme Court has never faced a FISA challenge. *See infra* Part II.

<sup>12</sup> The United and Strengthening of America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (2001) [hereinafter Patriot Act].

<sup>13</sup> *See, e.g.,* United States v. Abu-Jihaad, 531 F. Supp. 2d 299, 304 (D. Conn. 2008); United States v. Mubayyid, 521 F. Supp. 2d 125 (D.C. Mass. 2007). *See also infra* part IV.C.

<sup>14</sup> In any Fourth Amendment analysis, the facts are important to the determination whether searches and seizures are reasonable. *See, e.g.,* Illinois v. Gates, 462 U.S. 213, 232 (1983) (reiterating that the touchstone of Fourth Amendment analysis is reasonableness, a concept that is sensitive to different factual settings). Because the Mayfields ultimately mounted a facial challenge to specific FISA

Patriot Act amendments. Part III sets forth the court's decision in *Mayfield v. United States*. Part IV analyzes the court's decision, concluding that the court erred and therefore the Government should be successful in its appeal of the ruling.

## I. THE FACTUAL BACKGROUND OF THE MAYFIELD CASE

As discussed in the Introduction, on March 11, 2004, Islamic extremist terrorists detonated bombs on several commuter trains in Madrid, Spain, murdering almost 200 people and injuring more than 1,400 others.<sup>15</sup> Shortly after the bombings, the Spanish National Police [hereinafter SNP] recovered fingerprints from a plastic bag containing several detonators and remnants of explosives.<sup>16</sup> The bag was found in a stolen van located near the bombing site.<sup>17</sup> Eyewitnesses had reported seeing three persons handling backpacks next to the van before heading to the train station.<sup>18</sup> The SNP determined that the detonators and explosives were similar to those recovered from an unexploded bomb found at one of the March 11 bomb sites.<sup>19</sup>

The SNP processed the plastic bag for fingerprints and recovered more from inside the van.<sup>20</sup> On March 13, 2004, the SNP submitted digital photographs of the latent<sup>21</sup> fingerprints to the FBI in Quantico, Virginia.<sup>22</sup> According to the Department of Justice [hereinafter DOJ], “[t]he only information provided about the images in the initial . . . communication forwarded to the FBI was that they had been recovered in connection with the Madrid train bombings.”<sup>23</sup>

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sections, there was never a full factual hearing held by the District court. The facts presented in this article derived from the court's opinion and the IG Report and are presented to aid in understanding the civil settlement of this case and the underlying FISA issues.

<sup>15</sup> *Mayfield*, 504 F. Supp. 2d at 1026-27.

<sup>16</sup> *Id.* at 1027.

<sup>17</sup> IG REPORT, *supra* note 2, at 29.

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

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

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

<sup>21</sup> “The term ‘latent’ refers to fingerprints left on evidence, as distinguished from ‘inked’ and ‘known’ fingerprints collected intentionally.” *Id.* at 29 n.9.

<sup>22</sup> *Id.* at 64. The prints were transmitted via the International Criminal Police Organization. *Mayfield*, 504 F. Supp. 2d at 1027.

<sup>23</sup> IG REPORT, *supra* note 2, at 30.

### A. Misidentification

The Latent Print Unit of the FBI Laboratory initiated an Integrated Automated Fingerprint Identification System [hereinafter IAFIS] search in an attempt to match the latent prints received from Spain with known prints in the FBI computer system.<sup>24</sup> An automated system, IAFIS facilitated “computer searches of FBI databases containing the fingerprints of over 47 million individuals.”<sup>25</sup> At first, the FBI was unable to locate a fingerprint match.<sup>26</sup> Suspecting this failure to match was because the original images were of low resolution, the FBI requested that SNP send higher resolution digital photographs of the latent prints.<sup>27</sup> These were received on March 14, 2004, including the now infamous print which set the Mayfield case in motion. This print was identified as Latent Finger Print Number 17 [hereinafter LFP 17].<sup>28</sup>

On March 15, using the new images, the FBI performed another IAFIS search through several databases.<sup>29</sup> The FBI technicians programmed the computer to return up to twenty candidates whose known prints had features in common with each latent print.<sup>30</sup> The computer produced twenty candidates for LFP 17 that met the criteria.<sup>31</sup> Each candidate was identified by an IAFIS score, a number that reflected a rank as to how closely the IAFIS computer matched each candidate’s fingerprint to certain features of LFP 17.<sup>32</sup> According to the DOJ, “[t]he candidate print that receives the highest score from the computer may not be the true match, which is why the system generates a list of candidate prints rather than just the highest-scoring candidate. The final identification decision is made by the examiner, not by the computer.”<sup>33</sup> Mr. Mayfield’s left index finger popped up with an IAFIS score which ranked his print as fourth on the list of twenty candidates.<sup>34</sup>

Between March 15 and 16, 2004, a “Supervisory Fingerprint Specialist” for the FBI, Agent Green, concluded that Mr. Mayfield’s left index fingerprint matched LFP 17. In the family’s subsequent civil suit, they alleged that had Agent Green properly performed the fingerprint identification analysis,

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

<sup>25</sup> *Id.*

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

<sup>27</sup> *Id.*; see also *Mayfield*, 504 F. Supp. 2d at 1027.

<sup>28</sup> IG REPORT, *supra* note 2, at 29; see also *Mayfield*, 504 F. Supp. 2d at 1027.

<sup>29</sup> IG REPORT, *supra* note 2, at 30; see also *Mayfield*, 504 F. Supp. 2d at 1027.

<sup>30</sup> IG REPORT, *supra* note 2, at 30; see also *Mayfield*, 504 F. Supp. 2d at 1027.

<sup>31</sup> IG REPORT, *supra* note 2, at 30-31; see also *Mayfield*, 504 F. Supp. 2d at 1027.

<sup>32</sup> IG REPORT, *supra* note 2, at 30-31; see also *Mayfield*, 504 F. Supp. 2d at 1027.

<sup>33</sup> IG REPORT, *supra* note 2, at 30-31.

<sup>34</sup> *Id.* at 31; see also *Mayfield*, 504 F. Supp. 2d at 1027.

he would have been compelled to declare that Mr. Mayfield's print did not, in fact, match LFP 17.<sup>35</sup> However, the Mayfields claimed he was misidentified because Agent Green was improperly influenced by Mr. Mayfield's adherence to the Muslim faith.<sup>36</sup>

The issues that surround Mr. Mayfield's faith concern when and how that information affected the Government's handling of the case. As previously discussed, Mr. Mayfield was a 38-year-old American citizen, a father of three, born in Oregon, and reared in Kansas. He was a former Army officer with an honorable discharge and a practicing Oregon lawyer since 2000.<sup>37</sup> Prior to his arrest in this case, he had not traveled outside the United States since 1994.<sup>38</sup> He had never been arrested for a crime.<sup>39</sup> However, Mr. Mayfield was a practicing Muslim since converting to Islam in the late 1980s.<sup>40</sup> At some point, the Government became aware of his religious practices, his family's ties to the local Muslim community, and the fact that Mrs. Mayfield was a naturalized U.S. citizen, originally born in Egypt.<sup>41</sup> The Government's arrest and search warrant affidavits<sup>42</sup> referred to Mr. Mayfield's attendance at the Bilal mosque and his legal service advertisements on a Muslim internet directory service.<sup>43</sup> The Government also found it significant that Mr. Mayfield had previously represented Jeffrey Leon Battle, who was a member of the "Portland Seven," in a child custody dispute.<sup>44</sup> Battle pleaded guilty in October 2003 to Federal terrorism charges (conspiracy to levy war against the United States) and was subsequently sentenced to 18 years in prison.<sup>45</sup> The use of Mr. Mayfield's religious and cultural ties to initiate investigative actions and support various authorizations and warrants was a primary foundation of the Mayfields' civil

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<sup>35</sup> *Mayfield*, 504 F. Supp. 2d at 1027.

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

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

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

<sup>39</sup> *Id.* To be precise, Mr. Mayfield had never been arrested as an adult. As a teenager he was arrested for burglary of an automobile, but the charge was dismissed. However, his prints from that arrest were on file in the "Criminal Master File" database used in the IAFIS search. Mr. Mayfield's fingerprints were also recorded in connection with his service in the U.S. Army. IG REPORT, *supra* note 2, at 31-32.

<sup>40</sup> *Mayfield*, 504 F. Supp. 2d at 1026-28.

<sup>41</sup> IG REPORT, *supra* note 2, at 37.

<sup>42</sup> Note these were criminal, not FISA, affidavits. The FISA affidavit information was heard ex parte by the court, was redacted from the IG Report, and is not in the public domain.

<sup>43</sup> Chris Schatz & Steve Wax, Gross Error in the Brandon Mayfield Case, <http://www.nacdl.org/public.nsf/PrinterFriendly/A0409p6?openDocument> (last visited May 30, 2008) (The authors of this article were the Federal Defenders appointed to represent Mr. Mayfield.).

<sup>44</sup> IG REPORT, *supra* note 2, at 37.

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

rights suit, as well as a principal focus in the official report on the Government's conduct by the Inspector General of the DOJ [hereinafter IG Report].<sup>46</sup>

Thus, the civil suit alleged that FBI examiners were aware of Mr. Mayfield's Muslim faith and that this knowledge influenced their examination of his fingerprints.<sup>47</sup> Whether or not Mr. Mayfield's religion contributed to his misidentification was declared a "difficult question" in the IG Report.<sup>48</sup> The report concluded that the FBI fingerprint examiners were not aware of Mr. Mayfield's religion at the time he was initially declared the source of LFP 17.<sup>49</sup> The identification number for each candidate in the computer search allowed the FBI to retrieve the names, original fingerprint cards, and demographic information.<sup>50</sup> But this demographic information only included name, date of birth, sex, race, and social security number. It did *not* indicate religion, occupation, current address, or marital status.<sup>51</sup>

The IG Report concluded that when Agent Green first made the identification and when he submitted the print to an "independent fingerprint examiner" for verification, Mr. Mayfield's religion was not yet known.<sup>52</sup> On March 19, the FBI Lab informed authorities that Mr. Mayfield had been identified as the source of LFP 17.<sup>53</sup> On March 20, 2004, the FBI issued a formal report matching Mr. Mayfield's print to LFP 17.<sup>54</sup> Whether or not the FBI was aware of Mr. Mayfield's faith at this point, this was certainly a critical point in the case and arguably the single point of failure from which the

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<sup>46</sup> *Id.* at 270.

<sup>47</sup> *Mayfield*, 504 F. Supp. 2d at 1027.

<sup>48</sup> IG REPORT, *supra* note 2, at 12.

<sup>49</sup> *Id.* at 11.

<sup>50</sup> *Id.* at 31; *see also Mayfield*, 504 F. Supp. 2d at 1027.

<sup>51</sup> IG REPORT, *supra* note 2, at 32; *see also Mayfield*, 504 F. Supp. 2d at 1027.

<sup>52</sup> IG REPORT, *supra* note 2, at 11. Although not critical to the focus of this article, the Mayfields' complaint alleged that the "independent fingerprint examiner" that Agent Green submitted the print to was Mr. Massey, a former FBI employee, now retired, who was periodically hired by the FBI on a contract basis to "perform forensic examination of latent fingerprints." *Mayfield*, 504 F. Supp. 2d at 1027-28. The Mayfields alleged that when Mr. Massey was employed by the FBI, he was reprimanded on at least three occasions for erroneously "identifying" fingerprints. *Id.* The Mayfields contended that Mr. Massey was selected to "verify" the identification because his "employment history of discipline for poor performance would strongly motivate him to agree and verify the prior identification." *Id.* The complaint alleged that Mr. Massey was informed of Agent Green's prior identification of LFP 17 to Mr. Mayfield, and that Mayfield was a practicing Muslim. *Id.* Mr. Massey did, in fact, verify that Mr. Mayfield's left index fingerprint matched LFP 17. *Id.* The alleged "match" was then submitted to a senior FBI manager, Wieners, for verification. *Id.* The Mayfields alleged that when Wieners verified Mr. Mayfield's print he knew, prior to examining the print, that two examiners before him had identified and verified the purported match, and that Mayfield was a Muslim. *Id.* All of this occurred by March 20, 2004. *Id.*

<sup>53</sup> IG REPORT, *supra* note 2, at 34.

<sup>54</sup> *Mayfield*, 504 F. Supp. 2d at 1028.

subsequent errors sprang. But for this identification, the U.S. Government would never have invaded Mr. Mayfield's life. Because of this identification, there was no choice but to pursue him with all the tools authorized by Congress and the courts.

This is also a critical point in the case time line because, as will be discussed, the Government's *purpose* in investigating Mr. Mayfield goes to the heart of the Fourth Amendment issue. Was the purpose simply to pursue a criminal investigation against him to gather evidence for a criminal prosecution? Or was the purpose to collect intelligence about a possible terrorist with a goal of deterring or thwarting other terrorist acts? If the Government had both purposes simultaneously, which one was primary? Did the purpose change over the course of the investigation? The importance of these questions to the FISA framework will be discussed *infra* starting in Part II.C.

Returning to the timeline, the fingerprint misidentification sparked the U.S. Government's counterterrorism machinery into action. Arthur Cummings, the Section Chief of International Terrorism Operations Section I at FBI Headquarters, received word of the Mayfield identification and was rightfully concerned that Mr. Mayfield might be part of a "second wave" of terrorist attacks.<sup>55</sup> He thus ordered a "full-court press" on Mr. Mayfield, including 24-hour surveillance, which began on the afternoon of the March 19, 2004.<sup>56</sup>

FBI surveillance agents followed Mr. Mayfield and members of his family when they traveled to and from the Bilal Mosque, the family's place of worship; to and from Mr. Mayfield's law office, his place of employment; to and from his children's school; and to and from family activities.<sup>57</sup> The Mayfield complaint alleged that at some point after the fingerprint misidentification, the FBI applied to the Foreign Intelligence Surveillance Court [hereinafter FISC]<sup>58</sup> for an order authorizing the FBI to place electronic listening devices (also known as "bugs") in the "shared and intimate" rooms of the Mayfield family home; thereafter that the FBI executed repeated "sneak and peek" searches of the Mayfield family home, occurring when the family was away from the home; that these searches were performed "so incompetently that the FBI left traces of their searches behind, causing the Mayfield family to be frightened and believe that they had been burglarized;" that the FBI obtained private and protected information about the Mayfields from third parties; that

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<sup>55</sup> IG REPORT, *supra* note 2, at 35.

<sup>56</sup> *Id.* at 35-36.

<sup>57</sup> *Mayfield*, 504 F. Supp. 2d at 1028.

<sup>58</sup> The FISC will be discussed *infra* Part II. In essence the court exists to hear secret evidence and authorize surveillance and searches in accordance with FISA procedures.

the FBI executed “sneak and peek” searches of the law office of Brandon Mayfield; and that the FBI placed wiretaps on Brandon Mayfield’s office and home phones.<sup>59</sup>

On March 22, 2004 (during the approximate time frame<sup>60</sup> that FISA authorizations were being sought and executed), the United States Legal Attaché in Madrid, commonly called a “Legat,” reported that the SNP “expressed some concern about the identification of Mayfield through the latent print . . . . They just want to be absolutely sure, as this is so out of character for the subjects they are dealing with.”<sup>61</sup> The FBI had not yet provided the SNP with Mr. Mayfield’s known prints and the SNP were essentially amazed that an American’s fingerprint would show up on the evidence, given that the other suspects were local Moroccans.<sup>62</sup> On April 2, 2004, Mr. Mayfield’s prints were finally sent by the FBI to Spain.<sup>63</sup> The Mayfields alleged that by that date, the U.S. Government was aware that the Spanish Government had no information connecting the Moroccans with Mr. Mayfield or anyone else in the United States.<sup>64</sup>

The SNP examined the FBI’s report and Mr. Mayfield’s fingerprints, and concluded that there were dissimilarities in the comparison of the two prints for which there was no explanation.<sup>65</sup> On April 13, 2004, the SNP provided a written report to the FBI explaining that they had compared LFP 17 to Mr. Mayfield’s fingerprints, and concluded there was no match.<sup>66</sup>

After this report, the FBI Lab examiners took another look at the Mayfield identification and stood by their conclusions.<sup>67</sup> An e-mail from an FBI Senior Special Agent to the Portland FBI Office on April 15 stated, “I spoke with the lab this morning and they are absolutely confident that they have a match on the print.—No doubt about it!!!!—They will testify in any court you swear them into.” With the Madrid Legat coordinating, a meeting was arranged

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<sup>59</sup> *Mayfield*, 504 F. Supp. 2d at 1028; *see also* IG REPORT, *supra* note 2, at 38-39. The application to FISC for the FISA search and surveillance authorizations was personally approved by U.S. Attorney General John Ashcroft. *Mayfield*, 504 F. Supp. 2d at 1028.

<sup>60</sup> Because of the redactions in the IG Report and the secrecy surrounding FISA authorizations, the exact dates are not in the public domain.

<sup>61</sup> IG REPORT, *supra* note 2, at 41.

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

<sup>63</sup> *Mayfield*, 504 F. Supp. 2d at 1028.

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

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

<sup>66</sup> *Id.*; *see also* IG REPORT, *supra* note 2, at 51-54 (describing the “April 13 Negativo Report” from the SNP).

<sup>67</sup> IG REPORT, *supra* note 2, at 52.

between the FBI Lab and the SNP Lab.<sup>68</sup> On April 21, 2004, the FBI sent one of their Lab Fingerprint Examiners along with the Madrid Legat and another agent to meet with their Spanish counterparts.<sup>69</sup> The FBI presented Spanish authorities with the characteristics and rationale for their identification of Mr. Mayfield.<sup>70</sup> An SNP examiner also made a presentation, noting several differences that concerned them. The examiner reported that “details in the upper left portion of the latent fingerprint did not match Mayfield’s prints.”<sup>71</sup> The Spanish “refused to validate” the FBI’s conclusion that LFP 17 and Mr. Mayfield’s print were a match.<sup>72</sup>

Although aware of this difference in opinion between the SNP and FBI, the Mayfields alleged that DOJ and FBI employees “concocted false and misleading affidavits” in order to justify even more intrusive searches and ultimately to justify Mr. Mayfield’s arrest as a “material witness.”<sup>73</sup> They also alleged that an FBI investigator, Special Agent Werder, submitted a “concocted affidavit” to a Federal judge of the Oregon District Court, which stated that FBI Fingerprint Examiners considered LFP 17 a “100% positive identification” of

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<sup>68</sup> *Id.* at 52-53.

<sup>69</sup> *Mayfield*, 504 F. Supp. 2d at 1028; *see also* IG REPORT, *supra* note 2, at 54. In an e-mail on April 16, the Acting Section Chief in the FBI Laboratory responsible for the Latent Print Unit said, “We can’t be about the business to try and convince another Laboratory to change their conclusion to concur with ours.” *Id.* at 53. However, he agreed it would be productive to have a meeting to help all involved understand what the Spanish mean when they say “Negative.” *Id.*

<sup>70</sup> IG REPORT, *supra* note 2, at 54.

<sup>71</sup> *Id.* at 55.

<sup>72</sup> *Mayfield*, 504 F. Supp. 2d at 1028. This is the allegation in the Mayfield complaint. Not surprisingly, there are differing recollections about how the meeting concluded. The Madrid Legat reported in a contemporaneous memorandum that “[the FBI examiner] provided satisfactory explanations for each of their questions and at the conclusion of the meeting all of the SNP personnel seemed satisfied with the FBI’s identification.” IG REPORT, *supra* note 2, at 55. However, he later clarified that at the end of the meeting he felt that the SNP personnel were sufficiently impressed with the FBI presentation to agree to go back and conduct a reexamination of the print. *Id.* The FBI examiner and the other agent both reported they came away from the meeting with the expectation that the SNP would eventually agree with the FBI’s identification of Mr. Mayfield. *Id.* at 56. However, two SNP officials interviewed for the IG Report stated that while they were impressed with the presentation, no SNP person expressed agreement with the FBI’s conclusions. *Id.* While the SNP took another look at the identification approximately May 5, 2004, the SNP concluded that the differences between the prints could not be reconciled. *Id.* at 56, 77. There are “conflicting accounts” as to whether the SNP immediately informed the FBI of their findings. *Id.* at 76. However, the SNP never reported any concurrence with the FBI’s identification and the Madrid Legat was reporting to the FBI that SNP fingerprint report is still “undecided” as of May 7, 2004. *Id.* at 77. That same day, the DOJ and the U.S. Attorney’s Office were also informed that the Madrid Legat was reporting “there is apparently still some disagreement among the Spanish.” *Id.* at 78.

<sup>73</sup> *Mayfield*, 504 F. Supp. 2d at 1028.

Mr. Mayfield.<sup>74</sup> Although the affidavits stated that “preliminary findings” of the SNP “were not consistent” with the FBI fingerprint analysis, no mention was made of the April 13, 2004 SNP report to the FBI that stated the SNP did not agree with the FBI’s fingerprint match of LFP 17 and Mr. Mayfield.<sup>75</sup>

The Mayfields further alleged that the affidavit included “speculative and prejudicial narratives” focusing on Mayfield’s religion and association with co-practitioners.<sup>76</sup> As an example, the Mayfields cited Special Agent Werder’s inclusion in his affidavit of Mr. Mayfield attending a mosque and advertising his legal services in “Jerusalem Enterprises,” or what are known as the “Muslim Yellow Pages,” as evidence somehow connecting Mr. Mayfield to the bombings.<sup>77</sup> The Mayfields pointed out that these are the same “Muslim Yellow Pages” which also included advertising by major companies such as Avis, Best Western, and United Airlines.<sup>78</sup> The Mayfields alleged that the affidavit submitted to the court was knowingly or recklessly false and misleading.<sup>79</sup>

## B. The Arrest

On the morning of May 6, 2004, Mr. Mayfield was arrested as a “material witness.”<sup>80</sup> Although the misidentification of the fingerprint was

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<sup>74</sup> *Id.* The IG Report states that on May 5, 2004, the Portland Supervisory Special Agent decided to replace “Lead Case Agent 1” as the affiant with Special Agent Werder. There was a concern that Lead Case Agent 1 might be “tainted” as an affiant because he had previously reviewed potentially privileged documents seized from Mayfield’s office during a FISA search. Special Agent Werder had only limited involvement in the Mayfield investigation prior to that time. On May 6, Special Agent Werder signed the affidavits and they were submitted to the Court. IG REPORT, *supra* note 2, at 63.

<sup>75</sup> *Mayfield*, 504 F. Supp. 2d at 1028. The language submitted to the court supporting the material witness warrant stated, “At the conclusion of the [April 21] meeting it was believed that the SNP felt satisfied with the FBI Laboratory’s identification of LFP 17 and indicated that the [SNP] Forensic Science Division intended to continue its analysis of the latent print comparison. I have been advised that the FBI lab stands by their conclusion of a 100% positive identification that LFP 17 as [sic] the fingerprint of BRANDON BIERI MAYFIELD.” IG REPORT, *supra* note 2, at 65. While a reference to the “April 13 Negativo Report” was in the draft affidavit, the Madrid Legat objected because that report “had been provided by sources in the SNP in confidence, without the approval of the judge in charge of the investigation in Spain.” *Id.*

<sup>76</sup> *Mayfield*, 504 F. Supp. 2d at 1029.

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

<sup>79</sup> *Id.* The IG Report focused on three sections of the affidavits: (1) the statements that the FBI Senior Fingerprint examiner considered the match to be a 100% identification of Mr. Mayfield; (2) the statements describing doubts by the SNP (which the IG Report calls “ambiguous”); and (3) two paragraphs describing the “likelihood” that Mr. Mayfield had traveled to Spain under a false or fictitious name and would therefore be at risk of fleeing with false travel documents. IG REPORT, *supra* note 2, at 19, 63-67. Regarding the latter point, the IG Report believed it was an “unfounded inference.” *Id.* at 19.

<sup>80</sup> IG REPORT, *supra* note 2, at 67.

arguably the single point of failure, the arrest was what raised the specter of religious profiling and bias. The record reveals no basis for the arrest other than the fingerprint misidentification and Mr. Mayfield's legitimate links to the local Oregon Muslim community. Nothing connected Mr. Mayfield to Madrid and, by the time of the arrest, the SNP had expressed opposition to his identification. But the decision was made to arrest Mr. Mayfield for fear he would flee once the investigation became known through leaks to the press.<sup>81</sup>

Mr. Mayfield was brought before a Federal judge for his initial appearance the same day he was arrested.<sup>82</sup> Mr. Mayfield stated in court that the fingerprint was not his and asked to be released.<sup>83</sup> The judge declined and held Mr. Mayfield without bail pending his appearance before a grand jury.<sup>84</sup> Mr. Mayfield was confined and initially held in the lock down unit at the Multnomah County Detention Center.<sup>85</sup>

Based on affidavits provided to the Federal judge, broad criminal (vice FISA) search warrants were issued for Mr. Mayfield's family home, car, and law office.<sup>86</sup> Computer and paper files from his family home, including his children's homework, were seized.<sup>87</sup> His family was not told where he was being held.<sup>88</sup> He and his family were told, however, that he was being held as a primary suspect on offenses punishable by death, and that the FBI had made a 100% match of his fingerprint with the Madrid train bombing fingerprint.<sup>89</sup> Leaks to the media by government sources led to local, national, and international headlines that Brandon Mayfield's fingerprints connected him to the Madrid bombings.<sup>90</sup>

Due to Mr. Mayfield's protestations of innocence, and the issue of whether his prints actually matched LFP 17, the Federal judge ordered that LFP

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<sup>81</sup> *Id.* at 60-61.

<sup>82</sup> *Id.* at 70.

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

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

<sup>85</sup> *Mayfield*, 504 F. Supp. 2d at 1029.

<sup>86</sup> *Id.*; see also IG REPORT, *supra* note 2, at 62, 69. As will be discussed *infra* Part IV.D, the record and IG Report do not indicate any substantial difference between what probable cause information the Government possessed when it sought FISA orders and what probable cause information it had when it sought regular criminal warrants. This bears favorably on the Fourth Amendment reasonableness of the FISA framework, since the same level of information, at least in this case, was used to authorize searches and surveillances under both the FISA framework and the traditional criminal framework.

<sup>87</sup> *Mayfield*, 504 F. Supp. 2d at 1029; see also IG REPORT, *supra* note 2, at 69-70.

<sup>88</sup> *Mayfield*, 504 F. Supp. 2d at 1029.

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

<sup>90</sup> IG REPORT, *supra* note 2, at 60.

17 be provided to a court-appointed expert witness for comparison to Mr. Mayfield's known fingerprints.<sup>91</sup> That expert, Kenneth Moses, was selected by Mr. Mayfield and his defense attorneys.<sup>92</sup> In one of the more sobering moments of the case, on May 19, 2004, the court-appointed examiner testified in the material witness proceeding that he had "compared the latent prints that were submitted on Brandon Mayfield, and [he] concluded that the latent print *is the left index finger of Mr. Mayfield.*"<sup>93</sup> However, in a fortunate twist of fate, on that same day the FBI and U.S. Attorney's Office learned that the SNP had identified LFP 17 as belonging to a different person, an Algerian named Ouhmane Daoud.<sup>94</sup>

Mr. Mayfield was released from prison the following day, May 20, 2004. He was then held on home detention from May 21 through May 24, 2004.<sup>95</sup> During this time, the FBI Lab re-examined the prints and ultimately withdrew its identification of Mr. Mayfield as the source of LFP 17. At that point, the U.S. Attorney's Office filed a Motion to Dismiss Material Witness Proceeding.<sup>96</sup> That same day, the FBI held a press conference and apologized to Mr. Mayfield.<sup>97</sup>

### C. The Mayfields' Civil Suit

On October 4, 2004, the Mayfield family filed a civil law suit alleging various civil rights violations.<sup>98</sup> Specifically, they alleged a claim for unlawful arrest and imprisonment and unlawful searches and seizures against four

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<sup>91</sup> *Mayfield*, 504 F. Supp. 2d at 1029.

<sup>92</sup> *Id.* Mr. Moses was certified by the International Association for Identification and served as a crime scene investigator from 1971 to 1998 receiving numerous honors and awards. IG REPORT, *supra* note 2, at 80.

<sup>93</sup> *Mayfield*, 504 F. Supp. 2d at 1029 (emphasis added). But for the SNP's subsequent identification of Daoud, this independent examination would truly have placed Mr. Mayfield in a dire situation. Given the subsequent SNP identification of Daoud, the 100% match declared by the FBI experts and Mr. Moses raises significant doubts about forensic claims that fingerprints are unique. For further discussion on the uniqueness of fingerprints, see Sandy L. Zabell, *Fingerprint Evidence*, 13 J.L. & POL'Y 143, 163 (2005).

<sup>94</sup> *Id.*; see also IG REPORT, *supra* note 2, at 81 ("On approximately May 15, the SNP fingerprint examiners determined that Daoud's right middle finger was the source of LFP 17, based on a correspondence of 14 points of identity. . . . On May 19, the SNP delivered a letter to the Madrid Legat advising him that the SNP laboratory had identified Daoud as the source of LFP 17.").

<sup>95</sup> *Mayfield*, 504 F. Supp. 2d at 1029. The U.S. Government was still not convinced. One of the Assistant U.S. Attorneys told the judge that "it is our position that it is still Mr. Mayfield's print on that blue bag." IG REPORT, *supra* note 2, at 83.

<sup>96</sup> IG REPORT, *supra* note 2, at 88.

<sup>97</sup> *Id.* at 89.

<sup>98</sup> *Mayfield*, 504 F. Supp. 2d at 1025.

individual defendants.<sup>99</sup> They also brought a claim under the Privacy Act, 5 U.S.C. § 552a, alleging the defendants began “leaking” information contained within the DOJ and FBI files to the national and international media regarding the Mayfield family and Mr. Mayfield’s arrest.<sup>100</sup> The Mayfields asked for injunctive and declaratory relief against defendants DOJ and the FBI FISA searches and surveillance.<sup>101</sup> They challenged the constitutionality of portions of the Patriot Act.<sup>102</sup> Lastly they brought a claim for the return of property improperly seized.<sup>103</sup>

Subsequently, the parties filed motions for summary judgment and the Government filed a motion to dismiss based on jurisdiction.<sup>104</sup> The Oregon Federal District court heard oral argument on motions, and on July 28, 2005, issued an opinion, *Mayfield v. Gonzales*,<sup>105</sup> ruling, in part, that the defendants’ various motions to dismiss all or part of the Mayfields’ complaint were denied.<sup>106</sup> On September 23, 2005, the defendants filed an interlocutory appeal of the court’s ruling with the Ninth Circuit Court of Appeals.<sup>107</sup> In November 2006, the parties informed the District court they had reached a stipulated settlement regarding all issues except a Fourth Amendment challenge to FISA. The court signed the stipulated settlement agreement on November 29, 2006.<sup>108</sup>

The agreement allowed the Mayfields to make a facial (rather than as-applied) challenge to FISA, specifically 50 U.S.C. §§ 1804 and 1823.<sup>109</sup> The terms of the settlement restricted the challenge to what was contained in the Amended Complaint, as well as the parties’ Recitation of Stipulated Facts, and Memoranda of Law.<sup>110</sup> Moreover, the relief available to the Mayfields if they prevailed would be only a declaratory judgment that one or both of these two provisions violated the Fourth Amendment.<sup>111</sup>

The court held oral argument on September 10, 2007 concerning the parties’ cross-motions for summary judgment and defendant’s motion to dismiss

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

<sup>100</sup> *Id.* at 1026.

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

<sup>102</sup> See Patriot Act, *supra* note 12.

<sup>103</sup> *Mayfield*, 504 F. Supp. 2d at 1026.

<sup>104</sup> *Id.*

<sup>105</sup> *Mayfield v. Gonzales*, No. 04-1427-AA, 2005 U.S. Dist. LEXIS 45684 (D. Or. July 28, 2005).

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

<sup>107</sup> *Mayfield*, 504 F. Supp. 2d at 1026.

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

<sup>109</sup> *Id.* These FISA sections will be discussed in detail *infra* Part II. Issues surrounding “facial challenges” will be discussed *infra* Part IV.D.

<sup>110</sup> *Id.*

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

based on jurisdiction. On September 26, 2007, the court found for the Mayfields and declared that the two FISA sections were unconstitutional.<sup>112</sup> The *Mayfield* court's decision will be discussed in detail in Part III. However, in order to better understand that decision, a survey of FISA history and an overview of the statute are necessary.

## II. HISTORY AND DEVELOPMENT OF THE FOREIGN INTELLIGENCE SURVEILLANCE ACT (FISA)

### A. The Fourth Amendment and Title III

FISA has always concerned civil liberty activists because it does not follow the regular Fourth Amendment procedures. The regular procedures developed over time through judicial decisions and Congressional legislation. The Supreme Court's interpretation of the probable cause requirement in the Fourth Amendment is that in most cases it must be decided by a neutral judicial officer who will issue a warrant that narrowly defines the permissible scope of a search before it occurs.<sup>113</sup> Judicial approval is part of our constitutional framework of checks and balances. The warrant requirement reflects the belief that even well-intentioned executive officers can become mistakenly overzealous, and unreviewed executive discretion may yield to pressures to obtain incriminating evidence while overlooking invasions of privacy.<sup>114</sup> Security in "persons, houses, papers, and effects" comes right out of the text of the Fourth Amendment.<sup>115</sup> By analogy, personal communications in most non-public settings also fall within the realm of Fourth Amendment protections.<sup>116</sup> Therefore, such communications can normally only be monitored upon the authority of a warrant supported by probable cause. The Fourth Amendment also prohibits general searches, sometimes called "fishing expeditions", requiring that a valid warrant must "particularly describe the place to be searched, and the persons or things to be seized."<sup>117</sup>

Under the judicially defined constitutional umbrella, Congress enacted detailed legislation to enable eavesdropping and wiretapping warrants.

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<sup>112</sup> *Id.* at 1043.

<sup>113</sup> *See, e.g.*, *Coolidge v. New Hampshire*, 403 U.S. 442 (1971).

<sup>114</sup> *See United States v. United States Dist. Court (Keith)*, 407 U.S. 297 (1972).

<sup>115</sup> U.S. CONST. amend. IV.

<sup>116</sup> *See Katz v. United States*, 389 U.S. 347 (1967). The Court in *Katz* held that wiretapping falls within the scope of the Fourth Amendment, rejecting the notion that the Fourth Amendment only protects against physical trespass into protected areas. *Katz* overruled *Olmstead v. United States*, 277 U.S. 438 (1928).

<sup>117</sup> U.S. CONST. amend. IV.

Commonly known as “Title III,”<sup>118</sup> the regime permits surveillance only for enumerated, especially serious crimes and requires investigators to convince the court, before it issues a warrant, that the evidence they seek cannot be obtained by using less intrusive investigative tools. The statute limits the time period of surveillance, requires a specific showing of need to obtain time extensions, and mandates efforts to minimize eavesdropping on innocent parties. The statute also mandates prompt reports to the court of the surveillance results and regulates the manner in which the results can be used.<sup>119</sup> Title III originally specified that none of its requirements would “limit the constitutional power of the President to take such measures as he deems necessary to protect the United States . . . against [any] clear and present danger to the structure or existence of the Government.”<sup>120</sup> However, the Supreme Court would change all that in 1972.

### B. Intelligence Surveillance before FISA

There are a number of historical factors that led to the enactment of FISA in 1978, but two factors stand out over the others: a 1972 Supreme Court case and a 1976 Congressional Committee report. The Supreme Court has only addressed the field of intelligence surveillance once, and that was when it decided *United States v. United States District Court (Keith)*.<sup>121</sup> That case concerned the Fourth Amendment’s restrictions on the Executive’s power to authorize electronic surveillance in internal security matters without prior judicial approval.<sup>122</sup> The Supreme Court set the stage by stating:

[T]he President of the United States has the fundamental duty, under Art. II, § 1, of the Constitution, to “preserve, protect and defend the Constitution of the United States.” Implicit in that duty is the power to protect our Government against those who would subvert or overthrow it by unlawful means. In the discharge of this duty, the President—through the Attorney General—may find it necessary to employ electronic surveillance to obtain intelligence information on the plans of those who plot unlawful acts against the Government. The use of such surveillance in internal security cases has been sanctioned more or less continuously by various Presidents and Attorneys General since

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<sup>118</sup> Omnibus Crime Control and Safe Streets Act, Pub. L. No. 90-351, 82 Stat. 197 (1986) (codified as amended at 18 U.S.C. §§ 2510-20 (2008)).

<sup>119</sup> 18 U.S.C. §§ 2516-2519 (2008).

<sup>120</sup> 18 U.S.C. § 2511(3) (1968) (prior to the 1978 amendment); see also Stephen J. Schulhofer, *The New World of Foreign Intelligence Surveillance*, 17 STAN. L. & POL’Y REV. 531, 531-35 (2006) (discussing Title III and FISA).

<sup>121</sup> 407 U.S. 297 (1972).

<sup>122</sup> *Id.* at 299.

July 1946. . . . Though the Government and respondents debate their seriousness and magnitude, threats and acts of sabotage against the Government exist in sufficient number to justify investigative powers with respect to them. The covertness and complexity of potential unlawful conduct against the Government and the necessary dependency of many conspirators upon the telephone make electronic surveillance an effective investigatory instrument in certain circumstances. . . . It would be contrary to the public interest for Government to deny to itself the prudent and lawful employment of [the] very techniques which are employed against the Government and its law-abiding citizens.<sup>123</sup>

The Court went on to hold that the President did *not* have the constitutional power to authorize warrantless electronic surveillance to protect the nation from purely domestic threats.<sup>124</sup> But the *Keith* Court very clearly limited the case to “domestic security” and the surveillance of “domestic organizations” that were thought to be attempting to attack or subvert the existing structure of the U.S. Government.<sup>125</sup> The case facts offered no evidence of any involvement, directly or indirectly, of a foreign power,<sup>126</sup> and the Court pointedly refrained from addressing “the issues which may be involved with respect to activities of foreign powers or their agents.”<sup>127</sup> Thus, only the domestic aspects of national security came within the scope of the Court’s decision. More than 35 years later, *Keith* remains the only Supreme Court case to deal directly with the issue of warrantless electronic surveillance for intelligence purposes.<sup>128</sup>

Although clearly affecting Title III procedures, the decision in *Keith* arguably “did more to confuse the application of the Fourth Amendment to intelligence surveillance than it did to clarify it.”<sup>129</sup> *Keith* “created a distinction between domestic and foreign intelligence surveillance that did not exist, and it failed to define the distinction . . . .”<sup>130</sup> The Court admitted as much, noting:

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<sup>123</sup> *Id.* at 310-12.

<sup>124</sup> *Id.* at 324.

<sup>125</sup> *Id.* at 309.

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

<sup>127</sup> *Id.* at 322.

<sup>128</sup> Donald J. Musch, CIVIL LIBERTIES AND THE FOREIGN INTELLIGENCE SURVEILLANCE ACT 6 n.26 (2003).

<sup>129</sup> Elizabeth Gillingham Daily, Comment, *Beyond “Persons, Houses, Papers, and Effects”:* *Rewriting the Fourth Amendment for National Security Surveillance*, 10 LEWIS & CLARK L. REV. 641, 651 (2006).

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

No doubt there are cases where it will be difficult to distinguish between “domestic” and “foreign” unlawful activities directed against the Government of the United States where there is collaboration in varying degrees between domestic groups or organizations and agents or agencies of foreign powers. But this is not such a case.<sup>131</sup>

The distinction between domestic and foreign intelligence would become Congress’ burden to define and regulate.

The other major factor that led to the creation of FISA was the Church Committee Report.<sup>132</sup> In late 1974, investigative reporter Seymour Hersh revealed that the CIA was destabilizing foreign governments and conducting illegal intelligence operations against thousands of American citizens.<sup>133</sup> On January 27, 1975, the Senate voted overwhelmingly to establish a special eleven-member investigating body under the chairmanship of Idaho Senator Frank Church.<sup>134</sup> The so-called Church Committee interviewed 800 individuals, and conducted 250 executive and 21 public hearings.<sup>135</sup> The Church Committee revealed excessive use and abuse of unregulated intelligence surveillance targeted at U.S. citizens.<sup>136</sup> Many targets were not considered violent or even suspected of crimes.<sup>137</sup> The Church Committee found that intelligence investigations were being conducted with complete disregard for legal and constitutional constraints.<sup>138</sup> The panel issued a two-foot-thick final report in May 1976 which demonstrated the need for perpetual oversight of the intelligence community.<sup>139</sup> This resulted in the creation of the permanent Select Committee on Intelligence and the enactment of FISA.<sup>140</sup>

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<sup>131</sup> *Keith*, 407 U.S. at 309 n.8.

<sup>132</sup> SELECT COMMITTEE TO STUDY GOVERNMENTAL OPERATIONS WITH RESPECT TO INTELLIGENCE ACTIVITIES, FINAL REPORT: INTELLIGENCE ACTIVITIES AND THE RIGHTS OF AMERICANS, BOOK II, S. REP. NO. 94-755 (1976), available in part at [www.cointel.org](http://www.cointel.org) [hereinafter CHURCH COMMITTEE REPORT].

<sup>133</sup> U.S. Senate, *Art & History Minute: Church Committee Created*, [http://www.senate.gov/artandhistory/history/minute/Church\\_Committee\\_Created.htm](http://www.senate.gov/artandhistory/history/minute/Church_Committee_Created.htm) (last visited May 29, 2008).

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

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

<sup>136</sup> CHURCH COMMITTEE REPORT, *supra* note 132, at 5-20.

<sup>137</sup> Daily, *supra* note 129, at 654.

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

<sup>139</sup> *Art & History Minute: Church Committee Created*, *supra* note 133.

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

### C. Summary of FISA Framework

Acting on the Church Committee's recommendations, Congress implemented a statutory framework to monitor and control foreign intelligence surveillance through the Foreign Intelligence Surveillance Act of 1978.<sup>141</sup> FISA was designed to control and authorize Executive branch electronic surveillance in the investigation of foreign powers or agents of foreign powers.<sup>142</sup> Although implemented to govern the field of foreign intelligence surveillance, FISA permits targeting of U.S. citizens and residents who are foreign agents, as well as the targeting of foreign nationals and foreign governments. Similar to Title III, this surveillance is generally prohibited without judicial authorization.

However, the judicial authorization required by FISA differs from Title III procedures. First, it comes from judges sitting on the Foreign Intelligence Surveillance Court [hereinafter FISC].<sup>143</sup> This has sometimes been referred to as the "Spy Court"<sup>144</sup> and the "Secret Court" because the judges hear classified evidence *ex parte*.<sup>145</sup> These FISC judges are already existing Federal court judges, who are then appointed by the Chief Justice of the Supreme Court to FISC.<sup>146</sup>

Submissions to the FISC normally consist of two substantive components: an application with an affidavit, and a certification signed by a high-ranking Executive Branch official.<sup>147</sup> This certification is another difference from Title III and the obvious reason for it is to impose high-level accountability on the Executive Branch. The certification must state that the certifying official "deems" the information sought by the surveillance or search to be "foreign intelligence information," that the information "cannot reasonably be obtained by normal investigative techniques," and that a "*significant purpose*" of the electronic surveillance or physical search is to obtain "foreign intelligence information."<sup>148</sup>

In the context of the *Mayfield* court's decision, this latter purpose requirement forms the heart of the challenge. Under original FISA legislation,

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<sup>141</sup> FISA, *supra* note 9.

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

<sup>143</sup> 50 U.S.C. § 1803 (2008).

<sup>144</sup> *See, e.g.,* Matt Apuzzo, *Secretive Spy Court Refuses to Reveal Wiretap Rules*, STAR-LEDGER, Dec. 12, 1997, at 6.

<sup>145</sup> Judicial designations to the court are public information. 50 U.S.C. § 1803 (2008).

<sup>146</sup> 50 U.S.C. § 1803 (2008).

<sup>147</sup> 50 U.S.C. §§ 1804-05, 1823-24 (2008). Note that the difference in sections relates to whether the request is for electronic surveillance or physical search.

<sup>148</sup> 50 U.S.C. §§ 1804(a)(7), 1823(a)(7) (2008).

“the purpose” of any electronic surveillance had to be the acquisition of foreign intelligence information. That requirement was interpreted to mean that the “primary purpose” was to obtain foreign intelligence information.<sup>149</sup> The Patriot Act amended this requirement so that the acquisition of foreign intelligence only had to be a “significant purpose” of the investigation.<sup>150</sup> The constitutional issues surrounding this amendment, and the *Mayfield* court’s concerns, will be covered later in greater detail.

Returning to the FISA requirements, every submission must be individually approved by the Attorney General, “based upon his finding that it satisfies the criteria and requirements” for FISA applications.<sup>151</sup> To authorize the Government’s request, the FISC judge must find that there is probable cause to believe that the target is a “foreign power” or an “agent of a foreign power.”<sup>152</sup> The judge is directed to review the Executive Branch official’s certification for clear error when the target is a U.S. person and for only procedural regularity when the target is a non-U.S. person.<sup>153</sup> If the FISC judge

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<sup>149</sup> See generally David S. Kris, *The Rise and Fall of the FISA Wall*, 17 STAN. L. & POL’Y REV. 487 (2006) (discussing the evolution of the FISA wall).

<sup>150</sup> *Id.*

<sup>151</sup> 50 U.S.C. §§ 1804(a), 1823(a) (2008). Under 50 U.S.C. § 1801(g) (2008), “Attorney General” means the actual Attorney General, or the Acting Attorney General, the Deputy Attorney General, or the Assistant Attorney General for National Security.

<sup>152</sup> 50 U.S.C. §§ 1805(a)(3)(A), 1824(a)(3)(A) (2008). FISA essentially defines “foreign power” and “agent of a foreign power” as:

[A] foreign power includes foreign governments (e.g., the government of Russia), factions of foreign governments not substantially comprised of U.S. persons (e.g., the PLO), entities directed and controlled by foreign governments (e.g., OPEC), a group engaged in or preparing to engage in international terrorism (e.g., al-Qaeda), and foreign-based political organizations not substantially comprised of U.S. persons (e.g., foreign political parties).

Agents of foreign powers are generally individuals who are in some way affiliated with a foreign power. The precise requirements vary according to whether or not the individual is a U.S. person—a term that is defined to include all U.S. citizens and permanent resident aliens. Individuals who are not U.S. persons—e.g., non-resident aliens—may be agents of foreign powers if they act in the United States as an officer or employee of a foreign power (e.g., the ambassador of a foreign government) or as a member of an international terrorist organization (e.g., Zacharias Moussaoui), if they engage in international terrorism, or if they act on behalf of a foreign power that spies on the U.S. and it appears that they may be a spy, or knowingly assist or conspire with such spies.

By contrast, U.S. persons can be agents of a foreign power only if they engage in some level of criminal activity.

Kris, *supra* note 149, at 491-92 (2006) (discussing 50 U.S.C. § 1801).

<sup>153</sup> 50 U.S.C. §§ 1805(a)(5), 1824(a)(5) (2008). “United States person” is generally defined as a U.S. citizen or a permanent resident alien. 50 U.S.C. § 1801(i) (2008).

is dissatisfied with the certification, he or she can require additional information.<sup>154</sup>

Although the FISA judicial authorization procedures differ from those in Title III, there are varying opinions about the degree, and therefore the significance, of these differences. As one commentator notes:

[A]pplications for a FISA warrant go to specially selected federal judges; FISA imposes much less judicial control over the particularity and scope of the surveillance or search; and probable cause to believe that the surveillance or search will reveal evidence of crime is not invariably required. These simplified procedures apply to physical searches as well as electronic surveillance. Thus, although FISA requires a court order, the judge's role is far more limited than in domestic law enforcement situations, and the conventional probable cause requirement is substantially diluted.<sup>155</sup>

However, many argue these differences are necessary for the protection of national security and therefore, when the Government's interests are properly balanced under the Fourth Amendment, the differences are not constitutionally significant. The courts have generally agreed, finding that the Title III and FISA statutes are equivalent in many respects and the procedures are reasonable under the Constitution.<sup>156</sup> If there are no constitutional issues with FISA, then there are only two grounds for defendants to challenge a FISA order: (1) the information was unlawfully obtained, or (2) the information acquired surpassed the grant of authority in the FISA order.<sup>157</sup>

#### D. FISA in the Federal Courts

Prior to *Mayfield*, no court had ever held that FISA was unconstitutional on Fourth Amendment or any other grounds.<sup>158</sup> While this

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<sup>154</sup> 50 U.S.C. §§ 1804(d), 1805(a)(5), 1823(c), 1824(a)(5) (2008).

<sup>155</sup> Schulhofer, *supra* note 120, at 533.

<sup>156</sup> See, e.g., *In re Sealed Case*, 310 F.3d 717, 741 (FISA Ct. Rev. 2002) and *infra* Part II.D.

<sup>157</sup> See 50 U.S.C. § 1806(e) (2008).

<sup>158</sup> The Supreme Court has not addressed and substantive issues with FISA. Thus far, *Mayfield* is the only case to rule that FISA is unconstitutional under the Fourth Amendment. The following cases have found that FISA meets Fourth Amendment standards: *United States v. Wen*, 477 F.3d 896 (7th Cir. 2006); *United States v. Damrah*, 412 F.3d 618 (6th Cir. 2005); *ACLU v. United States Dep't of Justice*, 265 F. Supp. 2d 20 (D.D.C. 2003); *In re Sealed Case*, 310 F.3d 717; *United States v. Johnson*, 952 F.2d 565 (1st Cir. 1991); *United States v. Pelton*, 835 F.2d 1067 (4th Cir. 1987); *United States v. Cavanagh*, 807 F.2d 787 (9th Cir. 1987); *United States v. Duggan*, 743 F.2d 59 (2d Cir. 1984); *United States v. Warsame*, No. 04-29 (JRT), 2008 U.S. Dist. LEXIS 31698 (D. Minn. Apr. 17, 2008); *United States v. Abu-Jihaad*, 531 F. Supp. 2d 299 (D. Conn.2008); *United States v. Mubayyid*, 521 F. Supp. 2d 125 (D. Mass. 2007); *United States v. Holy Land Found. for Relief & Dev.*, No. 3:04-CR-240-G, 2007 U.S. Dist. LEXIS 50239 (N.D. Tex. Jul. 11, 2007); *United States v.*

sounds somewhat dramatic, the truth is there are very few reported decisions analyzing FISA, much less under the Fourth Amendment. In addition, an important distinction must be made between court decisions before and after the terrorist attacks of September 11, 2001 [hereinafter 9/11] and the subsequent enactment of the Patriot Act.<sup>159</sup> Challenges to FISA's constitutionality had all but disappeared prior to the Patriot Act.<sup>160</sup>

However, FISA was changed in the aftermath of the 9/11 terrorist attacks. Given the nature of that al-Qa'eda operation, there was grave concern that other al-Qa'eda terrorist cells were operating within the United States.<sup>161</sup> Almost immediately, Congress passed the Patriot Act to better assist law enforcement in preventing future terrorist attacks.<sup>162</sup> The Act contained a variety of criminal procedure provisions, many of which related to FISA.<sup>163</sup> Of principle concern to the *Mayfield* decision were the provisions of the Patriot Act which focused on breaking down the so-called "wall" between law enforcement and intelligence officers. Prior to 9/11, the ability to exchange foreign intelligence information within the Executive branch was significantly curtailed by a metaphysical "wall" which was imposed to prevent the use of FISA authorizations when the true purpose of the surveillance was to gather information for other than foreign intelligence purposes (i.e., criminal law enforcement).<sup>164</sup> To ensure there was no perception that FISA was being used for any *sub rosa* purposes, the "wall" established:

[F]ormal procedures for the flow of information from foreign intelligence investigations to criminal prosecutors. The . . . [p]rocedures allowed intelligence officers to provide information

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Sattar, No. 02 Cr. 395 (JGK), 2003 U.S. Dist. LEXIS 16164 (S.D.N.Y. Sept.15, 2003); *United States v. Nicholson*, 955 F. Supp. 588 (E.D. Va. 1997). FISA has also been challenged on other constitutional grounds. See, e.g., *Nicholson*, 955 F. Supp. at 592 (rejecting Fifth and Sixth Amendment challenges to FISA and reviewing related cases).

<sup>159</sup> Patriot Act, *supra* note 12.

<sup>160</sup> A search of case law through the LexisNexis service reveals approximately 35 cases discussing various issues with FISA between its enactment and September 11, 2001. 26 of those cases occurred prior to 1991. Since the Patriot Act amended FISA, there has been a significant rise in various challenges to FISA. Between 2002 and June 2008, there were at least 54 court decisions discussing constitutional issues and FISA. Search data on file with the author. It is also interesting to note there has been a significant rise in the number of approved FISA authorizations since 9/11. Between 1996 and 2000, the average number of approved FISA authorizations was 855. In 2000, there were 1,012 approved FISA authorizations. By 2007, that number had more than doubled to 2,370. See Department of Justice, National Security Division, Electronic Reading Room, [http://www.usdoj.gov/nsd/foia/reading\\_room/foia\\_readingroom.htm](http://www.usdoj.gov/nsd/foia/reading_room/foia_readingroom.htm)

<sup>161</sup> JEFFREY F. ADDICOTT, *TERRORISM LAW* 138 (4th ed. 2007).

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

<sup>163</sup> *Id.*

<sup>164</sup> *In re Sealed Case*, 310 F.3d at 725.

regarding ongoing FISA surveillance to law enforcement officers only when the investigation indicated “significant federal criminal activity.” The procedures forbade law enforcement officers from taking any action that would result in “either the fact or the appearance” of the law enforcement officers “directing or controlling” the foreign intelligence investigation for law enforcement purposes. However law enforcement officers were not prohibited from consulting with intelligence officers concerning the investigations.<sup>165</sup>

What happened next was chronicled by the 9/11 Commission<sup>166</sup> in their report: These [wall] procedures were . . . misunderstood and misapplied. As a result there was far less information sharing and coordination between the FBI and the Criminal Division in practice than was allowed under the department’s procedures. . . . The Office of Intelligence Policy and Review became the sole gatekeeper for passing information to the Criminal Division. . . . [P]ressure from the Office of Intelligence Policy Review, FBI leadership, and the FISA Court built barriers between agents—even agents serving on the same squads. . . . Agents in the field began to believe—incorrectly—that no FISA information could be shared with agents working on criminal investigations. This perception evolved into the still more exaggerated belief that the FBI could not share *any* intelligence information with criminal investigators, even if no FISA procedures had been used. Thus, relevant information from the National Security Agency and the CIA often failed to make its way to criminal investigators.<sup>167</sup> Although the DOJ was responsible for implementing these “wall” procedures, they did not do it based on any specific statutory requirement by FISA. Instead, the “wall” owes its creation to the courts.

#### **E. The Origin of the “Primary Purpose” Test and the Rise of the “Wall”**

The origins of the “wall” can be traced back to a Fourth Circuit case decided in 1980, *United States v. Truong Dinh Hung*.<sup>168</sup> Although the case involved electronic surveillance carried out pre-FISA, its “primary purpose” rationale would be followed by several other Federal circuits. The *Truong* court held that the Executive Branch should be excused from obtaining a warrant only when “the object of the search or the surveillance is a foreign power, its agents

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<sup>165</sup> Daily, *supra* note 129, at 658-59.

<sup>166</sup> In the wake of 9/11, Congress and the President created the National Commission on Terrorist Attacks Upon the United States [hereinafter 9/11 Commission]. See Intelligence Authorization Act for Fiscal Year 2003, Pub. L. No. 107-306, 116 Stat. 2383 (2002).

<sup>167</sup> NAT’L COMM’N ON TERRORIST ATTACKS UPON THE U.S., THE 9/11 COMMISSION REPORT 79 (2004).

<sup>168</sup> *United States v. Truong Dinh Hung*, 629 F.2d 908 (4th Cir. 1980).

or collaborators,” and “the surveillance is conducted ‘primarily’ for foreign intelligence reasons.”<sup>169</sup> Targets must “receive the protection of the warrant requirement if the government is primarily attempting to put together a criminal prosecution.”<sup>170</sup> Although the *Truong* court acknowledged that “almost all foreign intelligence investigations are in part criminal” ones, it rejected the Government’s assertion that “if surveillance is to any degree directed at gathering foreign intelligence, the executive may ignore the warrant requirement of the Fourth Amendment.”<sup>171</sup> Thus was born the FISA “primary purpose” test.

This test was followed by subsequent Federal decisions interpreting FISA, such as *United States v. Megahey* and *United States v. Duggan*,<sup>172</sup> in which the District court, with the subsequent endorsement of the Second Circuit, held that surveillance under FISA would be “appropriate only if foreign intelligence surveillance is the Government’s primary purpose.”<sup>173</sup> The Fourth and the Eleventh Circuits also approved District court findings that surveillance was primarily for foreign intelligence purposes.<sup>174</sup> These courts did not tie a “primary purpose” test to any statutory language in FISA. However, the First Circuit did in *United States v. Johnson*.<sup>175</sup> Pointing to “the purpose” language in Section 1804(a)(7), and citing *Duggan*, the court stated, “Although evidence obtained under FISA subsequently may be used in criminal prosecutions, the investigation of criminal activity cannot be the primary purpose of the surveillance.”<sup>176</sup>

Of potential importance to the *Mayfield* case, the Ninth Circuit did *not* apply the primary purpose test when it had the opportunity to do so in *United States v. Sarkissian*.<sup>177</sup> Instead, it declined to decide the issue, stating: We refuse to draw too fine a distinction between criminal and intelligence investigations. “International terrorism,” by definition, requires the investigation of activities that constitute crimes. That the government may later choose to prosecute is irrelevant. . . . FISA is meant to take into account “the differences between ordinary criminal investigations to gather evidence of

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<sup>169</sup> *Id.* at 915.

<sup>170</sup> *Id.* at 916.

<sup>171</sup> *Id.* at 915.

<sup>172</sup> *United States v. Megahey*, 553 F. Supp. 1180 (E.D.N.Y. 1982), *aff’d sub nom.*; *United States v. Duggan*, 743 F.2d 59 (2d. Cir. 1984).

<sup>173</sup> *Megahey*, 553 F. Supp. at 1189-90.

<sup>174</sup> *United States v. Pelton*, 835 F.2d 1067, 1075-76 (4th Cir. 1987); *United States v. Badia*, 827 F.2d 1458, 1464 (11th Cir. 1987).

<sup>175</sup> *United States v. Johnson*, 952 F.2d 565, 572 (1st Cir. 1991).

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

<sup>177</sup> *United States v. Sarkissian*, 841 F.2d 959 (9th Cir. 1988).

specific crimes and foreign counterintelligence investigations to uncover and monitor clandestine activities . . .”<sup>178</sup>

However, Ninth Circuit views aside, the DOJ began to apply the primary purpose test to its procedures to avoid running afoul of any other courts.<sup>179</sup> The test’s focus became the nature of the underlying investigation, rather than the general purpose of the surveillance.<sup>180</sup> Once prosecution of the target was being considered, the procedures discussed above prevented the Criminal Division from providing any meaningful advice to the FBI.<sup>181</sup> Throughout this time frame, the FISC was aware of the procedures being followed by the DOJ and apparently adopted elements of them in certain cases.<sup>182</sup>

#### F. The Patriot Act Amendments to “the Purpose”

Shortly after the 9/11 attacks, the DOJ sent Congress a FISA amendment designed to permit greater coordination between intelligence and law enforcement personnel.<sup>183</sup> The amendment, which ultimately became Section 218 of the Patriot Act, initially sought to replace “the purpose” with “a purpose” in 50 U.S.C. §§ 1804(a)(7)(B) and 1823(a)(7)(B).<sup>184</sup> The DOJ’s desire was to clear the way for law enforcement to be the primary purpose of FISA searches or surveillance.<sup>185</sup> “Eventually, the DOJ acceded to Congressional preferences and changed ‘a purpose’ to a ‘significant purpose’ in the final version of Section 218. The basic approach and effect of the amendment, however, remained unchanged.”<sup>186</sup>

The Patriot Act also sought to remove the “wall” through Section 504, which created 50 U.S.C. §§ 1806(k) and 1825(k). These sections provide that “federal officers” who conduct electronic surveillance or physical searches “to acquire foreign intelligence information . . . may consult with Federal law enforcement officers to coordinate efforts to investigate or protect against” the threats to national security specified in the definition of “foreign intelligence information” including attack, sabotage, terrorism, and espionage.<sup>187</sup> The

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<sup>178</sup> *Id.* at 965.

<sup>179</sup> *In re Sealed Case*, 310 F.3d at 727.

<sup>180</sup> *Id.* at 728.

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

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

<sup>183</sup> Kris, *supra* note 149, at 508.

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

<sup>185</sup> *Id.*

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

<sup>187</sup> 50 U.S.C. §§ 1806(k), 1825(k) (2008).

amendment also provided that “coordination authorized under” the provision “shall not preclude” the certification of a significant foreign intelligence purpose “or the entry of an order” by the FISC authorizing a surveillance or search.<sup>188</sup>

Congress did not necessarily intend to dilute the requirements for obtaining FISA authorization with these two measures, but was trying to achieve the flexibility to use FISA without the perception that it endangered prosecution of the target or prevented consultation with officials on the law enforcement side.<sup>189</sup> Shortly after the passage of the Patriot Act, the amendments were executed within DOJ, new procedures were implemented, and the “wall” came down between criminal investigations and foreign intelligence investigations.<sup>190</sup> When the Madrid bombings occurred and the FBI laboratory misidentified Brandon Mayfield’s fingerprint, both criminal and intelligence personnel collaborated in the use of various investigative tools, including FISC-authorized surveillances and searches, as they tried to decide if Mr. Mayfield was a terrorist.<sup>191</sup>

### III. THE COURT’S DECISION IN *MAYFIELD V. UNITED STATES*

Recalling all the events that surrounded the searches, seizures, arrest and detention of Brandon Mayfield, it is not hard to understand why the Mayfields filed a lawsuit. At a news conference announcing the lawsuit’s settlement, Mr. Mayfield said that he, his wife, and their three children still suffered from the scars left by the Government’s surveillance of him and his incarceration.<sup>192</sup>

The horrific pain, torture, and humiliation that this has caused myself and my family is hard to put into words . . . The days, weeks and months following my arrest were some of the darkest we have had to

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<sup>188</sup> *Id.*

<sup>189</sup> Schulhofer, *supra* note 120, at 536. Note that some members of Congress expressed reservations about the constitutionality of the “significant purpose” amendment to FISA in light of the “primary purpose” requirement apparently rooted in the Fourth Amendment. 147 CONG. REC. 510593 (Oct. 11, 2001) (statement of Sen. Leahy); *id.* at 510568 (statement of Sen. Specter); *id.* at 510585 (statement of Sen. Cantwell); *id.* at 510597 (statement of Sen. Kennedy); *id.* at E1896 (Oct. 12, 2001) (statement of Rep. Mink); *id.* at H6760 (statement of Rep. Scott); *id.* at H6761 (statement of Rep. Lofgren); *id.* at H6767 (statement of Rep. Conyers); *id.* at H6772 (statement of Rep. Udall).

<sup>190</sup> Jennifer L. Sullivan, Note, *From “The Purpose” to “A Significant Purpose”: Assessing the Constitutionality of the Foreign Intelligence Surveillance Act Under the Fourth Amendment*, 19 NOTRE DAME J.L. ETHICS & PUB. POL’Y 379, 400 (2005). For a thorough discussion of the “rise and fall” of the wall, see Kris, *supra* note 149.

<sup>191</sup> See, generally, IG REPORT, *supra* note 2.

<sup>192</sup> Eric Lichtblau, *U.S. Will Pay \$2 Million to Lawyer Wrongly Jailed*, N.Y. TIMES, Nov. 30, 2006, at A18.

endure. I personally was subjected to lockdown, strip searches, sleep deprivation, unsanitary living conditions, shackles and chains, threats, physical pain and humiliation.<sup>193</sup>

In exchange for a reported \$2 million settlement,<sup>194</sup> the Mayfields agreed to drop all of their claims but one: a facial, rather than as-applied, challenge to FISA, specifically 50 U.S.C. §§ 1804 and 1823, which had been amended by the Patriot Act to change “the purpose” to “significant purpose” in the effort to bring down the “wall.”<sup>195</sup> The Mayfield’s challenge to the FISA amendments was that they allowed federal agents to circumvent Fourth Amendment probable cause requirements when investigating persons suspected of crimes.<sup>196</sup> As discussed in Part I, *supra*, the only relief available to the Mayfields under the settlement agreement was a declaratory judgment that one or both of these two provisions were unconstitutional.<sup>197</sup> On September 26, 2007, in a decision that likely surprised the Government,<sup>198</sup> the court awarded that judgment.<sup>199</sup>

As a predicate matter, the court addressed the Government’s contention that the Mayfields lacked standing to seek a declaratory judgment regarding the facial constitutionality of FISA. The Government argued that the Mayfields’ had no standing because there was no ongoing injury-in-fact, that their past injuries had been settled, that any fear of future injuries was speculative, and even if there *were* any cognizable injuries the court had no ability to redress them through a declaratory judgment.<sup>200</sup> The court disagreed with the Government, noting that the Mayfields’ private information was disseminated to at least eight agencies of the federal government, including the Central Intelligence Agency, the National Security Council, the Department of Defense, the Department of Homeland Security, the DOJ, the FBI, the Department of the Treasury, and the National Security Agency and that several federal agencies continue to retain information collected.<sup>201</sup> The court found that “the government’s *continued retention* of derivative FISA materials collected by covert surveillance and searches from Mayfield, his wife, and their children . . .

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

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

<sup>195</sup> See *supra* Part II for a discussion of “the purpose” and the “wall”.

<sup>196</sup> See *Mayfield*, 504 F. Supp. 2d at 1030.

<sup>197</sup> *Mayfield*, 504 F. Supp. 2d at 1026 n.2.

<sup>198</sup> The Department of Justice had reportedly been “confident that the legal foundation of the Patriot Act, including the surveillance and search provisions challenged by Mr. Mayfield, would hold up in court.” Lichtblau, *supra* note 192.

<sup>199</sup> *Mayfield*, 504 F. Supp. 2d at 1043.

<sup>200</sup> See *id.* at 1033-1034.

<sup>201</sup> *Mayfield*, 504 F. Supp. 2d at 1030.

constitutes a real and continuing injury-in-fact to plaintiffs” and therefore standing.<sup>202</sup> As to the capability for redress, the court stated that even though the settlement agreement did not permit it to order the Government to return or destroy the derivative FISA materials, it was reasonable to assume that the Government would “act lawfully and make all reasonable efforts to destroy the derivative materials [if] a final declaration of the unconstitutionality of the challenged provisions is issued.”<sup>203</sup>

#### A. The Court’s Fourth Amendment Analysis

After determining the Mayfields had standing, the court began its Fourth Amendment analysis by highlighting the “significant purpose” amendment. It stated:

Now, for the first time in our Nation’s history, the government can conduct surveillance to gather evidence for use in a criminal case without a traditional warrant, as long as it presents a non-reviewable assertion that it also has a significant interest in the targeted person for foreign intelligence purposes.<sup>204</sup>

The court noted that prior to issuing a search warrant under the Fourth Amendment, law enforcement must have reasonable grounds to believe that the law is being violated. This was contrasted with FISA’s “foreign intelligence standard” of probable cause, which requires a showing that the target may be an agent of a foreign government and the place or facility to be searched is being used in furtherance of espionage or terrorist activities.<sup>205</sup> In the court’s words: Since the adoption of the Bill of Rights in 1791, the government has been prohibited from gathering evidence for use in a prosecution against an American citizen in a courtroom unless the government could prove the existence of probable cause that a crime has been committed. The hard won legislative compromise previously embodied in FISA reduced the probable cause requirement only for national security intelligence gathering. The Patriot Act effectively eliminates that compromise by allowing the Executive Branch to bypass the Fourth Amendment in gathering evidence for a criminal prosecution.<sup>206</sup>

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<sup>202</sup> *Id.* at 1034 (emphasis added).

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

<sup>204</sup> *Id.* at 1036.

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

<sup>206</sup> *Id.* at 1036-37.

The court then reviewed Fourth Amendment jurisprudence leading up to the Supreme Court's decision in *Keith*.<sup>207</sup> The *Keith* case heavily influenced the outcome in *Mayfield*. The court quoted from *Keith* that:

There is understandably, a deep-seated uneasiness and apprehension that this [surveillance] capability will be used to intrude upon cherished privacy of law-abiding citizens. We look to the Bill of Rights to safeguard this privacy. Though physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed, its broader spirit now shields private speech from unreasonable surveillance.<sup>208</sup>

The *Mayfield* court also noted *Keith*'s rejection of the arguments that "internal security matters are too subtle and complex for judicial evaluation," that "prior judicial approval will fracture the secrecy essential to official intelligence gathering," and that exceptions to the Fourth Amendment warrant requirement should be recognized for domestic security surveillance.<sup>209</sup> The *Mayfield* court concluded:

*Keith* drew a line between surveillance conducted by law enforcement officials to investigate crime—which requires a traditional warrant based on probable cause—and surveillance conducted by intelligence officials to obtain foreign intelligence information. . . . The government stipulated that it did not demonstrate to the FISC that its primary purpose in wiretapping, electronically eavesdropping, or physically searching Mayfield's home or law office was to gather foreign intelligence.<sup>210</sup>

In addition to the FISA probable cause standard, the *Mayfield* court was also concerned about the level of review afforded to FISC judges, in particular that FISA directs FISC judges to not scrutinize the Government certification unless it is "clearly erroneous."<sup>211</sup> The court noted that traditional Fourth Amendment judicial oversight of a surveillance order requires the Government to provide the court with "a full and complete statement of the facts and circumstances relied upon by the applicant to justify his belief that an order should be issued."<sup>212</sup> The court may "require the applicant to furnish additional

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<sup>207</sup> *Keith*, 407 U.S. 297.

<sup>208</sup> *Mayfield*, 504 F. Supp. 2d at 1037 (quoting *Keith*, 407 U.S. at 312-13).

<sup>209</sup> *Id.* at 1038 (quoting *Keith*, 407 U.S. at 320).

<sup>210</sup> *Id.* at 1038-39.

<sup>211</sup> 50 U.S.C. §§ 1805(a)(5), 1824(a) (2008).

<sup>212</sup> 18 U.S.C. § 2518(1)(b) (2008).

testimony or documentary evidence in support of the application.”<sup>213</sup> Finally, as to most substantive requirements, the court must find probable cause to believe they are satisfied.<sup>214</sup>

After discussing the FISA standards for probable cause and judicial authorization, the *Mayfield* court then compared the FISA regime to other traditional Fourth Amendment requirements. For instance, FISA’s lack of required notice, as compared to the Fourth Amendment requirement that the subject of a search be notified that the search has occurred.<sup>215</sup> The public policy reason for giving notice is that most targets have no way of challenging the legality of the surveillance or obtaining any remedy for violations of their constitutional rights without it. FISA restricts notice to protect national security information, and even when notice is given to criminal defendants, the Defense will likely receive no information beyond what is being admitted in evidence unless the judge determines ex parte that more disclosure is required. Thus the *Mayfield* court was concerned that the Government could retain information collected under FISA and use the collected information in criminal prosecutions without providing any meaningful opportunity for the target of the surveillance to challenge its legality.<sup>216</sup>

The court also noted that FISA does not require particularity. In contrast, the Fourth Amendment prohibits the Government from conducting intrusive surveillance unless it first obtains a warrant describing with particularity the things to be seized as well as the place to be searched.<sup>217</sup> The court took notice that FISA authorizes surveillance terms up to 120-days,<sup>218</sup> whereas Title III limits the term of surveillance to 30 days.<sup>219</sup> This was significant to the court because the Ninth Circuit has held that in the context of criminal investigations, the 30-day limitation is constitutionally required.<sup>220</sup>

### **B. *In re Sealed Case* and the Foreign Intelligence Surveillance Court of Review**

Despite the above concerns, the *Mayfield* court knew that in order to declare FISA unconstitutional it would have to deal with the opinion of *In re*

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<sup>213</sup> 18 U.S.C. § 2518(2) (2008).

<sup>214</sup> 18 U.S.C. § 2518(3) (2008).

<sup>215</sup> *Mayfield*, 504 F. Supp. 2d at 1039.

<sup>216</sup> *Mayfield*, 504 F. Supp. 2d at 1039.

<sup>217</sup> *Id.* at 1040.

<sup>218</sup> 50 U.S.C. § 1805(e)(1)(B) (2008). Note that 120 days applies only to a non-U.S. person. FISA surveillance on U.S. persons is limited to 90 days. *Id.*

<sup>219</sup> 18 U.S.C. § 2518(5) (2008).

<sup>220</sup> *United States v. Kovomejian*, 970 F.2d 536, 542 (9th Cir 1992).

*Sealed Case*, one of the more unique cases in American jurisprudence.<sup>221</sup> *In re Sealed Case* involved the Government's challenge to a decision by the FISC. Such a challenge had never happened in more than 20 years of FISC decisions.<sup>222</sup> The issue arose as a result of the post-9/11 and post-Patriot Act amendments to FISA. Collectively, the seven FISC judges addressed the newly amended FISA procedures, and issued a rare public and unanimous opinion declaring them to be improper. The FISC held:

[The new 2002 Procedures] are designed to enhance the acquisition, retention, and dissemination of *evidence for law enforcement purposes*, *instead* of being consistent with the need of the United States to "obtain, produce, and disseminate *foreign intelligence information*" . . . The 2002 Procedures appear to be designed to amend the law and substitute the FISA for Title III electronic surveillances and Rule 41 searches.<sup>223</sup>

To keep the FISC from returning to pre-Patriot Act procedures, the Government filed the first ever appeal to the Foreign Intelligence Surveillance Court of Review [hereinafter FISCR], a court that had never before met.<sup>224</sup> The FISCR reversed the FISC's ruling and held the 2002 Procedures were not only consistent with the Patriot Act, but went one step further and held that FISA, as amended, was constitutionally reasonable under the Fourth Amendment.<sup>225</sup> While the court accepted amicus briefs filed by the American Civil Liberties Union and the National Association of Criminal Defense Lawyers, only the Government was allowed to appear and participate at oral argument.<sup>226</sup>

Naturally, the Government cited FISCR's *In re Sealed Case* opinion to the *Mayfield* court as "highly persuasive" authority that FISA was constitutional and suggested the Ninth Circuit would follow the ruling.<sup>227</sup> However, the *Mayfield* court disagreed with the Government's analysis because the Ninth Circuit cases cited by the Government occurred prior to the Patriot Act amendments to FISA, and therefore were not on point for the Fourth Amendment challenge in *Mayfield*.<sup>228</sup> The court declined to adopt the FISCR's

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<sup>221</sup> *In re Sealed Case*, 310 F.3d 717.

<sup>222</sup> *Id.* at 719.

<sup>223</sup> *In re All Matters Submitted to the Foreign Intelligence Surveillance Court*, 218 F. Supp. 2d 611, 623 (FISA Ct. 2002) (emphasis in original) (citing 18 U.S.C. §§ 1801(h), 1821(4)).

<sup>224</sup> *In re Sealed Case*, 310 F.3d at 719.

<sup>225</sup> *Id.* at 746.

<sup>226</sup> *Id.* at 719.

<sup>227</sup> *Mayfield*, 504 F. Supp. 2d at 1040.

<sup>228</sup> The Government cited both *United States v. Cavanagh*, 807 F.2d 787 (9<sup>th</sup> Cir. 1987), and *United States v. Sarkissian*, 841 F.2d 959 (9<sup>th</sup> Cir. 1988), as evidence that the Ninth Circuit would follow the

analysis and conclusion.<sup>229</sup> Specifically, the court disagreed with the FISC’s finding that the primary purpose test “generates dangerous confusion and creates perverse organizational incentives arising from the purported need to distinguish between intelligence gathering and criminal investigation.”<sup>230</sup> The *Mayfield* court noted that Section 504 of the Patriot Act, which created 50 U.S.C. §§ 1806(k) and 1825(k), eliminated the DOJ “wall” and with it the “dangerous confusion” and “perverse organizational incentives” referred to and relied on by the FISC.<sup>231</sup> The *Mayfield* court also noted:

[T]o the extent the “primary purpose” test imposes any restraint on the sharing of FISA surveillance with criminal investigators, investigators are, of course, free to seek orders authorizing surveillance under Title III, and traditional search warrants that satisfy Fourth Amendment requirements. Finally, Title III includes predicate offenses for which surveillance is justified for virtually all terrorism and espionage-related offenses. 18 U.S.C. § 2516(1). As such, Title III provides a satisfactory alternative when criminal investigators cannot have access to FISA surveillance.<sup>232</sup>

The *Mayfield* court also disagreed with the FISC’s analogies to the Supreme Court’s “special needs” cases. “Special needs” cases are those where the Supreme Court has found it appropriate to carve out an exception to the Fourth Amendment’s requirement of probable cause based upon an individualized suspicion of wrongdoing.<sup>233</sup> In such cases, the Supreme Court found that special needs, often described as programmatic purposes beyond the normal need of law enforcement, might justify an otherwise unconstitutional search.<sup>234</sup> Thus the *Mayfield* court found that although FISA may have had as

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ruling of *In re Sealed Case*. *Cavanagh* held that where “the purpose of the surveillance is to obtain foreign intelligence,” FISA passes constitutional muster. *Id.* at 790-91. *Sarkissian* expressly declined to consider whether the primary purpose test was constitutionally required. *Sarkissian*, 841 F.2d at 964. The government also cited the recent case of *United States v. Holy Land Found. for Relief and Dev.*, No. 3:02-CR-240-G, 2007 U.S. Dist. LEXIS 50239 (N.D. Tex. July 11, 2007), in which the court decided a motion to compel production of documents related to the government’s applications under FISA and a motion to suppress evidence obtained from that surveillance. The *Holy Land* court denied the motions rejecting defendants’ Fourth Amendment challenge, and relied on the “thorough analy[sis]” by the Foreign Intelligence Surveillance Court of Review in *In re Sealed Case*. *Id.* at \*17. The *Mayfield* court found *Holy Land* unpersuasive because it simply reiterated the analysis of *In re Sealed Case*. *Mayfield*, 504 F. Supp. 2d at 1041 n.9.

<sup>229</sup> *Mayfield*, 504 F. Supp. 2d at 1041.

<sup>230</sup> *In re Sealed case*, 310 F.3d at 743.

<sup>231</sup> *Mayfield*, 504 F. Supp. 2d at 1041. The court noted that this provision was not challenged by the *Mayfields*. *Id.*

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

<sup>233</sup> *Mayfield*, 504 F. Supp. 2d at 1041-42.

<sup>234</sup> *See Skinner v. Railway Labor Executives’ Assn.*, 489 U.S. 602, 619 (1989).

its “general programmatic purpose . . . to protect the nation against terrorism and espionage threats directed by foreign powers”<sup>235</sup> before it was amended by the Patriot Act, the court questioned if that remained true today.<sup>236</sup> Since the Government’s position is that the primary purpose behind a FISA request may be the collection of evidence for criminal prosecution, then according to the court the amended FISA may instead have as its “programmatic purpose” the generation of evidence for law enforcement purposes, which is forbidden without criminal probable cause and a warrant.<sup>237</sup>

The *Mayfield* court concluded by expressing dismay at the amended FISA’s elimination of “the constitutionally required interplay between Executive action, Judicial decision, and Congressional enactment.”<sup>238</sup> The court decided that although the FISC found that “the Constitution need not control the conduct of criminal surveillance in the United States” in the case of *Mayfield*, it declined to do so.<sup>239</sup> Judgment was entered declaring 50 U.S.C. §§ 1804 and 1823 unconstitutional on its face because of the amended purpose requirement.<sup>240</sup>

#### IV. ANALYSIS OF THE MAYFIELD COURT’S DECISION

The Government has appealed *Mayfield* to the Ninth Circuit.<sup>241</sup> This appeal should succeed because the constitutional analysis in *Mayfield* is flawed for at least four reasons: (1) The court did not properly address the constitutional significance of the federal authority created by FISA’s combination of the President’s national security powers, Congressional authorization and judicial approval; (2) The court did not adequately address why the FISA procedures are not sufficient under *Keith*; (3) The court failed to properly balance the Government’s national security interest in its Fourth Amendment analysis of FISA’s reasonableness; and (4) The court conducted an improper Fourth Amendment facial analysis of FISA. Already, other Federal District courts have

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<sup>235</sup> *In re Sealed Case*, 310 F.3d at 746.

<sup>236</sup> *Mayfield*, 504 F. Supp. 2d at 1042.

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

<sup>238</sup> *Id.*

<sup>239</sup> *Id.*

<sup>240</sup> *Id.* at 1042-43.

<sup>241</sup> The initial notice of intent to appeal was provided following the court’s ruling. See Def. Notice of Intent to Appeal, Oct 9, 2007, available at [http://www.swamppolitics.com/news/politics/blog/2007/10/feds\\_appeal\\_brandon\\_mayfield\\_r.html](http://www.swamppolitics.com/news/politics/blog/2007/10/feds_appeal_brandon_mayfield_r.html) (last visited May 30, 2008). The parties have since filed their briefs and Amici Curiae (American Civil Liberties Union of Oregon, Center for Constitutional Rights, Electronic Frontier Foundation, and Center for Democracy and Technology) have also filed in support of the Mayfields. All three briefs are on file with the author or can be linked to electronically in 4-9 MEALEY’S PRIVACY REP. 6 (2008) available at LexisNexis.

disagreed with the holding in *Mayfield*.<sup>242</sup> On appeal the Ninth Circuit should find that *Mayfield* is a flawed case where “bad facts have made bad law” and the District Court’s decision must be reversed.<sup>243</sup>

### A. Presidential powers with Congressional Authorization

The various national security powers of the President have long been recognized by the judiciary. In the context of national security surveillance, the Court in *Keith* stated:

[T]he President of the United States has the fundamental duty, under Art. II, § 1, of the Constitution, to “preserve, protect and defend the Constitution of the United States.” Implicit in that duty is the power to protect our Government against those who would subvert or overthrow it by unlawful means. In the discharge of this duty, the President—through the Attorney General—may find it necessary to employ electronic surveillance to obtain intelligence information on the plans of those who put unlawful acts against the Government.<sup>244</sup>

Thus, in *Keith*, the Court acknowledged the duty of the President to protect the country. Though it declared that in purely domestic matters the President’s surveillance powers must be tempered, the opinion is very careful not to detract from the President’s surveillance power with respect to foreign activities.<sup>245</sup> It even favorably cites to a case expressing the opinion that warrantless surveillance, though impermissible in domestic security cases, may be constitutional where foreign powers are involved.<sup>246</sup> Still, the *Keith* opinion left the Fourth Amendment parameters of foreign intelligence gathering unresolved, thus Congress stepped into that void with FISA.

By enacting FISA, Congress sought to both authorize and control the President’s foreign surveillance power. In *Youngstown Sheet & Tube Co. v. Sawyer*, Justice Jackson wrote, “When the President acts pursuant to an express

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<sup>242</sup> See, e.g., *United States v. Abu-Jihaad*, 531 F. Supp. 2d 299 (D. Conn. 2008); *United States v. Mubayyid*, 521 F. Supp. 2d 125 (D.C. Mass. 2007).

<sup>243</sup> Note that it is possible that the Ninth Circuit will choose not to comment on the merits of the Fourth Amendment analysis in *Mayfield* and could instead reverse on just the issue of Standing, discussed *supra* Part III. The Government has raised Standing as an issue on appeal and would certainly be satisfied if the case were overturned on that issue alone. Hopefully the court will not choose to resolve the case so narrowly and instead will also address the larger FISA constitutional questions.

<sup>244</sup> *Keith*, 407 U.S. at 310.

<sup>245</sup> *Id.* at 309.

<sup>246</sup> *Id.* at 322 n.20 (citing *United States v. Smith*, 321 F. Supp. 424, 425-26 (C.D. Cal. 1971)).

or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate.”<sup>247</sup> Thus, this maximum authority is present in FISA because the President’s inherent authority to collect foreign intelligence for national security purposes is combined with the congressional legislation contained in FISA, to include the Patriot Act amendments.

The FISCR touched on this point in *In re Sealed Case* when discussing the President’s inherent authority to conduct warrantless searches to obtain foreign intelligence information:

We take for granted that the President does have that authority and, assuming that it is so, FISA could not encroach on the President’s constitutional power. The question before us is the reverse, does FISA amplify the President’s power by providing a mechanism that at least approaches a classic warrant and which therefore supports the government’s contention that FISA searches are constitutionally reasonable.<sup>248</sup>

Based on Justice Jackson’s famous concurrence in *Youngstown*, the answer to the FISCR’s question is “yes,” FISA does amplify the President’s power.<sup>249</sup> Congress was well aware that by changing to a “significant purpose” test, it was relaxing the requirement that the Government must show that its *primary* purpose was the gathering of foreign intelligence.<sup>250</sup> Despite various civil liberty and criminal defense challenges made to the “significant purpose” change, subsequent legislative changes to FISA have left the language in place.<sup>251</sup> Therefore, this direct and purposeful congressional authorization must

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<sup>247</sup> *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J. concurring).

<sup>248</sup> *Id.* at 742.

<sup>249</sup> Justice Jackson’s *Youngstown* concurrence was recently reaffirmed by the Supreme Court in *Medellin v. Texas*, 128 S.Ct. 1346, 1368 (2008) (“Justice Jackson’s familiar tripartite scheme provides the accepted framework for evaluating executive action in this area. First, when the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate. Second, when the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain. In this circumstance, Presidential authority can derive support from congressional inertia, indifference or quiescence. Finally, when the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, and the Court can sustain his actions only by disabling the Congress from acting upon the subject” (quotations and citations omitted)).

<sup>250</sup> *In re Sealed Case*, 310 F.3d at 732.

<sup>251</sup> In fact, the language was not simply left in place, it was ultimately made permanent. Section 224 of the Patriot Act was a “sunset” provision under which much of the Act would expire on December 31, 2005 unless reauthorized. This expiration included the “significant purpose” language. The

carry significant weight in any constitutional analysis. Under Justice Jackson's *Youngstown* framework, it carries even more weight because it is combined with the inherent national security powers of the Presidency.

In the context of FISA, this maximum authority dynamic is even further strengthened by joining the judicial branch to the process. FISA authorizations, though employing different procedures than Title III, only issue through judicial orders.<sup>252</sup> Whether these FISA search and surveillance orders are true "warrants" under the Fourth Amendment has been debated,<sup>253</sup> but whatever their legal nomenclature, the fact is that these orders require substantive and meaningful involvement of the judiciary in the process. As discussed in Part II.C above, not only do neutral and independent FISC judges review the Government's request for procedural regularity, but they make probable cause determinations,<sup>254</sup> and when the target is a U.S. person, the judge is directed to review the Executive Branch official's certification for clear error.<sup>255</sup> If the FISC judge is dissatisfied with the certification, he or she can require additional information.<sup>256</sup>

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Patriot Act sunset provision was extended until February 3, 2006 by Pub. L. No. 109-160, 119 Stat. 2957 (2005) and extended again to March 10, 2006 by Pub. L. No. 109-170, 120 Stat. 3 (2006). After that, the significant purpose language was made permanent by Section 102 of the USA PATRIOT Improvement and Reauthorization Act of 2005, Pub. L. No. 109-177, 120 Stat. 192 (2006) which repealed the Patriot Act sunset provision. FISA was again amended by the USA PATRIOT Act Additional Reauthorization Amendments Act of 2006, Pub. L. No. 109-178, 120 Stat. 279 (2006) without change to the FISA purpose language. Most recently, Congress appears set to again amend FISA with the FISA Amendments Act of 2008, H.R. 6304, 110th Cong. (2008). That act specifically employs the "significant purpose" language in new FISA procedures regarding certain persons outside the United States. See, e.g., *id.* at §§ 702(g)(2)(A)(v), 703(b)(1)(F)(ii), 704(b)(5)(B).

<sup>252</sup> The only exception to this is an "emergency order" which can be issued by the Attorney General. However, such orders require FISC notification and an application to the court within 72 hours. 50 U.S.C. § 1805(f). An emergency order was used against the Mayfield's. IG REPORT, *supra* note 2, at 38 ("[Agent] Cummings said that once he learned about the Mayfield fingerprint identification, he ordered agents . . . to seek emergency authorization from the Attorney General to conduct covert surveillance and physical searches concerning Mayfield pursuant to FISA.").

<sup>253</sup> See, e.g., *United States v. Mubayyid*, 521 F. Supp. 2d 125, 136 (D.C. Mass. 2007) ("Defendants. . . contend that the FISA search and surveillance orders are not 'warrants' within the meaning of the Fourth Amendment because they do not comply with the requirements of judicial review, probable cause, particularity, and notice.").

<sup>254</sup> 50 U.S.C. §§ 1805(a)(3), 1824(a)(3) (2008).

<sup>255</sup> 50 U.S.C. §§ 1805(a)(5), 1824(a)(5) (2008). "United States person" is generally defined as a U.S. citizen or a permanent resident alien. 50 U.S.C. § 1801(i) (2008).

<sup>256</sup> 50 U.S.C. §§ 1804(d), 1805(a)(5), 1823(c), 1824(a)(5) (2008). Additionally, in the event of a criminal prosecution, the District Court will examine *de novo* the adequacy of the FISA applications, certifications, and orders at issue, with no deference accorded to the FISC's probable cause determinations, but with a presumption of validity accorded to the certifications. In essence, the District Court will conduct the same review of the FISA materials that the FISC itself conducted. See *United States v. Mubayyid*, 521 F. Supp. 2d 125, 131 (D.C. Mass. 2007).

When all three branches come together to produce such a FISA order, it must have constitutional significance that bears directly on the balancing of reasonableness under the Fourth Amendment. Yet the *Mayfield* court misrepresented and disregarded this when it stated “the constitutionally required interplay between Executive action, Judicial decision, and Congressional enactment, has been eliminated by the FISA amendments.”<sup>257</sup> This is completely inaccurate, and a fundamental flaw in the court’s analysis.

**B. FISA Meets the Standards Expressed by the Supreme Court in *Keith***

Although the Court in *Keith* purposefully did not encroach on the field of foreign surveillance, it is the only Supreme Court opinion to come close, and the *Mayfield* court was influenced by the *Keith* analysis. However, the *Mayfield* court discounted or misinterpreted some of the final paragraphs in *Keith* where the Supreme Court attempted to balance the outcome by discussing the latitude to be granted to *domestic* security surveillance. For example, the Court:

- Suggested there could be different standards and procedures than prescribed by Title III.<sup>258</sup>
- Noted the different policy and practical considerations with intelligence gathering, including that it is long range, the targets may be more difficult to identify, and the focus may be less precise.<sup>259</sup>
- Noted that different standards may be compatible with Fourth Amendment if they are reasonable.<sup>260</sup>
- Suggested that applications showing probable cause could allege other circumstances more appropriate to domestic security cases.<sup>261</sup>

The *Mayfield* court failed to appreciate how the framework suggested in *Keith* supports FISA’s constitutionality. The Court in *Keith* was trying to demonstrate reasonableness, the “touchstone” of Fourth Amendment analysis,<sup>262</sup> even as it was imposing the requirement for prior judicial approval for domestic security surveillance. The Court was openly receptive to a process that did not follow a strict Title III regime in the intelligence surveillance context. In essence, the Court suggested a structure similar to the current FISA requirements. But instead of recognizing the Court’s flexible stance, the

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<sup>257</sup> *Mayfield*, 504 F. Supp. 2d at 1042.

<sup>258</sup> *Keith*, 407 U.S. at 322.

<sup>259</sup> *Id.*

<sup>260</sup> *Id.*

<sup>261</sup> *Id.* at 323.

<sup>262</sup> *Gates*, 462 U.S. at 232.

*Mayfield* court used this portion of the opinion to bolster the perceived differences between criminal and intelligence surveillance.<sup>263</sup> The *Mayfield* court should have acknowledged that FISA incorporates prior judicial review, a core *Keith* requirement for domestic surveillance, and therefore the other facets of FISA have greater flexibility under the Fourth Amendment given the significant Governmental interest in protecting the nation from foreign powers.<sup>264</sup>

**C. The *Mayfield* Court Failed to Properly Balance the Government’s National Security Interest in its Fourth Amendment Analysis of FISA’s Reasonableness**

It was never obvious in *Mayfield* what the court found to be specifically unreasonable about FISA under the Fourth Amendment. The court certainly focused on the change in the government’s purpose requirement and then made comparisons between the FISA procedures and those of Title III. The court was concerned that the Government can obtain FISA orders even when the Government’s “primary” purpose is to gather evidence of criminal activity, yet the court barely acknowledged that the Government still must have the gathering of foreign intelligence as a significant purpose. In fact, the *Mayfield* court never truly acknowledged that the gathering of foreign intelligence is motivated by the Government’s substantial interest in protecting National Security.

Instead, the court focused in on the semantic difference between the word “primary” and “significant.” The court’s concern was that law enforcement has become the *primary* focus of FISA authorizations. But the court does not answer the following question: *if a significant,<sup>265</sup> but not the primary, purpose of the investigation is to gather foreign intelligence, why is it unreasonable under the Fourth Amendment for investigators to use FISA procedures against a target?*

To clarify the scope of the issue, consider that the *Mayfield* court never suggested that FISA was unconstitutional when the *primary* purpose standard was used.<sup>266</sup> Indeed, it pointed favorably to the case law prior to *In re Sealed*

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<sup>263</sup> *Mayfield*, 504 F. Supp. 2d at 1038.

<sup>264</sup> The Supreme Court has stated that “It is ‘obvious and unarguable’ that no governmental interest is more compelling than the security of the Nation.” *Haig v. Agee*, 453 U.S. 280, 305 (1981).

<sup>265</sup> For the purposes of this argument, as interpreted by the FISCR, the “significant purpose” standard requires the government to demonstrate “a measurable foreign intelligence purpose, other than just criminal prosecution of even foreign intelligence crimes.” *In re Sealed Case*, 310 F.3d at 735.

<sup>266</sup> Recall that the word “primary” was never taken directly from FISA, or a Supreme Court decision, but instead evolved from lower court decisions with DOJ compliance.

*Case* which upheld that standard.<sup>267</sup> Thus the court implicitly accepts the FISA framework when the Government's primary purpose is foreign intelligence. Nor did the court take issue with any of the statutory definitions of "foreign power," "agent of a foreign power," or "foreign intelligence information."<sup>268</sup> The court also did not suggest that there could be no sharing of information between intelligence and law enforcement officials. In fact, it seemed to cite favorably to the elimination of the "wall" by 50 U.S.C. §§ 1806(k) and 1825(k).<sup>269</sup>

Thus, what the *Mayfield* court was saying (though it never specifically said it) was that it believed the FISA procedures were reasonable under the Fourth Amendment, but only when the Government's gathering of foreign intelligence was the primary purpose of the investigation and thus anything less than a primary purpose makes the FISA framework unreasonable and therefore unconstitutional. This rationale is itself unreasonable. The court would prevent the use of FISA tools and evidence against an agent of a foreign terrorist group simply because the Government potentially wants to both prosecute and gather intelligence from a terrorist, despite the fact that these are two goals that the Government will assuredly have in that situation. Intelligence gathering will always be a critical function in protecting the national security, but law enforcement and prosecution must also be a primary government tool against terrorism and espionage.

This situation was acknowledged in Congress during the debate on the Patriot Act amendments to FISA. Senator Feinstein stated that FISA surveillance often "will have two *key* goals – the gathering of foreign intelligence, and the gathering of evidence for a criminal prosecution," and that "[d]etermining which purpose is the 'primary' purpose of the investigation can be difficult, [all the] more so as we coordinate our intelligence and law enforcement efforts in the war on terror."<sup>270</sup> Perhaps the most important point from *In re Sealed Case* was when the court addressed the "false premise" that once the Government moves toward criminal prosecution, its "foreign policy concerns" recede.<sup>271</sup> As the court stated:

[T]hat is simply not true as it relates to counterintelligence. In that field the government's primary purpose is to halt the espionage or terrorism efforts, and criminal prosecutions can be, and usually are,

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<sup>267</sup> *Mayfield*, 504 F. Supp. 2d at 1040.

<sup>268</sup> 50 U.S.C. § 1801(a)(b), (e).

<sup>269</sup> *Mayfield*, 504 F. Supp. 2d at 1041. The court noted that this provision was not challenged by the *Mayfields*. *Id.*

<sup>270</sup> 147 CONG. REC. S10547, S10591 (2001) (statement of Sen. Feinstein).

<sup>271</sup> *In re Sealed Case*, 310 F.3d at 743.

interrelated with other techniques used to frustrate a foreign power's efforts. . . . [C]ounterintelligence brings to bear both classic criminal investigation techniques as well as less focused intelligence gathering.<sup>272</sup>

This was certainly the situation on March 20, 2004, after the FBI issued a formal report matching Mr. Mayfield's print to the latent finger print from Madrid.<sup>273</sup> Fingerprint misidentification issues aside, would it have been reasonable to make the Government choose between prosecution and intelligence gathering against Mr. Mayfield at that point in time? Does the Fourth Amendment mandate such a choice? The answer to both questions is "no."

#### 1. The Mayfield Court's Disregard of Ninth Circuit Precedence

What will Ninth Circuit's view be on the required level of foreign intelligence purpose to achieve a reasonable balance under the Fourth Amendment? The cases of *United States v. Cavanagh*<sup>274</sup> and *United States v. Sarkissian*<sup>275</sup> could be excellent foreshadowing. Although both cases were given short shrift in *Mayfield*,<sup>276</sup> the decision in *Cavanagh* found the FISA probable cause standard to be reasonable,<sup>277</sup> and the decision in *Sarkissian* suggested that the Ninth Circuit never believed the "primary purpose" standard was required by either the original version of FISA or by the Fourth Amendment. Together, the two cases suggest the Ninth Circuit will again find that Congress has "accommodate[d] and advance[d] both the government's interest in pursuing legitimate intelligence activity and the individual's interest in freedom from improper government intrusion" just as it found to be the case in *Cavanagh*.<sup>278</sup>

Although the *Mayfield* court seemed to believe that the *Cavanagh* decision only upheld the pre-Patriot Act FISA's reasonableness under the Fourth Amendment because "the purpose of the surveillance is not to ferret out criminal activity but rather to gather intelligence," the opinion in *Sarkissian* suggests

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<sup>272</sup> *Id.*

<sup>273</sup> See discussion *supra* Part I.A.

<sup>274</sup> 807 F.2d 787 (9th Cir. 1987).

<sup>275</sup> 841 F.2d 959 (9th Cir. 1988).

<sup>276</sup> *Mayfield*, 504 F. Supp. 2d at 1041 ("Both Ninth Circuit cases were decided prior to the Patriot Act's amendments to FISA. Regardless, I disagree with the government's analysis and find those cases are not persuasive as to whether the Ninth Circuit would adopt the reasoning of *In re Sealed Case*).

<sup>277</sup> *Cavanagh*, 807 F.2d at 790.

<sup>278</sup> *Id.* at 789.

otherwise.<sup>279</sup> In *Sarkissian*, the defendants were convicted of conspiracy to bomb, transportation of explosive materials, and possession of an unregistered firearm. They challenged their conviction on the ground that evidence collected pursuant to a FISA search violated the Fourth Amendment. They argued that the FISC erred when it authorized the FBI to continue its electronic surveillance once the FBI's primary purpose had shifted from an intelligence investigation to a criminal investigation.<sup>280</sup> The Ninth Circuit rejected this argument and reiterated its view generally that "the purpose of the surveillance [under FISA] must be to secure foreign intelligence information."<sup>281</sup> The Ninth Circuit further rejected the notion that criminal investigation and counterterrorism efforts should be kept separate, stating:

We refuse to draw too fine a distinction between criminal and intelligence investigations. "International terrorism," by definition, requires the investigation of activities that constitute crimes. That the government may later choose to prosecute is irrelevant. FISA contemplates prosecution based on evidence gathered through surveillance.<sup>282</sup>

The *Sarkissian* court further explained, "FISA is meant to take into account 'the differences between ordinary criminal investigations to gather evidence of specific crimes and foreign counterintelligence investigations to uncover and monitor clandestine activities . . .'"<sup>283</sup> The court held that authorization under FISA as originally enacted was appropriate so long as the Government could establish by its certification that its purpose was not the investigation of "ordinary" crime.<sup>284</sup>

In addition to discounting the pre-Patriot Act cases *Cavanagh* and *Sarkissian*, it is also interesting to note that the *Mayfield* court did not address the post-Patriot Act case of *United States v. Wen* out of the Seventh Circuit.<sup>285</sup> With so few cases discussing FISA as amended by the Patriot Act, it seems odd not to mention each of them, especially one from a Federal Appeals court. The Ninth Circuit may find *Wen*'s implicit support of FISA to be persuasive. In *Wen*, the jury found the Defendant guilty of violating export-control laws by

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<sup>279</sup> *Id.* at 790-791. The *Mayfield* court cites this language to suggest that because "purpose" has changed to "significant purpose," the Ninth Circuit would hold differently today. *Mayfield*, 504 F. Supp. 2d at 1041.

<sup>280</sup> *Sarkissian*, 841 F.2d. at 964.

<sup>281</sup> *Id.*

<sup>282</sup> *Id.* at 965 (citing 50 U.S.C. §§ 1801(c)(1), 1806).

<sup>283</sup> *Id.* (quoting S. REP. NO. 95-701 at 14 (1978), as reprinted in 1978 U.S.S.C.A.N. 3973, 3980).

<sup>284</sup> *Id.* at 965.

<sup>285</sup> 477 F.3d 896 (7th Cir. 2006).

providing militarily useful technology to the People's Republic of China.<sup>286</sup> The only argument on appeal was that the District court should have suppressed the FISA evidence. The *Wen* court did not go through a Fourth Amendment constitutional analysis, but it did cite the FISCR's opinion in *In re Sealed Case*, and implicitly followed it by finding that the statutory standard of "significant purpose" was met.<sup>287</sup>

## 2. Post-Mayfield Decisions Have Found FISA to be Constitutional

While the *Mayfield* case awaits disposition at the Ninth Circuit, there have already been two Federal District court decisions disagreeing with *Mayfield* and a third case that chose not to follow it. In the first case, *United States v. Mubayyid*,<sup>288</sup> a District Court in Massachusetts heard motions in a criminal prosecution where the Defendants were charged with conspiracy to defraud the United States, false statements, tax fraud, and obstructing the Internal Revenue Service.<sup>289</sup> The indictments charged that the defendants fraudulently obtained a charitable tax exemption for an entity that was soliciting and distributing funds for Islamic extremist activities.<sup>290</sup> During its investigation, the Government obtained FISC authorization for surveillances and searches. The Defendants filed motions for disclosure of the FISA materials and motions to suppress for failing to satisfy statutory and constitutional requirements.<sup>291</sup> The *Mubayyid* court very thoroughly set out the issues and the precedence, including *Mayfield*, and ultimately sided with *In re Sealed Case*, stating, "This Court agrees with that reasoning and accordingly concludes that FISA, as amended by the Patriot Act, does not violate the Fourth Amendment."<sup>292</sup>

In the second case, *United States v. Abu-Jihaad*,<sup>293</sup> a District Court in Connecticut heard motions in a criminal prosecution where the Defendant was charged with providing material support to terrorists and wrongfully communicating national defense information. During its investigation, the

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<sup>286</sup> *Id.* at 897.

<sup>287</sup> *Id.*

<sup>288</sup> *United States v. Mubayyid*, 521 F. Supp. 2d 125 (D.C. Mass. 2007).

<sup>289</sup> *Id.* at 128-29.

<sup>290</sup> *Id.* at 129.

<sup>291</sup> *Id.*

<sup>292</sup> *Id.* at 140. The also court stated, "[e]ven if the statute were deemed unconstitutional, there appears to be no issue as to whether the government proceeded in good faith and in reasonable reliance on the FISA orders. The exclusionary rule would thus not appear to apply under the rule of *United States v. Leon*, 468 U.S. 897 (1984)." *Id.* at 140 n.12.

<sup>293</sup> 531 F. Supp. 2d 299 (D. Conn. 2008).

Government obtained FISC authorization for surveillances and searches. As in *Mubayyid*, the Defendant filed motions for disclosure of the FISA materials and motions to suppress for failing to satisfy statutory and constitutional requirements. The court denied the motions, following both *In re Sealed Case* and *Mubayyid* in holding that FISA does not on its face violate the Fourth Amendment and the collection of the FISA-derived evidence did not violate the Fourth Amendment or FISA.<sup>294</sup> In its holding, the *Abu-Jihaad* court acknowledged *Mayfield*, but disregarded it, stating it was “not at all clear why the *Mayfield* court held FISA unconstitutional on its face.”<sup>295</sup>

In the third case, *United States v. Warsame*,<sup>296</sup> the result was almost identical in outcome to the *Mubayyid* and *Abu-Jihaad* cases, but the court dodged the “significant purpose” issue. The District Court in Minnesota heard motions in a criminal prosecution where the Defendant was charged with conspiracy to provide, as well as providing, material support and resources to a designated Foreign Terrorist Organization. The Defendant filed the same motions as in *Mubayyid* and *Abu-Jihaad*, including a motion to suppress the fruits of the FISA surveillance in the case. The Defendant argued that FISA, as amended by the Patriot Act, violated the Fourth Amendment because FISA does not require a sufficient showing of probable cause or particularity and that FISA’s “significant purpose” requirement was unconstitutional.<sup>297</sup> The court denied the motion, though it did so by upholding the older “primary purpose” standard instead of analyzing the revised “significant purpose” standard. The court took note of the *Mayfield* case, but did not take the opportunity to follow it, stating that “courts have unanimously concluded that the *Fourth Amendment* is satisfied where law enforcement certifies that its *primary* purpose in conducting FISA surveillance is to gather foreign intelligence.”<sup>298</sup> Although the court shared *Mayfield*’s “very significant concerns that the ‘significant purpose’ standard violates the *Fourth Amendment*,”<sup>299</sup> the court did not need to reach the issue because based on a review of the FISA applications and orders in the *Warsame* case, it was “satisfied that the *primary* purpose of the FISA surveillance and searches was to gather foreign intelligence, and was not to prosecute Warsame for criminal activity.”<sup>300</sup> This narrower upholding of the “primary purpose” standard could mark a potential trend in future cases, since the “significant purpose” language is likely to remain in constitutional doubt for some time.

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<sup>294</sup> *Id.* at 301.

<sup>295</sup> *Id.* at 304 n.5.

<sup>296</sup> No. 04-29 (JRT), 2008 U.S. Dist. LEXIS 31698 (D. Minn. Apr. 17, 2008).

<sup>297</sup> *See id.* at \*23.

<sup>298</sup> *Id.* at \*37 (emphasis added to “primary”).

<sup>299</sup> *Id.* at \*38.

<sup>300</sup> *Id.* (emphasis added).

As demonstrated by both the previous and subsequent federal cases to review the Fourth Amendment implications of FISA's purpose requirement, the constitutional analysis in *Mayfield* is flawed. The Ninth Circuit is likely to follow the rationale of those decisions, and overturn *Mayfield*.

**D. The Court's Failure to Properly Conduct a Facial Analysis of FISA: How Bad Facts Make Bad Law**

As discussed *supra* in Part I.C., the settlement between the Mayfields and the Government allowed the Mayfields to go forward with only a facial challenge to FISA. They could not, in other words, challenge the constitutionality of the statute as it was specifically applied in their case. But what exactly is the meaning of a facial challenge? As one commentator explained:

The distinction between facial and as-applied challenges is more illusory than the ready familiarity of the term suggests. The nature of a "facial" challenges is rarely explored in the case law; when a description is provided it usually is only the unhelpful description that such a challenge targets a statute "on its face." Instead, facial and as-applied challenges are more commonly differentiated by their effects. A successful facial challenge means that the "state may not enforce [a statute] under any circumstances, unless an appropriate court narrows its application" so as to render it constitutional; a successful as-applied challenge still allows the state to "enforce the statute in different circumstances." In fact, ordinary rules of preclusion and stare decisis make this contrast in effects far less stark: The preclusive effect of a successful facial challenge will depend on the level of court that issues the decision, and stare decisis means successful as-applied challenges often generate results that are not specific to a particular challenge.<sup>301</sup>

The *Mayfield* court found that the standard of review for a facial challenge was in flux.<sup>302</sup> If the standard comes from *Planned Parenthood v.*

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<sup>301</sup> Gilliam E. Metzger, *Facial Challenges and Federalism*, 105 COLUM. L. REV. 873, 880-881 (2005) (citations omitted).

<sup>302</sup> *Mayfield*, 504 F. Supp. 2d at 1036. This "flux" is more clearly set forth in *Sierra Club v. Bosworth*, 510 F.3d 1016, 1023 n.4 (9th Cir. 2007)(citing *City of Chicago v. Morales*, 527 U.S. 41, 55 n.22 (1999) (plurality opinion) ("To the extent we have consistently articulated a clear standard for facial challenges, it is not the *Salerno* formulation, which has never been the decisive factor in any decision of this Court."); *Washington v. Glucksberg*, 521 U.S. 702, 740 (1997) (Stevens, J., concurring) (commenting on Court's failure to apply *Salerno* standard even though challenge to assisted suicide ban was facial challenge, and stating that "I do not believe the Court has ever actually applied such a strict standard, even in *Salerno* itself" (footnote omitted)); *Janklow v.*

*Casey*,<sup>303</sup> it favors the plaintiff and the Mayfields needed to show only that the challenged sections of FISA placed an “undue burden” on the fundamental rights secured by the Fourth Amendment. If, on the other hand, the controlling case is *United States v. Salerno*,<sup>304</sup> then the standard favors the Government and the Mayfields must show that no set of circumstances could make constitutional the challenged sections of FISA. Both standards are problematic to apply and unfortunately the *Mayfield* court never fully explored their distinction. The court stated only that the Mayfields “satisfy either standard,” and never explained how it arrived at that conclusion.<sup>305</sup>

Nevertheless, the proper facial challenge standard should be considered in more detail because that issue may prove critical to the Ninth Circuit’s decision.<sup>306</sup> Although the *Salerno* “no set of circumstances” standard appears overly strict and a poor measure with which to analyze a Fourth Amendment challenge, it continues to be employed for facial challenges by many courts, including the Ninth Circuit.<sup>307</sup> If the Ninth Circuit does apply *Salerno* and analyzes whether FISA as amended can ever be applied in a constitutional manner, then it should reverse the decision below.<sup>308</sup> For instance, in a case

Planned Parenthood, Sioux Falls Clinic, 517 U.S. 1174, 1175 (1996) (Stevens, J., concurring in denial of cert.) (stating that the *Salerno* “no set of circumstances” standard “does not accurately characterize the standard for deciding facial challenges,” and that this “rigid and unwise dictum has been properly ignored in subsequent cases even outside the abortion context”); Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 895 (1992) (statute facially invalid as “substantial obstacle” to exercise of right in “large fraction” of cases); *id.* at 972-73 (Rehnquist, C.J., concurring in judgment in part and dissenting in part) (arguing that “no set of circumstances” dictum should have led to different result); Kraft Gen. Foods, Inc. v. Iowa Dep’t of Revenue & Fin., 505 U.S. 71, 82-83 (1992) (Rehnquist, C.J., dissenting) (arguing that tax statute was facially valid because it would be constitutional under certain facts); Bowen v. Kendrick, 487 U.S. 589, 602 (1988) (statute facially invalid under *Establishment Clause* only if, *inter alia*, law’s “primary effect” is advancement of religion, or if it requires “excessive entanglement” between church and state); *Id.* at 627 n.1 (Blackmun, J., dissenting) (pointing out and agreeing with majority’s rejection of “no set of circumstances” dictum)).

<sup>303</sup> 505 U.S. 833, 876-877 (1992).

<sup>304</sup> 481 U.S. 739, 745 (1987).

<sup>305</sup> *Mayfield*, 504 F. Supp. 2d at 1036. After setting forth the two standards, the court never refers again to either “undue burden” or “no set of circumstances.”

<sup>306</sup> Both parties have advocated contrary positions on the issues in their briefs. Briefs are on file with the author or can be linked to electronically in 4-9 MEALEY’S PRIVACY REP. 6 (2008) available at LexisNexis.

<sup>307</sup> See, e.g., *Lanier v. City of Woodburn*, 518 F.3d 1147, 1150 (9th Cir. 2008) (“[T]he [*Salerno*] test prescribed by the United States Supreme Court requires a party asserting a facial challenge to show that no set of circumstances exists under which the policy would be valid.”)(quotations and citations omitted).

<sup>308</sup> In *Lanier*, 518 F.3d 1150 the Plaintiff challenged the city’s drug screening policy which the Ninth Circuit refused to find invalid on its face, stating “Thus, a policy of general applicability is facially valid unless it can *never* be applied in a constitutional manner.” *Id.* See also *Int’l Bhd. Of Teamsters v. Dep’t of Transp.*, 932 F.2d 1292, 1303 (9th Cir. 1991) (noting that the court was deciding “only

such as *United States v. Warsame*,<sup>309</sup> the court found that the Government actually had as its primary purpose the collection of foreign intelligence, which exceeded the statutorily required significant purpose and therefore FISA as amended was applied constitutionally.

If the Ninth Circuit moves away from *Salerno* to the *Casey* “undue burden” standard, that analysis is also difficult to apply because it has primarily been used to challenge abortion statutes, offering no real guidance for Fourth Amendment situations. What is an “undue burden” under the Fourth Amendment? This must be the test for Fourth Amendment reasonableness, in which case the discussion *supra* in Part IV.C. reveals that FISA, after the Patriot Act amendment, is still reasonable and therefore the Ninth Circuit should uphold the “significant purpose” amendment under a *Casey* standard.

Whatever standard the Ninth Circuit chooses to follow for a facial constitutional analysis, the *Mayfield* court did not provide it much with which to work. Overall, the *Mayfield* court failed on many fronts: It failed to address the constitutional significance of FISA’s use of all three branches, it failed to put the *Keith* decision in context, it failed to perform a proper Fourth Amendment balancing of the Government’s national security interest and it failed to specifically discuss its application of either the *Salerno* or *Casey* standards to FISA.

Why did the *Mayfield* court render such a flawed decision? It is an old adage (which means there is truth to it) that “bad facts make bad law.” Few would disagree that the facts in the *Mayfield* case were extremely bad. A review of those facts requires an honest acknowledgement of a serious problem with the Government’s fingerprint identification process and at least the appearance of religious profiling, regardless of whether one agrees there was actual bias. Once the fingerprint misidentification came to light, all parties became acutely aware of how Mr. Mayfield’s faith in Islam may have played into the chain-of-events. Although it seems clear that his religion did not result in the initial misidentification, it was a definitely a factor by the time the SNP first expressed doubts about the FBI’s identification. As one of the FBI fingerprint examiners candidly admitted, “if the person identified had been someone without these characteristics, like the ‘Maytag Repairman,’ the Laboratory might have revisited the identification with more skepticism and caught the error.”<sup>310</sup>

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the narrow question of whether these drug tests can ever be conducted without offending” the Fourth Amendment.) (citations and quotations omitted).

<sup>309</sup> No. 04-29 (JRT), 2008 U.S. Dist. LEXIS 31698 (D. Minn. Apr. 17, 2008).

<sup>310</sup> *Id.* at 12.

The Mayfields underwent a horrible experience they should never have had to endure. Additionally, since Mr. Mayfield was apparently a hard-working American and upstanding member of the community, he is an even more sympathetic figure. To the extent that religious profiling may have played a part in the Government's intrusions on his privacy, his arrest, and his detention, it is all the worse. Understandably people can look at this case, identify with Mr. Mayfield, and think "that could have happened to me."

How much did the facts and sympathies of the *Mayfield* case influence the court's decision? Since this was a "facial" challenge to the statute, there should have been no *factual* influence. It was a question of law that should involve the facts only insofar as it was necessary to establish that the Mayfields were subjected to FISA authorized searches and surveillances.<sup>311</sup> However, the court's opinion suggested far greater factual influence. For instance, the court stated:

Here, the government chose to go to the FISC, despite the following evidence: Mayfield did not have a current passport; he had not been out of the country since completing his military duty as a U.S. Army lieutenant in Germany during the early 1990s; the fingerprint identification had been determined to be "negative" by the SNP; the SNP believed the bombings were conducted by persons from northern Africa; and there was no evidence linking Mayfield with Spain or North Africa. The government nevertheless made the requisite showing to the FISC that Mayfield was an "agent of a foreign power." That representation, which by law the FISC could not ignore unless clearly erroneous, provided the government with sufficient justification to compel the FISC to authorize covert searches and electronic surveillance in support of a criminal investigation.<sup>312</sup>

These were fairly specific facts to which the court was alluding, albeit the court was trying to make the point that FISC judges lack sufficient authority to inquire into FISA certifications. But by using the "facts" contained in the amended complaint to support its holding, instead of gathering facts through hearings, the court was influenced by incomplete or erroneous data. This highlights one of the reasons that facial challenges are disfavored by the Supreme Court in that, "[c]laims of facial invalidity often rest on speculation . . .

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<sup>311</sup> See Metzger, *supra* note 301, at 881. ("A facial challenge is one that 'puts into issue an explicit rule of law, as formulated by the legislature or the court, and involves the facts only insofar as it is necessary to establish that the rule served as a basis of decision.'").

<sup>312</sup> *Mayfield*, 504 F. Supp. 2d at 1033.

[and] raise the risk of premature interpretation of statutes on the basis of factually barebones records.”<sup>313</sup>

Since the *Mayfield* court was influenced by the facts, it is important to consider one aspect of the facts as it relates to the Fourth Amendment analysis. The Government had little more than the mismatched fingerprint throughout the course of its investigation, yet this was enough to gain all the relevant authorizations and warrants. Specifically, *the exact same evidence* was used to obtain “ordinary” criminal search warrants and a material witness warrant for Mr. Mayfield under traditional Fourth Amendment requirements.<sup>314</sup> How then would the outcome have been different if a court would still authorize the searches and surveillances without using FISA? The reality is the result would have been the same and the FISA process played no significant role in this case. The Mayfields’ privacy would still have been invaded and Mr. Mayfield would still have been arrested and held as a material witness. Regardless of the effect that religious profiling played in the case, the reason the Mayfields were subjected to both FISA and “ordinary” searches and surveillance was the faulty misidentification of his fingerprint. Without that event, there would be no case. Without that identification, there would be no probable cause to support allegations that Mr. Mayfield was a terrorist agent or a material witness. That is why this case should be a study in fingerprint analysis rather than a Fourth Amendment challenge to FISA.<sup>315</sup> However, the *Mayfield* court never recognizes or addresses what little impact FISA itself had on the case.

Under the settlement agreement, the *Mayfield* court was not presented with a fingerprint evidence issue or a civil rights case. Instead it was left with only a facial analysis of FISA. Based on its written opinion and holding, it is no stretch to infer that the court was simply not happy with what had been done to Mr. Mayfield. The court at one point said:

Notably, the *primary* purpose of the electronic surveillance and physical searching of Mayfield’s home was to gather evidence to prosecute him for crimes. Mayfield was ultimately arrested to compel his testimony before a Grand Jury investigating his alleged involvement in the crimes of bombing places of public use, providing national

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<sup>313</sup> *Washington State Grange v. Washington State Republican Party*, 128 S.Ct. 1184, 1191 (2008) (citing *Sabri v. United States*, 541 U.S. 600, 609 (2004)).

<sup>314</sup> *See supra* Part I.B.

<sup>315</sup> The misidentification of Mr. Mayfield is being discussed in the academic and fingerprint communities. *See, e.g., Zabell, supra* note 93.

support to terrorists and conspiracy to kill, kidnap, maim or injure persons or damage property in a foreign country.<sup>316</sup>

First, the court's determination of "primary purpose" was another example of it making a factually based decision which it did not have sufficient information to make. Notably, it did not explain how it came to the conclusion that the "primary purpose" of the investigation was to prosecute Mr. Mayfield. Second, the court did not distinguish between the FISA searches and the "ordinary" searches in the case. Third, the IG Report indicated that the court's conclusion as to the investigation's criminal purpose was far from true.

According to numerous witnesses interviewed by the OIG, there was considerable discussion, and some disagreement . . . whether to seek a material witness warrant. . . . [Agent] Cummings [the Section Chief of International Terrorism Operations Section I] said that the Portland Division wanted to "take Mayfield down" because of the [suspected media] leaks, since agents were worried they might lose him. Cummings said he told the Portland Division that its job was *intelligence collection* and that agents should not take Mayfield into custody *until all intelligence had been gathered*. Cummings said he told Portland to get more people for surveillance if needed. He said he also told Portland that there was more work to be done and he did *not want to lose the opportunity to possibly "recruit" Mayfield* to cooperate with the FBI concerning additional potential suspects.<sup>317</sup>

Moreover, the IG Report concluded that the Government would have proceeded with a FISA application under the former "primary purpose" standard. Witnesses with pre- and post-Patriot Act experience told the IG investigators that the Mayfield matter would have begun as an intelligence case rather than a criminal case.<sup>318</sup> Simply put, the U.S. Government had a latent fingerprint from the scene of a major terrorist attack that was declared to be a 100% match to a person living in the United States. That was information that could not be ignored, but it in no way automatically suggested that the Government proceed with a criminal, rather than intelligence, investigation.

Without a full factual hearing, the court could not grasp all the underlying details to the case. Yet because this was a facial challenge, the

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<sup>316</sup> *Mayfield*, 504 F. Supp. 2d at 1038-39 (emphasis added).

<sup>317</sup> See IG REPORT, *supra* note 2, at 60-61 (emphasis added). This is a perfect example of how law enforcement and intelligence purposes overlap and how the government can have significant interests in both.

<sup>318</sup> *Id.* at 16.

specific facts should not necessarily be a factor. Ultimately, the court's poor facial analysis suggests there was bias or sympathy underlying the court's holding. Whether this means "bad facts made bad law" in the case of *Mayfield v. United States* is a subjective opinion about which people can disagree. But the legal decision on the constitutionality of FISA is now in the hands of the Ninth Circuit. Given the emotional distance between that Court of Appeals and the *Mayfield* events, one hopes the court's logic will be clear. The Ninth Circuit should reverse the lower court because having a significant foreign intelligence purpose for a FISA order represents a reasonable Fourth Amendment balance by Congress, that acknowledges the Government's significant interest in national security coupled with the President's inherent executive powers to protect that interest, while at the same time imposing procedural safeguards to restrain that executive power, and implementing independent judicial scrutiny through the use of the FISC. The tension between liberty and security will always exist within the FISA framework, but the time has come to declare that the framework is constitutional.

# UNCHARTED WATERS: THE EXPANSION OF STATE REGULATORY AUTHORITY OVER FEDERAL ACTIVITIES AND MIGRATORY RESOURCES UNDER THE COASTAL ZONE MANAGEMENT ACT

Lieutenant Commander Joseph Romero, JAGC, USN\*

## INTRODUCTION

*"The safety of the whales must be weighed, and so must the safety of our warriors. And of our country."*<sup>1</sup>

Striking the proper balance when considering federal agency compliance with environmental law, particularly those agencies engaged in activities considered essential for national security, has been a source of ongoing controversy.<sup>2</sup> The growing assertiveness of states and private entities challenging federal activities that have strategic implications, and the judiciary's willingness to enjoin these activities, has further fueled this debate.<sup>3</sup> One statute

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<sup>1</sup> *Natural Resources Defense Counsel, Inc. v. Winter*, 502 F.3d 859, 864 (9th Cir. 2007)[hereinafter NRDC].

<sup>2</sup> See, e.g., Hope Babcock, *National Security and Environmental Laws: A Clear and Present Danger?*, 25 VA. ENVTL. L.J. 105, 107 (2007) ("The events of 9/11 have also brought into sharp focus a conflict that this country has not witnessed since the Cold War: the clash between the safety and continuation of the Republic and other values we hold dear, among them a healthy environment."); Colonel E.G. Willard et. al., *Environmental Law and National Security: Can Existing Exemptions in Environmental Laws Preserve DoD Training and Operational Prerogatives without New Legislation?*, 54 A.F. L. REV. 65 (2004) (discussing military's growing concerns regarding the impacts of urban development and environmental requirements on military preparedness); Nancye L. Bethurem, *Environmental Destruction in the Name of National Security: Will the Old Paradigm Return in the Wake of September 11?*, 8 HASTINGS W.-NW. J. ENVTL. L. & POL'Y 109, 110 (2002) (discussing the Cold War determination that military preparedness outweighed resultant environmental damage); Stephen Dycus, *Osama's Submarine: National Security and Environmental Protection after 9/11*, 30 WM. & MARY ENVTL. L. & POL'Y REV. 1 (2005) (discussing efforts to amend environmental laws to reflect national security concerns).

<sup>3</sup> See, e.g., *Okinawa Dugong v. Gates*, No. C 03-4350, 2008 WL 215400 (N.D. Cal. Jan. 24, 2008) (imposition of injunction on strategic redeployment of armed forces in foreign nation pursuant to international treaty for failure to comply with National Historic Preservation Act); 'Ilio'Ulaokalani

that has been used as a vehicle for these cases is the Coastal Zone Management Act [hereinafter CZMA].<sup>4</sup> The statute's use in such instances, particularly for activities that take place far outside the coastal zone, is noteworthy because it represents a significant evolution of the statute from its origins. When Congress enacted the CZMA in 1972, it intended to encourage "intelligent management"<sup>5</sup> within the coastal zone, which included the dual goals of preservation and development.<sup>6</sup> This included the requirement that federal agency activities directly affecting the coastal zone be consistent with state Coastal Management Plans [hereinafter CMPs].<sup>7</sup>

Since that time, amendments to the statute, expansive regulatory interpretations, and court decisions have dramatically expanded the scope of the federal consistency provisions in the CZMA without a unifying approach behind these changes. Being unrelated entities, the legislature, the regulators, and the judiciary individually have not fully considered the cumulative nature of the changes and the consequences resulting from increased local interference with issues of national importance and military preparedness. This situation is most apparent in the CZMA's application to migratory resources of the coastal zone, such as marine animals.

Today, the cumulative changes to the statute allow states to regulate federal activities, occurring well outside the coastal zone, and whose effect on the coastal zone is not obvious.<sup>8</sup> This, in turn, affects agency activities of strategic importance, such as the training of combat forces in time of war, when these activities may have only a *de minimis* effect on a state's coastal zone.<sup>9</sup> Consequently, this article argues that the CZMA's reach, specifically as applied

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Coalition v. Rumsfeld, 464 F.3d 1083 (9th Cir. 2006) (requiring U.S. Army to prepare supplemental environmental impact statement to include analysis of alternative sites for strategic transformation and placement of combat units); Center for Biological Diversity v. Pirie, 191 F. Supp.2d 161 (D.D.C. 2002), *remanded and vacated by*, Center for Biological Diversity v. England, 2003 U.S. App. LEXIS 1110 (D.C. Cir. Jan. 23, 2003) (holding that military violated Migratory Bird Treaty Act through live fire exercises on remote island, although rendered moot by subsequent change in the law); NRDC v. Winter, 518 F.3d 658 (9th Cir. 2008) (imposing various restrictions on use of active sonar in naval combat training conducted in preparation for deployment); Ocean Mammal Inst. v. Gates, No. 07-00254, 2008 U.S. Dist. LEXIS 15815 (D. Haw. Feb 29, 2008) (imposing various restrictions on use of active sonar in naval combat training); NRDC v. Gutierrez, No. C-07-04771, 2008 U.S. Dist. LEXIS 8744 (N.D. Cal. Feb. 6, 2008) (imposing various restrictions on Navy in use of low frequency sonar).

<sup>4</sup> 16 U.S.C. §§ 1451-1466 (2008).

<sup>5</sup> Ernest F. Hollings, *Congress and Coastal Zone Management*, 1 COASTAL ZONE MGMT. J. 116 (1973).

<sup>6</sup> 16 U.S.C. § 1452(1) (2008).

<sup>7</sup> See *infra* Part II.B.

<sup>8</sup> See *infra* Part II.B.3.

<sup>9</sup> Ocean Mammal Inst. v. Gates, No. 07-00254, 2008 U.S. Dist. LEXIS 15815 (D. Haw. Feb 29, 2008); see NRDC, *supra* note 1, 502 F.3d 859.

to migratory resources, is too expansive.

This article explores the CZMA's evolution and modern application. In Parts I and II, this article analyzes CZMA federal consistency law as it stands today, including a brief history of the CZMA and the purpose behind its enactment as relates to the federal consistency provisions. Part III applies the current state of consistency jurisprudence to the concept of a "migratory resource." Part IV briefly analyzes ongoing litigation regarding naval sonar, primarily to explore the CZMA's applicability and scope as it relates to modern federal activities outside the coastal zone.<sup>10</sup> Finally, Part V analyzes whether the current trend of state regulation of some migratory resources through the use of the CZMA is preempted by the Marine Mammal Protection Act [hereinafter MMPA].

This article concludes that the current CZMA consistency regime applied to migratory resources upsets the careful federal-state balance that underlies reasoned CZMA application. Thus, it proposes several minor changes to the statute to help restore this balance. The proposed changes would ensure that overriding national interests are not unduly affected by interests of purely local concern, yet concurrently protecting states from unrestrained federal interference with proper management of their coastal zones. This article also concludes that current application of the CZMA with regard to marine mammals conflicts with the MMPA by effectively circumventing the MMPA preemption. Therefore, this article proposes a means of interpreting both statutes such that the legislative purpose behind each is honored.

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<sup>10</sup> This case analysis will serve as an example of modern CZMA application, but is not intended to serve as an exhaustive analysis of the underlying case itself.

## I. COASTAL ZONE MANAGEMENT ACT - A BRIEF HISTORY<sup>11</sup>

By the late 1960's, the importance of the nation's coastal zone was coming into sharp focus. In a series of hearings, Congress came to realize that "[t]he coast of the United States is, in many respects, the Nation's most valuable geographic feature. It is at the juncture of the land and sea that the great part of this Nation's trade and industry takes place. The waters off the shore are among the most biologically productive regions of the Nation."<sup>12</sup> In 1972, however, Congress recognized that the coastal zones of the United States were under significant stress.<sup>13</sup> This stress was the result of "burgeoning populations congregating in ever larger urban systems, creating growing demands for commercial, residential, recreational, and other development, often at the expense of natural values that include some of the most productive areas found anywhere on earth."<sup>14</sup> There was also a general recognition that federal assistance would be needed at a time when the ability to manage the complexities of the coastal zone had grown beyond effective state control.<sup>15</sup>

<sup>11</sup> Much has already been written regarding the general history of the CZMA, federal consistency requirements, and the fierce debate that has raged regarding the appropriateness of the consistency paradigm since its enactment in 1972. Therefore, this article will present only so much history, focusing on federal consistency and legislative purpose, as is necessary to provide context for the reader of this article. See generally Lieutenant Patrick J. Gibbons, *Too Much of a Good Thing? Federal Supremacy & the Devolution of Regulatory Power: The Case of the Coastal Zone Management Act*, 48 NAVAL L. REV. 84 (2001) (overview of CZMA history, particularly with regard to federal consistency requirements and reviewed under Constitutional lens); Zigurds L. Zile, *A Legislative-Political History of the Coastal Zone Management Act of 1972*, 1 COASTAL ZONE MGMT J. 235 (1974); Timothy Beatley et al., AN INTRODUCTION TO COASTAL ZONE MANAGEMENT (1994); William C. Brewer, *Federal Consistency and State Expectations*, 2 COASTAL ZONE MGMT J. 315 (1976); David R. Godschalk, *Implementing Coastal Zone Management: 1972-1009*, 20 COASTAL MGMT 93 (1992); Robert V. Percival, *Symposium: Environmental Federalism: Historical Roots and Contemporary Models*, 54 MD. L. REV. 1141 (1995) (CZMA history as relates to federalism in environmental laws); Edward A. Fitzgerald, *California Coastal Commission v. Norton: A Coastal State Victory in the Seaweed Rebellion*, 22 UCLA J. ENVTL. L. & POL'Y 155 (2004) (brief of CZMA as relates to outer continental shelf (OCS) leasing programs); Bruce Kuhse, *The Federal Consistency Requirement of the Coastal Zone Management Act of 1972: It's Time to Repeal this Fundamentally Flawed Legislation*, 6 OCEAN & COASTAL L. J. 77 (2001) (arguing for repeal of CZMA consistency provisions); John A. Duff, *The Coastal Zone Management Act: Reverse Pre-emption or Contractual Federalism*, 6 OCEAN & COASTAL L. J. 109 (2001) (arguing that CZMA consistency requirement is an effective tool of federal Government to obtain state cooperation).

<sup>12</sup> S. REP. NO. 92-753 (1972), reprinted in 1972 U.S.C.C.A.N. 4776, 4778.

<sup>13</sup> *Id.* at 4776.

<sup>14</sup> *Id.* at 4777. Congress noted, "Settlement and industrialization of the coastal zone has already led to extensive degradation of highly productive estuaries and marshlands. For example, in the period 1922-1954 over one-quarter of the salt marshes in the U.S.A. were destroyed by filling, diking, draining or by constructing walls along the seaward marsh edge. In the following 10 years a further 10% of the remaining salt marsh between Maine and Delaware was destroyed. On the west coast of the U.S.A. the rate of destruction is almost certainly much greater, for the marsh areas and the estuaries are much smaller." *Id.*

<sup>15</sup> *Id.* at 4778. "Rapidly intensifying use of coastal areas already has outrun the capabilities of local

In response, Congress passed the CZMA and structured the statute around two main regimes: (1) providing states with funding to create and administer their CMPs; and (2) requiring federal agencies to comport their behavior to the state CMPs to the maximum extent practicable.<sup>16</sup> Several considerations unique to the coastal zone led Congress to develop the distinct form of "cooperative federalism" found in the CZMA. One, it was generally recognized the federal government, either through its activities or through permitted activities, was itself "among the most notorious" polluters in the coastal zone.<sup>17</sup> One incident, in particular, can be described as the spark that led to the CZMA. In 1969, partially because of lax federal oversight, an offshore oil drilling platform belonging to the Union Oil Company failed to properly line the walls of well shafts.<sup>18</sup> As a result, two different well shafts blew out, allowing oil to gush from the ocean floor at thousands of gallons per hour for over a week,<sup>19</sup> resulting in "an environmental disaster of unprecedented proportions that might have been avoided but for a failure of federal oversight."<sup>20</sup>

Two, the very complexity of the coastal zone, with competing federal, state, and local interests, not to mention commercial and public interests, creates an environment that Congress felt defied easy creation and application of uniform national standards.<sup>21</sup> As the Senate recognized in their report:

The coastal zone presents one of the most perplexing environmental management challenges. The thirty-one states which border on the oceans and the Great Lakes contain seventy-five percent of our Nation's population. ... This would entail mediating the differences between conflicting uses and overlapping political jurisdiction. The uses of valuable coastal areas generate issues of intense state and local interest, but the effectiveness with which the resources of the coastal zone are used and protected often is a matter of national importance. The ultimate success of a coastal management program will depend on the

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governments to plan their orderly development and to resolve conflicts. The division of responsibilities among the several levels of government is unclear, and the knowledge and procedures for formulating sound decisions are lacking." *Id.* See also, Robert V. Percival, *Symposium: Environmental Federalism: Historical Roots and Contemporary Models*, 54 MD. L. REV. 1141, 1144 (1995). "[E]nvironmental law became federalized only after a long history of state failure to protect what had come to be viewed as nationally important interests." *Id.*

<sup>16</sup> See *infra* Part II.B.4.

<sup>17</sup> Robert V. Percival, *Symposium: Environmental Federalism: Historical Roots and Contemporary Models*, 54 MD. L. REV. 1141, 1144 (1995). See also, Melinda R. Kassen, *Environmental Federalism: The Inadequacies of Congressional Attempts to Legislate Federal Facility Compliance with Environmental Requirements*, 54 MD. L. REV. 1475 (1995).

<sup>18</sup> *California v. Norton*, 311 F.3d 1162, 1165 (9th Cir. 2002).

<sup>19</sup> *Id.* at 1166.

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

<sup>21</sup> S. REP. NO. 92-753, *supra* note 12, at 4778.

effective cooperation of federal, state, regional, and local agencies.<sup>22</sup>

Three, Congress recognized that management of the coastal zone was fundamentally an exercise in local land use planning, and "Congress did not wish to preempt what traditionally has been a matter of state authority."<sup>23</sup> This approach had the additional benefit of avoiding potential Constitutional concerns regarding the creation of a federal program of local land use management.<sup>24</sup> Therefore, instead of creating federal normative rules that would bind or control state action, Congress created a voluntary program where the states would create the primary enforceable rules governing coastal usage.<sup>25</sup> Otherwise, the "act does not provide for direct federal action or otherwise probes the limits of the Constitution."<sup>26</sup>

## II. CZMA STRUCTURE

The CZMA outlines two national programs, the Coastal Zone Management Program<sup>27</sup> and the Estuarine Research Reserve System.<sup>28</sup> In order to obtain the state's cooperation in developing a coastal zone management program, which would likely be complex, expensive, and controversial, the statute's regime provides for two main incentives: federal grants<sup>29</sup> and federal consistency.<sup>30</sup>

### A. Economic Incentives and CMP Development

Section 1454 authorizes the Secretary of Commerce to provide grants to states to assist them in development of its management program.<sup>31</sup> These

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

<sup>23</sup> *New York v. DeLyser*, 759 F. Supp. 982, 988 (W.D.N.Y. 1991).

<sup>24</sup> Zigurds L. Zile, *A Legislative-Political History of the Coastal Zone Management Act of 1972*, 1 COASTAL ZONE MGMT J. 235, 236 (1974).

<sup>25</sup> "State participation is entirely voluntary, however. The act does not create a federal enforcement mechanism to compel a state to submit coastal zone management programs for federal approval, or permitting the Administrator to impose a plan on states that fail to submit a plan. A state that does not want to apply for a federal grant may decide to have no protection for coastal zones, or, using its own resources, it may adopt plans that would not meet the conditions of the act." 5-10 TREATISE ON ENVIRONMENTAL LAW § 10.04

<sup>26</sup> Zile, *supra* note 24, at 236.

<sup>27</sup> 16 U.S.C. §§ 1453-1460 (2008).

<sup>28</sup> 16 U.S.C. § 1461 (2008).

<sup>29</sup> 16 U.S.C. §§ 1454 - 1455b (2008).

<sup>30</sup> 16 U.S.C. § 1456(c) (2008). Some states have argued that the consistency provision is more important than the financial incentives. Historically, "[l]ittle effort was expended by states in planning the use of Federal lands to comply with zoning ordinances likely because there was no expectation that such plans would have any effect on the agencies." William C. Brewer, *Federal Consistency and State Expectations*, 2 COASTAL ZONE MGMT J. 315, 316 (1976).

<sup>31</sup> 16 U.S.C. § 1454 (2008).

grants were available so long as the state incorporated various enumerated requirements found within the statute.<sup>32</sup> This included the opportunity for "full participation by relevant federal and state agencies, local governments, regional organizations, port authorities, and other interested parties and persons."<sup>33</sup> Once a CMP was approved, §1455 authorized the Secretary to make grants to the state in order to assist in the state's administration of that plan.<sup>34</sup> In addition, §1455a allows the Secretary to provide more targeted grants for certain specified activities, such as preservation or restoration of specific areas because of their unique economic, ecological or recreational value, for the redevelopment of deteriorating and underutilized urban waterfronts, and to enhance access to public beaches and other public coastal areas.<sup>35</sup>

In addition to the foregoing, the CZMA provides two other economic incentives for participation in the program. It creates a Coastal Zone Management Fund, from which monies are available to states for certain enumerated coastal zone-related matters.<sup>36</sup> In addition, it establishes the Coastal Zone Enhancement Grants, which are aimed at the protection, restoration, or enhancement of existing coastal wetlands, or the creation of new coastal wetlands.<sup>37</sup>

Once a state completes their CMP, it is submitted to the National

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<sup>32</sup> *Id.* at §§1455(b)-(d). The enumerated requirements included identification of the boundaries of the coastal zone subject to the management program, identification of permissible land uses and water uses within the coastal zone which have a direct and significant impact on the coastal waters, an inventory and designation of areas of particular concern, and the means by which the state proposes to exert control over the land uses and water uses, including a list of relevant state constitutional provisions, laws, regulations, and judicial decisions. *Id.* at §1455(d)(2). In addition, the Secretary of Commerce was to be satisfied that the state had robust coordination mechanisms between state and local governments, the state established a system of public hearings, that the Governor of the state approve the CMP, that the Governor designated a single state agency to receive and administer grants for implementing the management program, that the state was organized to implement the management program, that the CMP adequately considered the national interest involved in planning for, and managing the coastal zone, which are of greater than local significance, and, specifically with regard to energy facilities, the Secretary shall find that the state has given consideration to any applicable national or interstate energy plan or program. In addition, the Secretary must be satisfied that the CMP includes procedures whereby specific areas may be designated for the purpose of preserving or restoring them for their conservation, recreational, ecological, historical, or esthetic values. *Id.* at § 1455(d)(3).

<sup>33</sup> 15 C.F.R. § 923.3(a) (2008).

<sup>34</sup> 16 U.S.C. § 1455(a) (2008).

<sup>35</sup> 16 U.S.C. § 1455a(b) (2008).

<sup>36</sup> 16 U.S.C. § 1456a (2008). These projects include those needed to address management issues which are regional in scope, including interstate projects, demonstration projects which have high potential for improving coastal zone management, emergency grants to address unforeseen or disaster-related circumstances, appropriate awards recognition, and to provide financial support to coastal states for use for investigating and applying the public trust doctrine. *Id.* at §1456a(b)(2)(B).

<sup>37</sup> 16 U.S.C. § 1456b (2008).

Oceanic and Atmospheric Administration's [NOAA] Office of Coastal Resource Management [OCRM] for review.<sup>38</sup> If approved, OCRM is then charged with the ongoing responsibility to review the performance of coastal states with respect to coastal management.<sup>39</sup> Moreover, OCRM oversees enforcement of violations of a state's responsibilities of its approved CMP or federal regulation.<sup>40</sup> Enforcement may include the suspension of financial assistance, or withdrawal of CMP approval.<sup>41</sup>

### **B. Federal Consistency and its Expanding Scope**

Once a CMP is approved by OCRM, federal agencies must comply with the statute's consistency provisions. The federal consistency provisions apply to two broad categories of federal activities. First, it requires that actions by the federal agencies themselves be consistent "to the maximum extent practicable" with "enforceable policies" of the state's CMP.<sup>42</sup> Second, it requires that activities by third parties who receive federal permits or licenses for activities that affect a state's coastal zone obtain state certification that their activities are consistent with a state's CMP.<sup>43</sup> This article will focus on the issue of federal agency activities. The pertinent portion of CZMA §307(c)(1)(A),<sup>44</sup> as amended, provides:

Each Federal agency activity within or outside the coastal zone that affects any land or water use or natural resource of the coastal zone shall be carried out in a manner which is consistent to the maximum extent practicable with the enforceable policies of approved State management programs.<sup>45</sup>

The heart of the federal consistency program regime is its triggering mechanism. A federal agency's activity is subject to a consistency determination when it "affects any land or water use or natural resource of the coastal zone[.]"<sup>46</sup> This threshold in the statute provides a substantive restriction on the CZMA's application. Specifically, not all federal agency activities fall within the ambit of the state's consistency authority, only those activities that have an 'effect' on the resources of the coastal zone. Therefore, in evaluating statutory compliance, the focus "should be on coastal effects, not on the nature of the

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<sup>38</sup> 15 C.F.R. § 923.60 (2008).

<sup>39</sup> 15 C.F.R. § 923.133 (2008).

<sup>40</sup> 15 C.F.R. § 923.135 (2008).

<sup>41</sup> *Id.*

<sup>42</sup> 16 U.S.C. § 1456(c)(1)(A) (2008).

<sup>43</sup> *Id.* at § 1456(c)(3) (2008).

<sup>44</sup> 16 U.S.C. § 1456(c)(1)(A) (2008).

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

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

activity."<sup>47</sup> While a simple phrase, proper application of the test is difficult and requires an examination of the distinct elements of the statutory requirements.

### 1. Federal Activities

The statute itself does not define a "federal activity." A review of the legislative history, however, reveals that Congress intended to include "all Federal agencies conducting or supporting activities in the coastal zone to administer their programs consistent with approved State management programs except in cases of overriding national interest as determined by the President."<sup>48</sup> It is clear from the legislative record that Congress meant what it said; *all* activities. No individual federal activity enjoys an exemption.<sup>49</sup> Moreover, Congress meant to include those activities relating to the military and national security.<sup>50</sup> NOAA's implementing regulations carry forward this broad application to federal activities, providing that the term "federal agency activity" means, "any functions performed by or on behalf of a federal agency in the exercise of its statutory responsibilities."<sup>51</sup>

The only avenue of exemption provided in the statute was one given to the President of the United States in the 1990 Amendments. Section 307(c)(1)(B) provides that, after a judicial determination that a federal activity is not consistent with a state CMP, the President may exempt the activity from

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<sup>47</sup> Coastal Zone Management Act Federal Consistency Regulations, 65 Fed. Reg. 77,124 (Dec. 8, 2000) (codified at 15 C.F.R. Part 930) [hereinafter *Consistency Regulations*].

<sup>48</sup> S. REP. NO. 92-753, *supra* note 12, at 4792 (emphasis added). The House Conference Report provided, "[The Conferees] also agreed that as to Federal agencies involved in any activities directly affecting the state coastal zone and any Federal participation in development projects in the coastal zone, the Federal agencies must make certain that their activities are to the maximum extent practicable consistent with approved state management programs." H. REP. NO. 92-1544 (Oct. 5, 1972), *reprinted in* 1972 U.S.C.C.A.N. 4822, 4824.

<sup>49</sup> S. REP. NO. 92-753, *supra* note 12, at 4792. "The Committee does not intend to exempt Federal agencies automatically from the provisions of this Act." *Id.*

<sup>50</sup> *Id.* at 4793. The Senate Conference Report documents the Conferee's desire that, while the Secretary of Defense may claim a national security requirement, the Secretary of Commerce exercise independent judgment to balance the needs of national security against the purpose of the statute. The Senate Report provides, "[W]here the Secretary of Defense informs the Secretary that a developmental project is necessary in the interest of national security, the Committee intends that the Secretary will make an independent inquiry and finding, as to the need for the project and its relationship to the state management program. It is not sufficient, for the purposes of this Act, that the Secretary of Defense merely inform the Secretary that the developmental project is needed in the interest of national security. All reasonable efforts should be made by the Secretary to reconcile national security needs and the state management program in the case of such conflicts." *Id.*

<sup>51</sup> 15 C.F.R. § 930.31(a) (2008). The regulation goes on to state, "The term 'Federal agency activity' includes a range of activities where a Federal agency makes a proposal for action initiating an activity or series of activities when coastal effects are reasonably foreseeable, e.g., a Federal agency's proposal to physically alter coastal resources, a plan that is used to direct future agency actions, a proposed rulemaking that alters uses of the coastal zone."

compliance.<sup>52</sup> A careful reading of this provision highlights how narrowly Congress intended to draw this Presidential exemption.<sup>53</sup>

First, the exemption can be utilized only after a court finds that a specific federal activity is not in compliance with a state CMP.<sup>54</sup> The threshold requirement, that there be an adverse judicial ruling against the federal agency activity, seems somewhat odd at first. While the legislative history does not explain why this exemption was constrained in this unusual manner, it is arguable that this threshold requirement is in keeping with Congress' desire to make its use rare. Since the prospect of litigating any case, with its attendant delay and expense, will be unpalatable to a federal agency in most cases, combined with the low probability of obtaining a Presidential exemption,<sup>55</sup> this approach appears to serve as a powerful incentive for a federal agency to negotiate with the state in achieving consistency instead of litigating the case and then seeking an unlikely exemption from the President.<sup>56</sup>

Second, the exemption requires that the Secretary of Commerce certify that mediation under § 307(h) is unlikely to result in compliance.<sup>57</sup> Third, the exemption then requires a written request by the Secretary to the President.<sup>58</sup> Finally, the President may exempt the activity, but only if the President determines that the activity is "in the paramount interest of the United States[.]" and the President may exempt only those "elements of the Federal agency activity that are found by the court to be inconsistent" with the state CMP.<sup>59</sup> The numerous procedural requirements were intended by Congress to reinforce that "no federal agency activities are categorically excluded from the consistency

<sup>52</sup> 16 U.S.C. § 1456(c)(1)(B) (2008).

<sup>53</sup> COASTAL ZONE ACT REAUTHORIZATION AMENDMENTS OF 1990, 136 CONG. REC. H8068, 8087 (1990) [hereinafter REAUTHORIZATION AMENDMENTS]. "[T]he Committee has closely prescribed the circumstances under which an exemption can occur because the Committee intends that the exemption be used only in extraordinary circumstances." *Id.*

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

<sup>55</sup> The Presidential exemption in the CZMA has been used only one time, and only very recently. See Mem. for Secretary of Defense and Secretary of Commerce, Presidential Exemption from the Coastal Zone Management Act (Jan. 16, 2008), available at <http://www.whitehouse.gov/news/releases/2008/01/20080116.html>.

<sup>56</sup> In addition to the practical difficulties that an agency would face in using this exemption only after having suffered defeat in court, the unique nature of this exemption has raised Constitutional issues regarding the separation of powers. See *NRDC v. Winter*, 527 F. Supp. 2d 1216, 1234 (C.D. Cal. 2008) (exemption found constitutionally suspect).

<sup>57</sup> 16 U.S.C. § 1456(c)(1)(B) (2008). The pertinent portion of the statute provides that the exemption requires "a certification by the Secretary that mediation under subsection (h) of this section is not likely to result in compliance[.]" *Id.*

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

<sup>59</sup> *Id.* All told, the procedural hurdles associated with this exemption, along with its attended Constitutional concerns, would make it an option of near desperation for a federal agency that, rightly or wrongly, would see consistency as either impossible or wholly inconsistent with their agency mission.

provisions of section 307."<sup>60</sup>

## 2. The Coastal Zone

The effect must be to the state's "coastal zone." The statute defines the term as:

the coastal waters (including the lands therein and thereunder) and the adjacent shorelands (including the waters therein and thereunder), strongly influenced by each other and in proximity to the shorelines of the several coastal states... The zone extends ... seaward to the outer limit of State title and ownership under the Submerged Lands Act (43 U.S.C. §1301 et seq.).<sup>61</sup>

The definition includes two important qualifications that evidence Congress' desire to protect federal interests that could otherwise be influenced by purely local concerns. One, the coastal zone's outer limit is defined by reference to the Submerged Lands Act, which gives states title and ownership to lands beneath navigable waters<sup>62</sup> up to three geographic miles from the coast line of each state.<sup>63</sup> The Act exempted from state title and ownership are federal lands acquired through various powers of land acquisition, such as cessation by states, eminent domain, purchase, reclamation, and where the U.S. reserved title upon entry of the state into the Union.<sup>64</sup> Since the definition of "coastal zone" in the CZMA provides that it extends only to the extent of "State *title and ownership*,"<sup>65</sup> Congress intended that "no State may assert management authority beyond the outer limits of the territorial sea, nor may a state management program interfere with rights under the Submerged Lands Act[.]"<sup>66</sup> Two, this limit on state authority is reinforced by a second qualification in the definition, which excludes from the coastal zone lands "the use of which is by law subject solely to the discretion of or which is held in trust by the Federal Government, its officers or agents."<sup>67</sup>

<sup>60</sup> REAUTHORIZATION AMENDMENTS, *supra* note 53, at H8076.

<sup>61</sup> 16 U.S.C. § 1453(1) (2008). The act continues by defining the coastal zone inland "from the shorelines only to the extent necessary to control shorelands, the uses of which have a direct and significant impact on the coastal waters, and to control those geographical areas which are likely to be affected by or vulnerable to sea level rise." *Id.*

<sup>62</sup> 43 U.S.C. § 1311(a) (2008).

<sup>63</sup> *Id.* at § 1301(a)(2).

<sup>64</sup> *Id.* at § 1313(a).

<sup>65</sup> 16 U.S.C. § 1453(1) (2008).

<sup>66</sup> 5-10 TREATISE ON ENVIRONMENTAL LAW § 10.04 (2007). This would extend to federal interests protected by the "Outer Continental Shelf Lands Act, and acts creating national parks, forests, wildlife refuges, Indian reservations and defense establishments." *Id.*

<sup>67</sup> 16 U.S.C. § 1453(1) (2008). *See also*, H. REP No. 92-1544, *reprinted at* 1972 U.S.C.C.A.N. 4822. "The Conferees also adopted the Senate language in this section which made it clear that

Therefore, by definition, federal lands such as military bases and wildlife refuges are not subject to direct state regulatory control.<sup>68</sup> Nonetheless, what seems clear in the statute is much more difficult in practice. As noted in the statute's implementing regulations:

The exclusion of Federal lands does not remove Federal agencies from the obligation of complying with the consistency provisions ... when Federal actions on these excluded lands have spillover impacts that affect ... the [State's] coastal zone[.] ... Even though States may not directly regulate Federal lands, Federal activities on these lands are nonetheless subject to consistency determination if their activities on the Federal land will affect the State coastal zone.<sup>69</sup>

In addition to the consistency requirement, the ability of states to directly regulate activities on federal lands, despite the apparent prohibition on such regulation provided for in the statute, has been examined by subsequent judicial interpretation. These judicial holdings have limited the import of the federal land exclusion in the CZMA, and begin to demonstrate the steady expansion of state's authority over federal activities in the coastal zone.

In *Cal. Coastal Comm'n v. Granite Rock Co.*,<sup>70</sup> Granite Rock Co. obtained unpatented mining claims on federally owned lands pursuant to the Mining Act of 1872.<sup>71</sup> These federal lands would have been within California's coastal zone as defined by the statute but for the federal exclusion. California law<sup>72</sup> required that "any person undertaking any development, including mining, in the State's coastal zone must secure a permit from the California Coastal Commission."<sup>73</sup> The California Coastal Commission<sup>74</sup> [hereinafter the Coastal

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Federal lands are not included within a state's coastal zone." *Id.* at 2.

<sup>68</sup> S. REP. NO. 92-753, *supra* note 12, at 4780. "The Committee hopes that the states will move forthrightly to find a workable method for state, local, regional, federal and public involvement in regulation of nonfederal land and water use within the coastal zone." *Id.* (emphasis added).

<sup>69</sup> 15 C.F.R. § 923.33(b) (2008).

<sup>70</sup> 480 U.S. 593 (1987).

<sup>71</sup> 30 U.S.C. §§21-42. "[A] private citizen may enter federal lands to explore for mineral deposits. If a person locates a valuable mineral deposit on federal land, and perfects the claim by properly staking it and complying with other statutory requirements, the claimant 'shall have the exclusive right of possession and enjoyment of all the surface included within the lines of their locations,' 30 U.S.C. § 26, although the United States retains title to the land. The holder of a perfected mining claim may secure a patent to the land by complying with the requirements of the Mining Act and regulations promulgated thereunder, see 43 C.F.R. § 3861.1 *et seq.* (1986), and, upon issuance of the patent, legal title to the land passes to the patent holder." *Granite Rock*, 480 U.S. at 575.

<sup>72</sup> California Coastal Act, CAL. PUB. RES. CODE ANN., §§ 30106 and 30600 (1986) [hereinafter CCA]. The CCA was amended in 2008, but none of the amendments affect the analysis in this article.

<sup>73</sup> *Granite Rock*, 480 U.S. at 577 (emphasis added).

<sup>74</sup> The California Coastal Commission "exercises the state's police power and constitutes the state's

Commission] instructed Granite Rock to apply for a coastal development permit for any mining activities that the company would undertake on their unpatented mining claims within federal lands. Granite Rock immediately brought suit against the Coastal Commission claiming that "the Coastal Commission permit requirement was preempted by Forest Service regulations, by the Mining Act of 1872, and by the CZMA."<sup>75</sup> While there were multiple issues raised in the case, with regard to the CZMA, Granite Rock argued that "the CZMA, by excluding federal lands from its definition of the coastal zone, declared a legislative intent that federal lands be excluded from all State coastal zone regulation."<sup>76</sup> The Court held, in a 5-4 split decision, that California law was not preempted by any of the federal laws in question, thus allowing California to impose a permit requirement upon the company.<sup>77</sup>

In considering the CZMA issue specifically, Justice O'Connor posed the issue in two parts: "[F]irst, whether unpatented mining claims in national forests were meant to be excluded from the § 1453(1) definition of a State's coastal zone, and, second, whether this exclusion from the coastal zone definition was intended to pre-empt State regulations that were not pre-empted by any other federal statutes or regulations."<sup>78</sup> Justice O'Connor's actual inquiry, however, began and ended with the second question- whether the CZMA acted to preempt state environmental regulation. Regarding preemption, the Court looked extensively at the statute's legislative history and concluded that Congress did not intend to preempt all state regulation of activities on federal lands.<sup>79</sup> Based on this review, Justice O'Connor determined that an analysis regarding the federal lands exclusion in the statute was not necessary because "even if all federal lands are excluded from the CZMA definition of 'coastal zone,' the CZMA does not automatically pre-empt all state regulation of activities on federal lands."<sup>80</sup> Thus, the Court concluded that states are permitted to directly regulate activities on federal lands so long as those regulations are held to be environmental regulations.<sup>81</sup>

The full meaning of the Court's opinion, however, is opaque in several

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coastal zone management program for purposes of the federal CZMA." *Id.* See CCA § 30300 *et seq.* (2008). Matters within the Commission's jurisdiction' are "any permit action, federal consistency review, appeal, local coastal program, port master plan, public works plan, long-range development plan, categorical or other exclusions from coastal development permit requirements, or any other quasi-judicial matter requiring commission action, for which an application has been submitted to the commission." CCA § 30321.

<sup>75</sup> *Granite Rock*, 480 U.S. at 577.

<sup>76</sup> *Id.* at 582.

<sup>77</sup> *Id.* at 593.

<sup>78</sup> *Id.* at 591.

<sup>79</sup> *Id.* at 592.

<sup>80</sup> *Granite Rock*, 480 U.S. at 593.

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

respects. The Court's analysis does not seem to fully analyze the relationship between the state statute in question and the CZMA. California's statute was enacted to implement its CMP in accordance with the CZMA.<sup>82</sup> As such, California's statutory authority, by its own terms, extended only to activities within their coastal zone as defined by the CZMA.<sup>83</sup> In this case, the mining activity was occurring entirely within federal lands of exclusive federal jurisdiction, which is by definition outside of California's coastal zone. Since the mining activity was operating outside of the "coastal zone" as the term is defined in the CZMA, no permit was required as was argued by Granite Rock Co.

The Court's opinion, however, does not appear to regard this relationship as all that important, and instead rests its holding on an unspecified state power of regulation outside of the CZMA. What this state power is, however, is difficult to discern because the Court does not identify any precedent supporting its holding, or the basis of this state right.<sup>84</sup> The area of state-federal land relations is complex and there may be numerous arguments that could have been offered that would have arguably justified direct state regulation of private conduct on federal lands in this case.<sup>85</sup> The Court's opinion, unfortunately, fails to clearly articulate the basis for its holding. As one commentator has noted, "Focusing on the specific statutory framework before it, Justice O'Connor's majority opinion cites almost no cases, draws on no other statutes or regulatory areas for guidance by analogy, and pays little attention to the rich history of state-federal relations in land management."<sup>86</sup>

Moreover, the Court's opinion, that states possess a traditional authority to directly impose environmental regulations on activities occurring within

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<sup>82</sup> See *supra* note 72.

<sup>83</sup> See *supra* note 73. *Granite Rock*, 480 U.S. at 576. Justice Scalia noted, "Finally, any lingering doubt that exercise of Coastal Act authority over federal lands is an exercise of land use authority pre-empted by federal laws is removed by the fact that this is not only the view of the federal agencies in charge of administering those laws, ... , but also was the original view of California, which until 1978 excluded from the Coastal Act, in language exactly mirroring that of the federal lands exclusion from the CZMA, 16 U.S.C. §1453(1), "lands the use of which is by law subject solely to the discretion of or which is held in trust by the federal government, its officers or agents." 1976 Cal. Stats., ch. 1331, § 1, as amended by 1978 Cal. Stats., ch. 1075, § 2, codified at CAL. PUB. RES. CODE ANN. § 30008 (West 1986)." *Granite Rock*, 480 U.S. at 613 (Scalia, J. dissenting) (emphasis added).

<sup>84</sup> The Court's only authoritative reference to California's regulatory authority was California's Coastal Act. *Granite Rock*, 480 U.S. at 572.

<sup>85</sup> See generally 73B C.J.S. *Public Lands* § 3 (2007). "The Property Clause of the United States Constitution alone does not withdraw federal land within a state from the jurisdiction of the state, but rather simply empowers Congress to exercise jurisdiction over federal land within a state if Congress so chooses." *Id.*, citing *Wyoming v. U.S.*, 279 F.3d 1214 (10th Cir. 2002).

<sup>86</sup> John D. Leshy, *Granite Rock and the States' Influence Over Federal Land Use*, 18 ENVTL. L. 99, 115 (1987).

federal lands, begs the question why Congress or the states saw the need to include a federal consistency provision in the CZMA. As noted above, the federal consistency provisions were of great import when the statute was enacted specifically because States perceived that they did not have the authority to regulate the very conduct that the Supreme Court now said they had.<sup>87</sup> Justice Scalia noted that by allowing California to directly regulate the activity on federal land, this effectively rendered the consistency determination provisions superfluous.<sup>88</sup>

Perhaps the only clear holding that can be drawn from the opinion is that states are precluded from imposing purely land-use regulations on lands of exclusive federal jurisdiction, while they are permitted to impose environmental regulations. Nevertheless, as a practical matter, it will be difficult in many cases to determine whether a state regulation is one of land-use or of environmental protection since many "environmental" regulations regulate land use directly, either by design or by effect. Consequently, it will be difficult to place such a regulation neatly within the Court's analytical framework.

The somewhat ambiguous holding of the Court in *Granite Rock* would have significant relevance in the expansion of State regulatory power in the coastal zone using statutory and regulatory schemes enacted pursuant to the CZMA. In a prescient observation, one commentator noted, "[D]espite Justice O'Connor's admonition that the majority decision was, in answering that question in the affirmative, 'narrow,' it will inevitably have broader implications, as state and federal agencies and the lower courts now take up the task of sorting through state-federal conflicts that are not on all fours with the facts of *Granite Rock*."<sup>89</sup> This prediction was realized when *Granite Rock*'s narrowing of the of CZMA's federal lands exclusion's relevance was applied directly to federal agency activities in *Friends of Earth v. U.S. Navy*.<sup>90</sup>

In *Friend's of the Earth*, numerous environmental groups sought to stop construction of the United States Navy's proposed homeport of a nuclear-powered aircraft carrier, along with numerous other support vessels, in Everett,

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<sup>87</sup> See *supra* note 30.

<sup>88</sup> *Granite Rock*, 480 U.S. at 613 (Scalia, J. dissenting). As noted by Justice Scalia in his dissent, "The Court is quite correct that the CZMA did not purport to change the status quo with regard to state authority over the use of federal lands. Ante, at 589-593. But as the CZMA's federal lands exclusion, 16 U.S.C. §1453(1), and consistency review provisions, 16 U.S.C. §1456(c)(3)(A), clearly demonstrate, that status quo was assumed to be exclusive federal regulation." *Granite Rock*, 480 U.S. at 613 (Scalia, J. dissenting). Surprisingly, and offering no explanation as to why, Justice Powell, in his dissent, chose to "express no view as to the Court's conclusion that the Coastal Zone Management Act of 1972 (CZMA) . . . does not pre-empt the state regulation in this case." *Id.* at 604 n 6.

<sup>89</sup> Leshy, *supra* note 86, at 103.

<sup>90</sup> 841 F.2d 927 (9th Cir. 1988).

Washington.<sup>91</sup> Among its allegations of numerous statutory violations, the Plaintiffs argued that by commencing construction prior to termination of review proceedings concerning issuance of Washington State's Shoreline Management Act permit [hereinafter SMA permit], the Navy was in violation of the Washington Shoreline Management Act [hereinafter SMA].<sup>92</sup> The SMA was Washington State's implementation of the CZMA.<sup>93</sup> The Navy argued that the SMA was primarily a land use planning statute and "therefore is not applicable to the Navy's activities in the coastal zone, much of which will allegedly occur on federal lands."<sup>94</sup> The 9th Circuit adopted the rationale provided in *Granite Rock* and rejected the Navy's argument, noting, "The SMA, as described above, is a mixed statute containing both land use and environmental regulations. The provisions of the SMA, Everett [Shore Management Plan], and the shoreline permit relating to dredging and water quality are environmental regulations."<sup>95</sup> Much like *Granite Rock*, the case did not involve the consistency provisions of the CZMA and did not discuss the extent that the Submerged Lands Act restricted state authority under the CZMA over "defense establishments."<sup>96</sup>

In summary then, it is difficult to determine whether the federal land exclusion in the CZMA has any real relevance. By holding that this provision

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<sup>91</sup> *Friends of Earth v. U.S. Navy*, 841 F.2d 927, 928 (9th Cir. 1988). To date, the 9th Circuit is the only Federal Judicial Circuit or District Court to confer standing under the CZMA to an organization other than the state coastal zone agency. *Id.* at 936. In addition, at least one District Court has suggested in dicta that a private right of action may exist in the CZMA against the federal government via the Administrative Procedures Act. *See New York v. DeLyser*, 759 F. Supp. 982 (W.D.N.Y. 1991). One federal district court has reached the opposite conclusion. *See Lopez v. Cooper*, 193 F. Supp. 2d 424 (D.P.R. 2002). "The only party that could potentially bring its concerns, interest, and potential injuries within the zone of interests of the CZMA under these particular circumstances is the [state agency] by further contesting the Navy's consistency determination. Ultimately, as Defendants correctly suggest, no provision is made in the CZMA or Part 930 of the CFR for private or local entities and individuals to substitute their own interests and judgments for that of the reviewing state agency." *Id.* at 434. Courts have almost universally found no private right of action in the CZMA when the federal Government is not a party. *See, e.g., George v. N.Y. City Dep't of City Planning*, 436 F.3d 102 (2d Cir. 2006) (holding that there is no private right of action in CZMA); *Dep't of Env'tl. Protection & Energy v. Long Island Power Auth.*, 30 F.3d 403 (3d Cir. 1994) (holding no private right of action exists in CZMA); *California ex rel. Brown v. Watt*, 683 F.2d 1253, 1270 (9th Cir. 1982), *rev'd on other grounds*, 464 U.S. 312 (1984) (assuming, though not deciding, that no private right of action is available under CZMA); *Town of N. Hempstead v. Vill. of N. Hills*, 482 F. Supp. 900, 905 (E.D.N.Y. 1979) ("[The CZMA] is neither a jurisdictional grant, nor a basis for stating a claim upon which relief can be granted."). *Friends of the Earth* has been cited favorably in the 5th Circuit in a case which analyzed plaintiff standing under NEPA. This case, however, did not involve the CZMA. *See, Sabine River Authority v. U.S. Dep't of Interior*, 951 F.2d 669 (5th Cir. 1992).

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

<sup>93</sup> *Id.* at 936.

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

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

<sup>96</sup> *See supra* note 66. Considering the size and nature of the activity in question, however, the impacts on the coastal zone would have been obvious.

does not preempt direct environmental regulation of federal activities on federal lands of exclusive federal jurisdiction, both cases have significantly curtailed the exclusion's importance and have, consequently, expanded state authority in the coastal zone over federal activities.<sup>97</sup> This narrowing of the exclusion is relevant because, cumulatively with expansion of other statutory provisions of the CZMA as is discussed below, it greatly expanded state authority beyond what was originally intended by Congress.

### 3. The Effects Test

What constitutes an "effect" is perhaps the area of the statute that has seen the most significant expansion. Congress, acting to overturn a specific Supreme Court case, may have been overreacting by removing any geographic threshold to the CZMA. Consequently, NOAA issued significantly expanded regulations in response to these amendments. Further still, NOAA took a very expansive view of what the legislature said and broadened not only the geographic scope of the statute, but also the nature of the effects that trigger it.

As discussed above, the triggering mechanism for a consistency determination is the "effects test." If a proposed federal activity is going to have an effect on the land or water use or natural resource of the state's coastal zone, then the agency must conduct its activities consistent to the maximum extent practicable with the state's CMP.<sup>98</sup> The effect on the coastal zone from the agency activity must be "reasonably foreseeable."<sup>99</sup> This is a factual determination made on a case-by-case basis by the federal agency.<sup>100</sup> In determining whether a proposed activity is reasonably foreseeable, the federal agency must determine whether it will initiate a series of events where coastal effects are likely.<sup>101</sup> Essentially, the effect on the coastal zone must be the result of a causal chain that begins with the federal activity.

Two significant questions arise regarding the effects test. The first is to what extent, if any, the proposed affect must be felt in the coastal zone in order to trigger the consistency requirement. The second question is what geographic limitations apply to a state's authority to seek a consistency determination. In

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<sup>97</sup> See Leshy, *supra* note 86, at 103. "The slipperiness of the distinction offers a substantial opportunity to state and local governments, especially those who are willing to review and, if necessary, recharacterize their regulatory processes to shade them toward environmental regulation." *Id.* The full extent of state authority, and the corresponding limits under the Supremacy, Enclave, and Property Clause of the U.S. Constitution is a topic of much debate and is beyond the scope of this article.

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

<sup>99</sup> 15 C.F.R. § 930.15(a) (2008).

<sup>100</sup> *Consistency Regulations*, *supra* note 47, at 77,125.

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

other words, is there a point of delineation where the federal activity's distance from the coastal zone is outside the ambit of the CZMA?

*a. What is an Effect?*

Section 307 of the CZMA does not define the term "affect."<sup>102</sup> The question, then, is whether Congress nonetheless meant for the CZMA to control significant effects, or did it mean for it to control all effects, regardless of how negligible.

NOAA defined the term "effect on any coastal use or resource," as, "any reasonably foreseeable effect on any coastal use or resource resulting from a Federal agency activity or federal license or permit activity."<sup>103</sup> The term includes direct effects which "result from the activity and occur at the same time and place as the activity, and indirect (cumulative and secondary) effects which result from the activity and are later in time or farther removed in distance, but are still reasonably foreseeable."<sup>104</sup> The regulations go on to define "indirect effects" as "resulting from the incremental impact of the federal action when added to other past, present and reasonably foreseeable actions, regardless of what person(s) undertake(s) such actions."<sup>105</sup> Thus, indirect effects may include an immediate effect on the coastal zone, even though the federal activity may be some distance away, or a series of lesser activities which cumulatively will have a foreseeable impact on the coastal zone.

NOAA intentionally did not include any substantive qualifier which would delineate the level of effect on the coastal zone that would trigger the statute's consistency provision.<sup>106</sup> In other words, NOAA specifically interpreted "effect" to mean any effect, regardless of how small or insignificant. In their explanation of the final rule, NOAA stated, "There is no distinction as to the magnitude of effects."<sup>107</sup> The only instance where NOAA allows the significance of an effect to be considered is when a state concurs with a federal agency request to designate an activity as *de minimis*. In creating procedures for

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<sup>102</sup> 16 U.S.C. § 1456(c) does not provide any qualifying limitation as opposed to other environmental statutes. For example, § 102(C) of the National Environmental Policy Act (NEPA) requires that a federal activity must "significantly" affect the quality of the human environment. 42 U.S.C. § 4332(C) (2008); Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) § 106 allows for response when there is an "imminent and substantial endangerment." 42 U.S.C. § 9606 (2008); the Resource Conservation and Recovery Act (RCRA) allows for Federal or private actions when there is an "imminent or substantial endangerment." 42 U.S.C. §§ 6977, 6973 (2008).

<sup>103</sup> 15 C.F.R. § 930.11(g) (2008) (emphasis added).

<sup>104</sup> *Id.*

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

<sup>106</sup> *Consistency Regulations*, *supra* note 47, at 77, 130.

<sup>107</sup> *Id.* at 77, 135.

seeking this concurrence, NOAA stated, "*De minimis* activities are activities that are expected to have insignificant direct or indirect ... coastal effects and which the state agency concurs are *de minimis*."<sup>108</sup> Thus, activities that will have an insignificant effect must nonetheless obtain a state review of some form, either for a *de minimis* effects concurrence, or for a full consistency review.

In explaining why NOAA interpreted "affects" so broadly, the agency stated that this definition "is not over broad, but is consistent with the CZMA, legislative history and CEQ's NEPA definitions of cumulative and secondary effects."<sup>109</sup> NOAA's reading of the legislative history and its interpretation of the statute may have been somewhat more expansive than warranted by either of those sources. With regard to legislative history, NOAA relies on a 1990 House Committee Report that documents the proceedings leading up to the enactment of the 1990 Amendments.<sup>110</sup> A review of the House Report, however, suggests that NOAA's reading of Congressional intent may have been too broad. In amending the CZMA in 1990, the bill's proponents were seeking to overturn the holding of *Sec'y of the Interior v. Cal.*,<sup>111</sup> which held that outer continental shelf mineral leases, far outside the coastal zone, were outside the scope of the CZMA because the lease itself would not "directly affect" the coastal zone.<sup>112</sup> The amendment's proponents expressed a concern regarding the case's implications with regard to the geographic scope of the statute, and the types of federal agency activities that are covered, but not the significance of the activity's effects on the coastal zone.<sup>113</sup> The House Report notes:

This amended provision establishes a generally applicable rule of law that any federal agency activity (regardless of its location) is subject to the CZMA requirement for consistency if it will affect any natural resources, land uses, or water uses in the coastal zone. No federal agency activities are categorically exempt from this requirement.<sup>114</sup>

In fact, nowhere does the Report address the substantive threshold to the term "effect." On the contrary, the bill's proponents stated that they "aimed at saving the waters of our coasts and the land whose use has a direct, *significant*, and adverse impact upon that water."<sup>115</sup> The Report does note

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<sup>108</sup> 15 C.F.R. § 930.33(a)(3)(ii) (2008).

<sup>109</sup> *Consistency Regulations*, *supra* note 47, at 77, 129-77, 130.

<sup>110</sup> *Id.* at 77, 135.

<sup>111</sup> 464 U.S. 312 (1984).

<sup>112</sup> *Id.* at 342. "Nevertheless, even if OCS lease sales are viewed as involving an OCS activity "[conducted]" or "supported]" by a federal agency, lease sales can no longer aptly be characterized as 'directly affecting' the coastal zone." *Id.*

<sup>113</sup> REAUTHORIZATION AMENDMENTS, *supra* note 53, at H8076.

<sup>114</sup> *Id.*

<sup>115</sup> *Id.* at H8070 (emphasis added).

Congressional concern about "cumulative and secondary effects."<sup>116</sup> The Report defines these terms as:

Cumulative effects are the impacts on the coastal zone which result from the incremental effects of an activity when added to other past, present, and reasonably foreseeable future actions, regardless of what agency or person undertakes such other actions. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time. Secondary effects are impacts that are associated with, but do not result directly from, an activity. Secondary effects can include growth inducing effects and other effects related to induced changes in the pattern of land use.<sup>117</sup>

NOAA relies on this language to justify the interpretation that the "effects test" includes any effect, not just those that are "significant or substantial."<sup>118</sup> This language alone, however, appears to be a weak basis upon which to rest such a broad interpretation of the statute. While the House Report does make clear that cumulative effects include those resulting from individually minor actions, the cumulative and secondary effects were of concern because they could have a significant effect, not simply because they would have any effect divorced from their overall impact.<sup>119</sup>

NOAA also cites to *Environmental Defense Fund, Inc. v. EPA*,<sup>120</sup> which held that an agency cannot simply create *de minimis* exceptions to a statute if to do so is contrary to the terms of the statute and legislative intent.<sup>121</sup> Reliance on this case by NOAA for their position also appears unsound. The House Report indeed contains an admonition that the effects test should be read broadly, but it is evident that Congress was discussing the *types* of federal activities that were covered, along with their geographic location, not the *significance* of that

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<sup>116</sup> *Id.* at H8078.

<sup>117</sup> *Id.*

<sup>118</sup> *Consistency Regulations*, *supra* note 47, at 77,130.

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

<sup>120</sup> 82 F.3d 451 (D.C. Cir. 1996), *modified by*, 92 F.3d 1209 (D.C. Cir. 1996).

<sup>121</sup> *Consistency Regulations*, *supra* note 47, at 77,135. NOAA's justification for its position rests almost entirely on the pronouncements of select sections of the House Report. NOAA's explanation states, "As the court noted in *Environmental Defense Fund v. EPA* ..., '[t]he ability to create a *de minimis* exemption is not an ability to depart from the statute, but rather a tool to be used in implementing the legislative design. \* \* \* Of course, \* \* \* a *de minimis* exemption cannot stand if it is contrary to the express terms of the statute.' The express terms of the CZMA are that consistency applies to 'each' federal activity 'affecting' 'any' coastal use or resource. Neither the CZMA nor the Conference Report specifically authorize a *de minimis* exemption. Conference Report at 970-972. Rather, the Conference Report provides persuasive authority regarding legislative design: 'effects' are to be construed broadly and include reasonably foreseeable direct and indirect effects." *Id.*

activity's effect on the coastal zone.<sup>122</sup> The only mention of significance in the Report deals with the concern of secondary or cumulative affects that would ultimately have significant effects on the coastal zone.<sup>123</sup> It is a long road to travel, however, to extrapolate from this that Congress intended to control all effects, regardless of how minor.

The statute itself is replete with language that evidences Congress' concern with significant impacts, not trifling ones. In fact, § 306 of the statute, which mandates the minimum requirements for, and required substance, of state CMPs, repeatedly provides that a state CMP is intended to deal with significant effects. For example, Congress stated it was concerned with land use in the coastal zone because such use could "*significantly affect* the quality of coastal waters and habitat, and efforts to control coastal water pollution from land use activities must be improved."<sup>124</sup> The definition of "coastal zone" itself provides that it "extends inland from the shoreline to the extent necessary to control lands, the uses of which have a direct and *significant impact* on coastal waters."<sup>125</sup> Congress provided that the Secretary of Commerce, before approving a state management program, will make a finding the state program contains a "definition of permissible land uses and water uses within the coastal zone which have a direct and *significant impact* on the coastal waters,"<sup>126</sup> and "[a] planning process for energy facilities likely to be located in, or which may *significantly affect*, the coastal zone, including a process for anticipating and managing the impacts from such facilities."<sup>127</sup>

In amendments that incorporated nonpoint source pollution planning requirements, Congress provided that state plans must include, "The identification of, and a continuing process for identifying, land uses which, individually or cumulatively, may cause or contribute *significantly* to a degradation of ... coastal waters[.]"<sup>128</sup> Furthermore, the House Report heavily relied on by NOAA noted that, when the CZMA was enacted in 1972, "Congress envisioned that a primary purpose of the CZMA was to control land use activities which have a direct and *significant impact* on the coastal waters."<sup>129</sup> Thus, in developing state management plans in accordance with § 306,<sup>130</sup>

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<sup>122</sup> REAUTHORIZATION AMENDMENTS, *supra* note 53, at H8076. "This exemption provision reinforces the Committee's position that no federal agency activities are categorically excluded from the consistency provisions of section 307. Section 307(c)(2) is the only exemption authorized or intended for section 307(c)(1) activities." *Id.*

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

<sup>124</sup> 16 U.S.C. § 1451(k) (2008) (emphasis added).

<sup>125</sup> 16 U.S.C. § 1453(1) (2008) (emphasis added).

<sup>126</sup> 16 U.S.C. § 1455(d)(2)(B) (2008) (emphasis added).

<sup>127</sup> 16 U.S.C. § 1455(d)(2)(H) (2008) (emphasis added).

<sup>128</sup> 16 U.S.C. § 1455b(b)(1) (2008) (emphasis added).

<sup>129</sup> REAUTHORIZATION AMENDMENTS, *supra* note 53, at H8071.

<sup>130</sup> 16 U.S.C. § 1455 (2008).

Congress intended the states "to manage land and water uses in the coastal zone so as to reduce or minimize a direct, *significant*, and adverse effect."<sup>131</sup> This is in keeping with Congress' desire that state CMPs are to be "the process by which a coastal State or other approved agency proposes. . . to manage land and water uses in the coastal zone so as to reduce or minimize a direct, *significant* and adverse affect upon those waters."<sup>132</sup>

NOAA was correct in stating that, in 1990, "Congress amended the CZMA in 1990 to specifically guard against Federal agencies exempting their activities[.]"<sup>133</sup> but again, it was the type and geographic nature of agency activities that Congress was addressing, not the extent of their effect on the coastal zone. In fact, the House Report organized its response to the case under the headings, "Geography," "Preemption," and "Directly Affecting."<sup>134</sup> The Committee never addressed 'significance.'

This is not to label NOAA's approach as whimsical. On the contrary, NOAA's reluctance in developing a "significance" threshold today is partially understood in light of its experience with such an endeavor in the past.<sup>135</sup> "In its 1977 ... proposed rule, NOAA proposed ... a test that focused on the significance of an activity's effects on the coastal zone."<sup>136</sup> NOAA, however, faced resistance from the Department of Justice [hereinafter DOJ] with regard to the proposed rule, which argued that "directly affecting" test is "essentially a factual determination ... and ... should not be diluted to 'significantly' and then to 'primarily, secondarily and cumulatively' affecting the coastal zone."<sup>137</sup> The core of DOJ's objection, however, was rooted on the fact that § 307, prior to the 1990 amendments, contained two distinct "affects tests"; "directly affects" for federal agency activities, and simply "affects" for other federal activities.<sup>138</sup> "Justice found ... that the CZMA did not authorize the Secretary to employ only one triggering test based on the significance of the effects applicable to each of the separate consistency provisions."<sup>139</sup> DOJ's opinion, however, may have been misguided because, "contrary to the Department's view, the use of the

<sup>131</sup> SEN. R. 92-753, *supra* note 12, at 4784. *See also*, American Petroleum Institute v. Knecht, 456 F. Supp. 889 (C.D. Cal. 1978).

<sup>132</sup> *Id.* at 4784.

<sup>133</sup> *Consistency Regulations*, *supra* note 47, at 77, 135.

<sup>134</sup> REAUTHORIZATION AMENDMENTS, *supra* note 53, at H8072-3.

<sup>135</sup> Tim Eichenberg & Jack Archer, *The Federal Consistency Doctrine: Coastal Zone Management and "New Federalism,"* 14 *ECOLOGY L.Q.* 9, 19 (1987).

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

<sup>137</sup> *Id.* at n.65, *citing* 42 Op. Att'y Gen. 13-14 (1979) [hereinafter Justice Advisory Opinion]. It is interesting to note that Congress appears, in its House Report, to, intentionally or not, have rejected DOJ's position regarding secondary and cumulative effects. REAUTHORIZATION AMENDMENTS, *supra* note 53, at H8072.

<sup>138</sup> Eichenberg, *supra* note 135, at 19.

<sup>139</sup> *Id.* at n.64

'significance of effects' test is well-supported by the language of the CZMA itself ... and the legislative history."<sup>140</sup>

*b. Geography*

As noted above, one of the primary driving forces behind the 1990 amendments to the CZMA was the intent of the Amendment's proponents to overturn the holding in the Supreme Court case of *Sec'y of the Interior v. Cal.*<sup>141</sup> Prior to the 1990 amendments, § 307(c)(1) provided that a federal activity would be subject to a consistency determination if the activity "directly affects" the state's coastal zone.<sup>142</sup> In the case, the Department of the Interior sold oil and gas leases on the Outer Continental Shelf [hereinafter OCS] off the coast of California.<sup>143</sup> The Coastal Commission informed the Department of the Interior that it deemed several of the lease sales as activities "directly affecting the California coastal zone...[and]...demanded a consistency determination."<sup>144</sup> The Department of the Interior rejected the state's demands, reasoning that "no consistency review was required because the lease sale did not engage CZMA §307(c)(1), and the Governor's request was not binding because it failed to strike a reasonable balance between the national and local interests[.]"<sup>145</sup> In addition, the Secretary argued that the lease sales would not "directly affect" the California coastal zone.<sup>146</sup> When the Secretary of Interior consummated the lease sales, the Coastal Commission brought suit.<sup>147</sup>

The CZMA's consistency provision in effect at the time provided, "Each Federal agency conducting or supporting activities *directly affecting* the coastal zone shall conduct or support those activities in a manner which is, to the maximum extent practicable, consistent with approved State management programs."<sup>148</sup> Thus, the Court faced the issue of "whether the sale is an activity 'directly affecting' the coastal zone under § 307(c)(1) of the Coastal Zone Management Act (CZMA)."<sup>149</sup> Ultimately, the Court held that the proposed lease sales did not "directly affect" the coastal zone.<sup>150</sup> In reaching its decision,

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<sup>140</sup> Eichenberg, *supra* note 135, at n.66, citing 16 U.S.C. §§ 1456(b)(2), 1455(c)(8) (2008); *The Coastal Zone Management Act of 1972*, CONGRESSIONAL RESEARCH SERVICE, LIBRARY OF CONGRESS, LEGISLATIVE HISTORY OF THE COASTAL ZONE MANAGEMENT ACT OF 1972, at 459.

<sup>141</sup> REAUTHORIZATION AMENDMENTS, *supra* note 53, at H8075.

<sup>142</sup> Eichenberg, *supra* note 135, at 15 (1987).

<sup>143</sup> *Sec'y of Interior v. Cal.*, 464 U.S. 312, 315 (1984).

<sup>144</sup> *Id.* at 317 (quotations omitted).

<sup>145</sup> *Id.* at 318.

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

<sup>147</sup> *Id.* at 319.

<sup>148</sup> 16 U.S.C. § 1456(c)(1) (1982 ed.), 86 Stat. 1285 (emphasis added to highlight difference with modern version of the statute).

<sup>149</sup> *Sec'y of Interior*, 464 U.S. at 315.

<sup>150</sup> *Id.* at 331.

Justice O'Connor wrote that Congress did not intend for the CZMA to apply to federal activities that were conducted "outside the coastal zone."<sup>151</sup>

In response to the Court's holding, Congress amended the CZMA by a thin margin during its reauthorization in 1990, and enacted § 307 in its current form.<sup>152</sup> Congress clarified that the statute applied to federal agency activities "within or outside the coastal zone."<sup>153</sup> In amending the statute, the legislative history reveals that Congress considered two approaches to addressing the Court's holding. It could enumerate which federal activities are subject to consistency determinations, or it could amend that statute to "reestablish a general rule of law that is equally applicable to all federal agency activities. The Committee chose the latter approach."<sup>154</sup> As the House Report documents:

This amended provision establishes a generally applicable rule of law that any federal agency activity (regardless of its location) is subject to the CZMA requirement for consistency if it will affect any natural resources, land uses, or water uses in the coastal zone. No federal agency activities are categorically exempt from this requirement.<sup>155</sup>

Congress struck the "directly affecting" language and made clear that the amendment "dispels the misplaced notion that the CZMA's geographical scope is limited by inserting the phrase 'in or outside of the coastal zone' to modify the term 'federal agency activity'."<sup>156</sup> The breadth of this amendment was further clarified in the Report as follows:

The Committee intends this determination to include effects in the coastal zone which the federal agency may reasonably anticipate as a result of its action, including cumulative and secondary effects. Therefore, the term "affecting" is to be construed broadly, including

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<sup>151</sup> *Id.* As Justice O'Connor wrote, "It is clear beyond peradventure that Congress believed that CZMA's purposes could be adequately effectuated without reaching federal activities conducted outside the coastal zone. Both the Senate and House bills were originally drafted, debated, and passed, with [the CZMA] expressly limited to federal activities in the coastal zone. Broad arguments about CZMA's structure, the Act's incentives for the development of state programs, and the Act's general aspirations for state-federal cooperation thus cannot support the expansive reading . . . urged by respondents." *Id.* at 331.

<sup>152</sup> REAUTHORIZATION AMENDMENTS, *supra* note 53, at H8072; Edward A. Fitzgerald, *California Coastal Commission v. Norton: A Coastal State Victory in the Seaweed Rebellion*, 22 *UCLA J. ENVTL. L. & POL'Y* 155, 177 (2004).

<sup>153</sup> 16 U.S.C. § 1456(c)(1)(A) (2008).

<sup>154</sup> REAUTHORIZATION AMENDMENTS, *supra* note 53, at H8076.

<sup>155</sup> *Id.* at H8077. The Committee Report, to make its position abundantly clear, stated, "What the Committee has done is to make clear what it thought had been well-understood prior to the Supreme Court's decision; it has established a general rule of law that applies equally to all federal agency activities, whether those activities occur inside or outside of the coastal zone." *Id.*

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

direct effects which are caused by the activity and occur at the same time and place, and indirect effects which may be caused by the activity and are later in time or farther removed in distance, but are still reasonably foreseeable.<sup>157</sup>

Thus, it is fair to summarize the test as follows: any federal activity occurring anywhere that has any reasonably foreseeable effect on a state's coastal zone resources is subject to a state's consistency determination. In other words, the effects test includes any federal agency activity, wherever it occurs, that starts a "chain of events" that ultimately has any effect that reaches the coastal zone so long as the causal chain is reasonably foreseeable.<sup>158</sup> The effect need not occur within the coastal zone, it only need affect a resource of the coastal zone, even when that resource is outside the coastal zone. The only remaining nexus to the geographical limit of the coastal zone is that the affected resource itself must, at some point in time, be present in the state's coastal zone. As will be seen below, the lack of a geographic limit, when applied to migratory natural resources, has effectively turned the CZMA into a statute of global applicability.

c. *Reasonably foreseeable*

The removal of any geographic and substantive limit on the effects test makes the term "reasonably foreseeable" the key criteria for determining whether an agency activity is subject to the consistency requirements of the CZMA. Despite its importance, NOAA elected not to define the term,<sup>159</sup> and provided the following reasoning:

Congress envisioned that Federal-State coordination through consistency would be interactive. Thus, the application of consistency, the varied State management programs, the analysis of effects, and the case-by-case nature of federal consistency precludes fast and hard definitions of effects and what is reasonably foreseeable.<sup>160</sup>

In light of the importance that the term "reasonably foreseeable" has assumed, NOAA's reluctance to provide some guidance regarding what is foreseeable may have been unwise since placing this term in some context seems a vital means of avoiding significant controversy between federal and state agencies over the statute's application. Absent direction from NOAA, we must look elsewhere. Unfortunately, interpretation of this term as it applies to

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

<sup>158</sup> 15 C.F.R. § 930.31(a) (2008); *Consistency Regulations*, *supra* note 48, at 77, 135.

<sup>159</sup> *Consistency Regulations*, *supra* note 47, at 77, 130.

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

the CZMA is scant, likely because the term "reasonably foreseeable" was not meant to be given special treatment with regard to the CZMA versus other areas of law. Regarding legislative intent, the 1990 House Report provides rather unilluminating guidance that a reasonably foreseeable effect is one "which the federal agency may reasonably anticipate as a result of its action[.]"<sup>161</sup> Otherwise, there is no evidence that Congress gave much thought to the term.

A question as to whether an "effect" will be reasonably foreseeable will likely arise most often with regard to indirect coastal effects since direct coastal effects will be more obvious and predictable. It is no surprise, therefore, that NOAA's definition for indirect coastal zone effects is very similar to the Council for Environmental Quality's [hereinafter CEQ] definition for "cumulative" effects in the context of National Environmental Policy Act [hereinafter NEPA],<sup>162</sup> which defines indirect effects as "caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable."<sup>163</sup> Hence, an examination of what is "reasonably foreseeable" in the case of NEPA application serves as useful guidance for the CZMA.

In the oft cited case of *Sierra Club v. Marsh*,<sup>164</sup> the First Circuit echoed other federal Judicial Circuits when it held, "the terms 'likely' and 'foreseeable,' as applied to a type of environmental impact, are properly interpreted as meaning that the impact is sufficiently likely to occur that a person of ordinary prudence would take it into account in reaching a decision."<sup>165</sup> Something is not reasonably foreseeable if it is "highly speculative or indefinite."<sup>166</sup> While the

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<sup>161</sup> REAUTHORIZATION AMENDMENTS, *supra* note 53, at H8076.

<sup>162</sup> See 40 C.F.R. § 1502.16 (2008).

<sup>163</sup> 40 C.F.R. § 1508.8 (2008).

<sup>164</sup> 976 F.2d 763 (1st Cir. 1992).

<sup>165</sup> *Marsh*, 976 F.2d at 767. The court in *Marsh* was required to determine whether the creation of a port facility would likely lead to the development of other water dependent industries that would have adverse environmental impacts. The plaintiffs in the case used studies of other ports to show such a development was reasonably foreseeable. In that the Government defendants did not include an analysis of these secondary industries in its EIS for the port facility, the plaintiffs claimed that the EIS was deficient. The court in *Marsh* held, "We conclude that it was permissible for the agencies not to analyze other water-dependent industries, such as auto processing, petroleum, and cement, because the likelihood of these industries developing on Sears Island is too speculative to be reasonably foreseeable. The only evidence Sierra Club identifies (other than general statements to the effect that water-dependent industries are likely to develop) is the study of comparable ports around the United States. The fact that auto processing developed as an indirect effect of a port project in Georgia, for example, does not, without more, make the development of auto processing on Sears Island reasonably foreseeable."

<sup>166</sup> *Id.* at 768, *citing* *Kleppe v. Sierra Club*, 427 U.S. 390, 402 (1972). The Ninth Circuit has defined "foreseeable" as being "not too speculative." *Northern Alaska Environmental Center v. Kempthorne*, 457 F.3d 969, 980 (9th Cir. 2006). The Second Circuit interpreted a contingent as being unforeseeable when it is "speculative and contingent." *Village of Grand View v. Skinner*, 947 F.2d 651, 659 (2d Cir. 1991).

"agency need not foresee the unforeseeable,"<sup>167</sup> the agency is required to engage in "some degree of forecasting."<sup>168</sup>

The Supreme Court's analysis in *Metropolitan Edison Co. v. People Against Nuclear Energy*<sup>169</sup> can also serve as a useful analogy to determine whether a federal agency's activity will have a predictable, thus foreseeable, effect on the state's coastal zone. The Court equated foreseeable environmental effects to "include a requirement of a reasonably close causal relationship between a change in the physical environment and the effect at issue. This requirement is like the familiar doctrine of proximate cause from tort law."<sup>170</sup> Like defendant liability in tort, the agency activity must not only be the factual cause of the coastal effect, it must be the legal cause of the harm.<sup>171</sup> Mere causation would be insufficient.<sup>172</sup> In this light, "there is nothing novel about the 'reasonable foreseeability' standard" as a guide for determining effects under the CZMA.<sup>173</sup>

#### 4. Maximum Extent Practicable

NOAA's interpretation of the requirement that federal activities be consistent to the maximum extent practicable with state CMPs is another instance where the statute's scope, or at least federal agency obligations pursuant to the statute, has been expanded to a degree that, when combined with the expansion already discussed, has led to an unbalancing of the statute's state-federal paradigm.

The statute itself provides that any federal activity which otherwise triggers the "effects test" must be conducted in a manner that is consistent with a state CMP to the "maximum extent practicable."<sup>174</sup> The statute does not define what this limit means. Nonetheless, "[b]ecause this phrase establishes for

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<sup>167</sup> *Scientists' Inst. for Public Information, Inc. v. Atomic Energy Comm'n*, 481 F.2d 1079, 1092 (C.A.D.C. 1973).

<sup>168</sup> *Id.* "Reasonable forecasting and speculation is thus implicit in NEPA."

<sup>169</sup> 460 U.S. 766 (1983).

<sup>170</sup> *Metropolitan Edison*, 460 U.S. at 774. The Supreme Court provided a caveat to this analogy by stating, "In drawing this analogy, we do not mean to suggest that any cause-effect relation too attenuated to merit damages in a tort suit would also be too attenuated to merit notice in an EIS; nor do we mean to suggest the converse. In the context of both tort law and NEPA, courts must look to the underlying policies or legislative intent in order to draw a manageable line between those causal changes that may make an actor responsible for an effect and those that do not." *Id.* at n.7.

<sup>171</sup> Matthew C. Porterfield, *Rippling Puddles, Small Handles and Links of Chain: The Scope of Environmental Review for Army Corps of Engineers Permit Decisions*, 10 TUL. ENVTL. L.J. 31, 36 (1996).

<sup>172</sup> *Id.* at 37.

<sup>173</sup> *Id.* at 58.

<sup>174</sup> 16 U.S.C. § 1456(c)(1)(A) (2008).

federal activities the standard of compliance with state CMP's, its definition is critical."<sup>175</sup> The legislative history indicates "that the House intended a high standard of compliance. ... [O]nce state CMP's received federal approval and the federal consistency provisions became effective, state management policies were not to be evaded because federal agencies subsequently found it inconvenient or 'impractical' to conform their activities to approved state CMP's."<sup>176</sup>

In implementing this specific mandate, however, NOAA moved well beyond the ideas of practicality and defined this provision as follows: "The term "consistent to the maximum extent practicable" means fully consistent with the enforceable policies of management programs unless full consistency is prohibited by existing law applicable to the Federal agency."<sup>177</sup>

In other words, this definition effectively constricts the term such that the requirements in the CMP are binding unless compliance is prohibited by another statute or regulation. In this sense, a state's CMP effectively is elevated to a plain at least equal to a federal agency's own statutory mandates.<sup>178</sup> In other words, a federal agency must conform to a state CMP unless its activity is nondiscretionary as a matter of law.<sup>179</sup>

As a practical matter, through its interpretation, NOAA has taken the phrase "maximum extent practicable" in the statute and essentially broadened that term to mean "maximum extent permitted by law." The difference between these two phrases can be quite significant. For example, in the case of *California Coastal Comm'n v. Dep't of the Navy*,<sup>180</sup> California required that the U.S. Navy use suitable dredge material which resulted from deepening of a channel, necessary to support the movement of aircraft carriers, for beach replenishment.<sup>181</sup> During the dredging, however, unexploded ordnance was discovered in the dredge material and the Navy argued that it would have been prohibitively expensive to clean the dredge material to the degree needed for safe use on a public beach.<sup>182</sup> Despite the fact that the presence of ordnance, in addition to the allegedly excessive cost in cleaning the material, would have made the use of the dredge material for beach replenishment impracticable, to

<sup>175</sup> Eichenberg, *supra* note 135, at 23.

<sup>176</sup> *Id.* at 23, 24.

<sup>177</sup> 15 C.F.R. § 930.32(a)(1) (2008).

<sup>178</sup> *Id.* "Congress has asserted its undoubted Constitutional power to enact general legislation governing the activities of Federal agencies in the coastal zone, and in doing so has assimilated state law- to the extent incorporated in a [CMP]- directly into the body of federal law governing the missions of such agencies." William C. Brewer, Jr., *Federal Consistency and State Expectations*, 2 COASTAL ZONE MGMT. J. 315, 318 (1975).

<sup>179</sup> Brewer, *supra* note 178, at 318.

<sup>180</sup> 5 F. Supp. 2d 1106 (S.D. Cal. 1998).

<sup>181</sup> *Id.* at 1110.

<sup>182</sup> *Id.* at 1109.

say the least, California demanded that the Navy replenish the beach, even if it required the purchase of clean sand as a substitute for the beach replenishment.<sup>183</sup> The Court felt that California presented a case sufficient to warrant a preliminary injunction.<sup>184</sup>

The outcome of this case is notable not only because it demonstrates the high standard of compliance that will be demanded of federal agencies by the states, but also because it demonstrates practical difficulties in applying the standard imposed by NOAA. In this case, federal law arguably made compliance with the California demand unlawful, and this was an issue curiously unaddressed by the Court. The Water Resource Development Act of 1986 requires that states provide 50% of the cost of placing dredge material from federal projects on state beaches, and this assumes that the project could have satisfied other statutory cost/benefit analysis.<sup>185</sup> Compliance with California's demand could have been a violation of this statutory provision. Thus, even under NOAA's expansive interpretation, determining what is within an agency's statutory discretion may be difficult.

The requirement for full consistency, unless it would be unlawful, is mandated in all instances save one. The only exception from full compliance is when full compliance is not possible as a result of "an emergency or other similar unforeseen circumstance."<sup>186</sup> Again, however, this exception is itself an exceedingly narrow opening to the general rule. Even in the face of an emergency or unforeseen circumstance, "Any deviation shall be the minimum necessary to address the exigent circumstance."<sup>187</sup> Furthermore, the regulation provides that federal agencies will resume full compliance "to the maximum extent practicable" once the emergency has passed.<sup>188</sup>

What exactly constitutes an "exigent circumstance" is not defined and

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<sup>183</sup> *Id.* Section 30233(b) of the California Coastal Act provided that, "[d]redging and spoils disposal shall be planned and carried out to avoid significant disruption to marine and wildlife habitats and water circulation. Dredge spoils suitable for beach replenishment should be transported for such purposes to appropriate beaches or into suitable longshore current systems." *Id.* at 1110.

<sup>184</sup> *Id.* at 1113.

<sup>185</sup> Water Resource Development Act of 1986, Pub. L. No. 99-662, 100 Stat. 4082 (2008), § 933 (codified as amended in scattered sections of the United States Code). *See also*, Memorandum from Major General Arthur E. Williams, Director of Civil Works, U.S. Army Corps of Engineers, Memorandum for Major Subordinate Commands and District Commands (Nov. 22, 1991), *available at*, <http://www.usace.army.mil/cw/cecw-p/pgls/pgl22.pdf> (explaining cost/benefit analysis that would be used).

<sup>186</sup> 15 C.F.R. § 930.32(b) (2008).

<sup>187</sup> *Id.* The regulation further provides, "Federal agencies shall carry out their activities consistent to the maximum extent practicable with the enforceable policies of a management program, to the extent that the exigent circumstance allows." *Id.*

<sup>188</sup> *Id.*

there appears to be no judicial application of the provision of the CZMA.<sup>189</sup> Thus, we are left to apply the term, as written, to whatever facts exist at the moment of truth. One interesting, if not somewhat obvious, question is whether combat operations would qualify as an exigent circumstance. Neither the statute itself, nor the implementing regulations, provide for any wartime exemption. Nevertheless, it appears safe to assume that actual combat, even if directly affecting the coastal zone, would fall under the caveat of "exigent."

A more realistic question, therefore, is how far removed from combat will this deference extend? Where one can draw a line that defines one activity as clearly supporting combat operations, and another not, is a difficult task the more distant you are from actual military operations. In effect, this issue is being addressed in the courts today as litigation continues over military training of forces deploying into war zones such as Iraq and Afghanistan.

In one example, the court in *Ocean Mammal Institute v. Gates*<sup>190</sup> faced this issue when environmental groups sued the U.S. Navy over the use of active sonar off the coast of Hawaii.<sup>191</sup> One of the Plaintiff's claims alleged that the Navy failed to comply with the procedural requirements of the CZMA.<sup>192</sup> In deciding a motion for a preliminary injunction, the court noted that the "scope of ... relief depends, at least in part, upon an analysis of what harm would come to the Navy ... should this court issue an injunction that completely or severely limits the Navy's ability to conduct [its exercise]. The hardship on the Navy in

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<sup>189</sup> In a notable case, a federal district court enjoined the federal Government from proceeding with plans to relocate thousands of Haitian and Cuban refugees to Fort Allen in Puerto Rico from the continental United States because the federal Government failed to comply with the consistency provisions of the CZMA. *See Puerto Rico v. Muskie*, 507 F. Supp. 1035 (D.C.P.R. 1981), *vacated as moot*, *Marquez-Colon v. Reagan*, 668 F.2d 611 (1st Cir. 1981) (vacated because of settlement agreement reached by the parties). In this case, thousands of Haitian and Cuban refugees fled their home islands in a massive exodus. The United States rescued many of the individuals at sea and temporarily housed them in the United States. The housing of so many refugees in some states caused political and practical difficulties that required the relocation of many thousands to other locations, including federal facilities in Puerto Rico. Various challenges against the relocation to Puerto Rico were filed by individuals who resided near the federal facilities in question. With regard to the CZMA, the Court found that the federal Government failed to provide sufficient detail in their consistency determination to the state. In addition, the federal Government failed to adhere to the 90 day waiting period between submission of a consistency determination and the execution of the agency activity in question. What makes this case notable is that neither the Court nor the Government raised the issue of exigent circumstances for purposes of the CZMA, even though language existed in NOAA regulations then in effect that had language similar to what is found in the regulations today. Thus, in one of the few cases where exigent circumstances could have played a significant part in the Court's analysis, it is curiously devoid of any such discussion.

<sup>190</sup> *Ocean Mammal Institute v. Gates*, No. 07-00254, 2008 U.S. Dist. LEXIS 15815 (D. Haw. Feb. 29, 2008).

<sup>191</sup> *See supra* note 91 regarding private party standing under the CZMA.

<sup>192</sup> *Ocean Mammal Institute*, 2008 U.S. Dist. LEXIS 15815 at \*58.

such a scenario would be severe."<sup>193</sup> The court went on to note why such training was critical, particularly in light of "the clear and present danger posed to the United States by quiet diesel submarines now operated by several countries."<sup>194</sup>

The court held that imposing the blanket injunction, as demanded by the Plaintiffs, would be unduly harmful to the U.S. Navy and the national security.<sup>195</sup> In so holding, the court provided several considerations that could be used to judge the potential danger of enjoining military training activities, particularly during a time of armed conflict short of declared war. The court noted that a blanket injunction would:

deprive deploying strike groups of the last and best opportunity to hone perishable [anti-submarine warfare] skills prior to entering areas of the world where they might need them most. Moreover, delaying [the exercise] could result in strike groups being deployed in to [sic] real-world theaters of operation, without the ability to conduct [anti-submarine warfare] at sufficient level, thus creating a potentially dangerous, even deadly, situation.<sup>196</sup>

Thus, the court looked at the nature of the training being conducted, the skills that were being exercised, their perishable nature, the nature of the any impending deployment, the likelihood that such skills would be used in real-world operations, and the potential consequences for not having exercised those skills. Considering these factors, the court nonetheless found that if the exercises were to be conducted unabated, the environment would suffer from "irreparable harm."<sup>197</sup> This placed the court in a difficult situation because it determined that the balance of hardships "does not tip sharply in favor of either party."<sup>198</sup> In the end, however, the court did determine that the balance tipped slightly in favor of the Plaintiffs, thus warranting some form of injunction, albeit one that was significantly narrower than what the Plaintiffs requested.<sup>199</sup>

As military operations short of declared war continue in the foreseeable future, this issue, determining the balance between military compliance with the strict mandates of the CZMA, will likely continue to vex the judiciary for some time to come.<sup>200</sup> Moreover, many may feel a slight discomfort or be openly

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<sup>193</sup> *Id.* at \*63.

<sup>194</sup> *Id.* at \*64 n.18.

<sup>195</sup> *Id.* at \*65.

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

<sup>197</sup> *Id.* at \*66.

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

<sup>199</sup> *Id.* at \*67.

<sup>200</sup> As eloquently explained by the Court, "The fact remains that we are currently at war on two

hostile to what they perceive to be unwarranted judicial intervention in military training.<sup>201</sup> At least the factors articulated above provide some guidance on how to balance the interests involved in determining not only the scope of an injunction, but whether the national interest would dictate against any injunction at all.

### 5. Enforceable Policies

The notion of what are a state's "enforceable policies" is itself a somewhat opaque concept, and an understanding of the difficulty of its application is important in order to place the overarching discussion of consistency and migratory resources in this article in the proper context. The statute defines "enforceable policy" as "[s]tate policies which are legally binding through constitutional provisions, laws, regulations, land use plans, ordinances, or judicial or administrative decisions, by which a State exerts control over private and public land and water uses and natural resources in the coastal zone."<sup>202</sup>

As should already be evident from the text of the definition alone, there is no one source of a state's enforceable policies. That is because "Congress in enacting and amending the CZMA did not specify any particular form which management programs [should] assume; nor for that matter did it specify the form or manner in which a program [may] fulfill the requirements of ... [the statute]. Wisely or unwisely, it left the details to the Department of Commerce and the states."<sup>203</sup> State law or regulation is not considered an enforceable policy, however, until the Office of Ocean and Coastal Resource Management [hereinafter OCRM] within NOAA approves it as part of the state's CMP.<sup>204</sup> Nevertheless, once approved, a federal agency must navigate through a state's legal and administrative system in order to identify what has been approved by NOAA. The obligation is on the federal agency to determine what enforceable

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fronts and this Court will not compromise our nation's ability to fight and defend itself. Furthermore, it is within the bounds of reason to assume that other rogue nations, such as North Korea and Iran, that have shown both hostility and contempt for the United States, may attempt to exploit any perceived weakness in this country's defenses. In short, a poorly trained Navy in an increasingly hostile and unpredictable global environment is a recipe for national disaster. This Court finds that the public interest necessitates allowing the Navy not only to continue with [the exercise], but to do so in a way that will not compromise its overall training objectives or the safety of its personnel." *Id.* at \*67-68.

<sup>201</sup> See, e.g., Republican Senate Committee, The Impact of Environmental Extremism On Military Readiness: The Encroachment Problem (Apr. 1, 2003), available at, [http://rpc.senate.gov/public/\\_files/DEFENSEdf040103.pdf](http://rpc.senate.gov/public/_files/DEFENSEdf040103.pdf) (last visited May 27, 2008).

<sup>202</sup> 16 U.S.C. § 1453(6a) (2008).

<sup>203</sup> *Knecht*, 456 F. Supp., at 917.

<sup>204</sup> 15 C.F.R. § 930.11(h) (2008).

policies may apply during that agency's consistency determination process.<sup>205</sup> Some states, like California, make the task of finding enforceable policies relatively painless by incorporating their CMP into one body of law.<sup>206</sup> Other states, such as Florida and North Carolina, make the task more challenging by incorporating different bodies of state law, and multiple state agencies, into a CMP.<sup>207</sup>

A reviewer of state enforceable policies may be struck by the incredible degree of generality, almost vagueness, found within some enforceable policies. For example, § 30230 of the California Coastal Act provides: "Uses of the marine environment shall be carried out in a manner that will sustain the biological productivity of coastal waters and that will maintain healthy populations of all species of marine organisms adequate for long-term commercial, recreational, scientific, and educational purposes."<sup>208</sup>

What is meant by "biological productivity" and "healthy populations" is left undefined. NOAA regulations provide that, while State enforceable policies must "contain standards of sufficient specificity to guide public and private uses[,]"<sup>209</sup> they "need not establish detailed criteria such that a proponent of an activity could determine the consistency of an activity without interaction with the State agency."<sup>210</sup> Thus, a federal agency which identifies a state enforceable policy applicable to their activity may nonetheless be unsure as to what is required without further consultation with state officials. This creates at least two sources of potential friction between the state and federal officials. One source of friction is when state policies that are approved by OCRM refer to other policies that are not. Since it was not approved, the referenced policy is not an "enforceable policy" within the meaning of the regulation.<sup>211</sup> In effect,

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

<sup>206</sup> See California Coastal Act, *supra* note 72.

<sup>207</sup> "The Florida Coastal Management Program (FCMP) was approved by NOAA in 1981 and consists of a network of twenty-three (23) Florida Statutes administered by eleven (11) State agencies and four of the five water management districts. Each FCMP State agency must ensure that federal activities within the State comply with the requirements of the specific FCMP statutes and authorities within its jurisdiction." Florida Department of Environmental Protection, [http://www.dep.State.fl.us/secretary/oip/State\\_clearinghouse/manual2.htm#attachments](http://www.dep.State.fl.us/secretary/oip/State_clearinghouse/manual2.htm#attachments)). Florida makes the task more palatable by consolidating much of the otherwise dispersed information in a well organized DEP website. North Carolina's CMP is comprised of the North Carolina "Coastal Area Management Act, the State's Dredge and Fill Law, Chapter 7 of Title 15A of N.C.'s Administrative Code, regulations passed by the Coastal Resources Commission (CRC); local land-use plans certified by the CRC; and a network of other State agencies' laws and regulations." See <http://dcm2.enr.State.nc.us/Permits/consist.htm>.

<sup>208</sup> California Coastal Act, *supra* note 72, at § 30230.

<sup>209</sup> 15 C.F.R. § 930.11(h) (2008).

<sup>210</sup> *Id.*

<sup>211</sup> CZMA Federal Consistency Overview, Office of Ocean and Coastal Resource Management, available at <http://www.coastalmanagement.noaa.gov/consistency/media/FCoverview081007.pdf> at

state CMPs cannot incorporate unapproved laws or regulations by reference. A more contentious issue arises when federal and state officials interpret the enforceable policies differently. NOAA recognized this potential when it promulgated its final rules by noting:

NOAA understands that there may be disagreements between a State agency and Federal agency as to whether a Federal agency is fully consistent with a management program's enforceable policies. This is particularly problematic where the State's policy is broadly worded. ... A State agency may object based on its interpretation of its policies. In such cases, the State may be requiring consistency for an interpretation that is not set forth in the enforceable policies. This does not make the enforceable policy invalid, but it does create a factual issue regarding full consistency.<sup>212</sup>

NOAA goes on to encourage the disputants to resolve their differences through consultation or mediation, but recognizes that, ultimately, it may result in litigation between the federal agency and the state.<sup>213</sup> This lack of definable requirements, subject to varying state interpretation, can lead to another problem. Notably, it may cause significant friction when the state's interpretation of its enforceable policy changes, or, more concerning perhaps, when it applies an enforceable policy in a manner originally not foreseen or approved by OCRM, and which may violate other federal laws.<sup>214</sup>

### III. COASTAL ZONE RESOURCES & MIGRATORY RESOURCES

An issue that readily demonstrates the significant expansion of state's rights under the CZMA is the statute's application to migratory resources. As the name implies, a migratory resource is one that is mobile, such as an animal, but that nonetheless has some nexus to a state's coastal zone. As discussed above, the consistency provisions of the statute come to bear when there is a reasonably foreseeable "effect" on a state's coastal zone resource. Since a migratory resource can be affected outside of the coastal zone, the CZMA applies wherever the migratory resource is affected. Since, by legislative design, there is no geographic limit to the CZMA's jurisdictional reach, application of the CZMA to migratory resources makes the CZMA a statute of nearly limitless geographic scope, tied only to the location of the migratory resource. This is a marked expansion from the initial role envisioned for states when the CZMA was

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<sup>212</sup> *Consistency Regulations*, *supra* note 47, at 77, 142.

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

<sup>214</sup> *See infra* Part IV.

enacted.<sup>215</sup>

The first issue that must be addressed is identifying what constitutes a migratory resource. The CZMA provides that a federal agency must seek a consistency determination when its activity "affects any land or water use or *natural resource*" of the coastal zone.<sup>216</sup> While not defined in the statute, NOAA has defined "natural resource" to include, "biological or physical resources that are found within a State's coastal zone on a regular *or cyclical basis*."<sup>217</sup> NOAA further provides that biological resources include, "fish, shellfish, invertebrates, amphibians, birds, mammals, [and ] reptiles[.]"<sup>218</sup> Therefore, without actually using the terms "migratory," it appears reasonably clear that NOAA intended to include species of animals that are found within a coastal zone as the result of movement, migration, or natural life cycles. To illustrate the applicability of their definition, NOAA stated in its final regulations:

A federal action occurring outside the coastal zone may cause effects felt within the coastal zone (regardless of the location of the affected coastal use or resource). For example, a State's fishing or whale watching industry (which are coastal uses) could be affected by federal actions occurring outside the coastal zone. Thus, the effect on a resource or use while that resource or use is outside of the coastal zone could result in effects felt within the coastal zone.<sup>219</sup>

What few judicial interpretations that have specifically mentioned marine species have held that they fall within the meaning of the term "natural resources." In *Cal. Coastal Comm'n v. Norton*,<sup>220</sup> the Court commented in a footnote that the federally-permitted activity in question would affect the state's coastal zone in part because it involved "3D seismic survey using underwater explosives may permanently injure marine mammals."<sup>221</sup> While the Court did not explicitly hold that marine mammals are a resource of the coastal zone, it would be difficult to read the opinion otherwise. Likewise, in *Blanco v. Burton*,<sup>222</sup> a federal district court found a federal agency consistency determination significantly lacking because it failed to consider new information that became available.<sup>223</sup> This included new population estimates for cetaceans, a revised marine mammal impact analysis, and an updated sea turtle impact

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<sup>215</sup> See *supra* text accompanying notes 22, 23.

<sup>216</sup> 16 U.S.C. §1456(c)(1)(A) (emphasis added).

<sup>217</sup> 15 C.F.R. §930.11(b) (emphasis added).

<sup>218</sup> *Id.*

<sup>219</sup> *Consistency Regulations*, *supra* note 47, at 77,130.

<sup>220</sup> 311 F.3d 1162, 1172 (9th Cir. 2002).

<sup>221</sup> *Id.* at 1172 n.5.

<sup>222</sup> No. 06-3813, 2006 U.S. Dist. LEXIS 56533 (E.D. La. 2006).

<sup>223</sup> *Id.* at \*45-46.

analysis.<sup>224</sup> Again, like *Norton*, the Court did not explicitly declare that marine animals are coastal zone natural resources. Nonetheless, the Court would not have held in such a manner if it thought otherwise.

In discussing migratory resources such as marine mammals and sea turtles, it is important to keep in mind the nature of the migratory patterns of these species because the extent of their migratory habits, some of which are quite extraordinary, defines the potential extent of CZMA jurisdiction. Florida Loggerhead Sea Turtles, for example:

leave their natal beaches and migrate east to the Gulf Stream current. ... The offshore migration is just the first step in a much longer transoceanic migration. By entering the Gulf Stream current, turtles become entrained in the North Atlantic gyre, the circular current system that flows around the [Atlantic Ocean].<sup>225</sup>

Since the Florida Loggerhead Sea Turtle begins its life by hatching, among other places, on Florida beaches, and then returns to Florida as an adult to lay its own eggs, it finds itself in Florida's coastal zone on a cyclical basis. Therefore, it appears that the Florida Loggerhead Sea Turtle is a natural resource of Florida's coastal zone. The question is whether, as a natural resource of Florida's coastal zone, any effect on the sea turtle by a federal activity, regardless how slight, and regardless of where it occurs in the world, is subject to consistency review by Florida. Again, the only limit would be whether the effect is "reasonably foreseeable."

Consider the following hypothetical. What if a NOAA research vessel is scheduled to sail from Florida to Spain and presently is only a few miles off the coast of Florida. Its course crosses over the known migratory route of the Florida Sea Turtle, which has just hatched days before. Is there a reasonably foreseeable chance that this activity will begin a causal chain that can interfere with the migration of young sea turtles? Is NOAA's basic act of sailing its vessel, a core of its basic function as a federal agency, subject to Florida's

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<sup>224</sup> *Id.* at \*46.

<sup>225</sup> *Sea Turtle Migrations: Migratory Route of Florida Loggerheads*, Univ. at N.C. at Chapel Hill, Dept. of Biology, available at <http://www.unc.edu/depts/oceanweb/turtles/>. The migratory patterns of these animals is simply amazing. "The long-distance migrations of sea turtles involve some of the most remarkable feats of orientation and navigation in the animal kingdom. As hatchlings, turtles that have never before been in the ocean establish unerring courses towards the open sea as soon as they enter the water and then maintain their headings after swimming beyond sight of land. Adult turtles of several species migrate across hundreds or thousands of kilometers of open ocean to nest on their natal beaches, which are often isolated stretches of continental shores or tiny, remote islands." citing K. J. Lohmann & C. M. F. Lohmann, *Orientation and Open-Sea Navigation in Sea Turtles*, 199 J. EXPERIMENTAL BIOLOGY 73, 73-81 (1996).

consistency determination? Since the turtle's migratory pattern encompasses the entire Atlantic Ocean, how far from the coast must the vessel be before the causal chain becomes so tenuous that an effect cannot be reasonably foreseeable? In fact, what would an "effect" on the Sea Turtle be? Could it be the change in course of the hatchlings on approach of the vessel (assuming they could even detect the vessel), or perhaps it is the increase in the water's turbidity caused by the ship's wake that may cause some of the newly hatched turtles to become disoriented?

The above hypothetical may very well represent an extreme example. Nevertheless, it demonstrates the potential for excessive, or even abusive, application of the Act. The difficulty in applying the statute is that there is no standard in current CZMA jurisprudence by which to draw a line defining what is reasonable application and what is excessive. It also demonstrates the difficulty in determining what is a reasonably foreseeable effect and what is speculative. Scientific data regarding Sea Turtle behavior would no doubt be vital in making this determination, but what if such data is not available or easily applicable to the facts in issue? It is in this context that the "effects" test as it currently stands becomes more difficult to apply in an easy or predictable manner. As already discussed, the effects test effectively has no geographic limitations when applied to migratory resources. In addition, it does not substantively limit the degree of the effect on these coastal resources. Thus, being able to predict what is a "reasonably foreseeable" effect can become extremely difficult and may lend itself to speculative conclusions.

Another important issue to consider is whether transitory effects on the migratory resource which occur and end outside of the coastal zone, and so are never felt in the coastal zone, fall within the broad scope of the "effects test." This issue was raised by the U.S. Navy in litigation regarding use of active sonar.<sup>226</sup> Essentially, the Navy argued that the use of sonar would, at most, frighten the animals or temporarily change their behavior, but that no permanent injury would result. With the effect starting and ending outside of the coastal zone, the Navy argued, and with no appreciable permanent effect to the species, this activity would not deprive the coastal state of use of the natural resource, is outside of the coastal zone, and should therefore, not be considered an "effect" which triggers the statute.<sup>227</sup> Moreover, the consideration of what is a "temporary" effect is an important question because it encompasses many more activities beyond military. States and organizations have expressed growing concern that the temporary effects caused by more innocuous pursuits, such as whale watching, are having a sufficient impact on marine animals as to warrant

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<sup>226</sup> See *infra* Part II.B.2.

<sup>227</sup> *Id.*

more stringent regulation.<sup>228</sup>

This issue was tentatively addressed in NOAA's promulgation of its 2001 implementing regulations when it stated, "[I]t is possible that a federal action could temporarily affect a coastal resource while that resource is outside of the coastal zone, e.g., temporary harassment of a marine mammal, such that resource impacts are not felt within the coastal zone."<sup>229</sup> What then is a "temporary harassment" of a marine mammal? Unfortunately, NOAA provides no further explanation and no court has addressed the issue.<sup>230</sup> Assuming for a moment that the assertions by the Navy are accurate, and that the only effects resulting from sonar use are temporary behavioral shifts which occur far outside the coastal zone. The animal is otherwise unhurt and, shortly after exposure to the sonar, resumes its normal activities. Is this a "temporary harassment" that, while affecting the migratory resource, does not otherwise injure or impair it, does not impact the state's ability to manage the animal as a natural resource when it is in the coastal zone, and thus never seems to "affect" the coastal zone?

Assuming such a temporary effect is reasonably foreseeable, it would appear that NOAA's caveat would cast this type of temporary event as outside the ambit of the CZMA's consistency requirement. Nevertheless, on its face, NOAA's caveat regarding temporary effects seems to run counter to CZMA consistency law as it currently stands. NOAA's caveat fundamentally rests on the premise that the temporary effect does not trigger the statute's consistency determination because the ultimate effect will not be felt within the coastal zone. This appears to disregard, however, the purpose articulated by Congress for the 1990 Amendments to § 307.<sup>231</sup> The statute as amended very clearly provides, "Each Federal agency activity within *or outside* the coastal zone *that affects* any ... *natural resource* of the coastal zone ..."<sup>232</sup> It does not provide that the effect

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<sup>228</sup> See, e.g., Coastal Commission Comments on the Effects of Anthropogenic Sound on Marine Mammals, Statement for The Report of the Advisory Committee on Acoustic Impacts on Marine Mammals to the Marine Mammal Commission, Dec. 13, 2005, at 13, *available at*, <http://www.coastal.ca.gov/energy/comments-mmcc-12-2005.pdf> (arguing for more action in the face of anthropogenic noise, including that from whale watching, and its effect on marine mammals); John Hildebrand, *Impacts of Anthropogenic Sound on Cetaceans*, *available at*, <http://cetuc.ucsd.edu/projects/pubs/SC-56-E13Hilde.pdf> (last visited May 27, 2008) (noise from whale watching and other local activities may be source of significant local noise sources); MARINE MAMMAL COMMISSION, 2000 ANNUAL REPORT TO CONGRESS (2001), *available at*, <http://www.mmc.gov/reports/annual/pdf/2000annualreport.pdf> (discussing numerous tourism and recreational activities, such as whale and dolphin watching, as potentially constituting harassment of marine mammals).

<sup>229</sup> *Consistency Regulations*, *supra* note 47, at 77,130.

<sup>230</sup> The *NRDC v. Winters* case discussed in Part III comes close to addressing the issue, but ultimately it is clear that the holdings of both the District Court and 9th Circuit Court of Appeals ground their holdings on alleged *permanent* effects to California's coastal zone. See *infra* Part III.

<sup>231</sup> See *supra* note 112.

<sup>232</sup> 16 U.S.C. § 1456(c)(1)(A) (2008) (emphasis added).

must ultimately be felt in the coastal zone. In addition, NOAA's implementing regulations identify the trigger of a consistency determination as an effect, not on the coastal zone, but on the coastal zone's natural resource itself.<sup>233</sup> In other words, the effect that must be considered is the effect on the natural resource *of* the coastal zone, not the natural resource *in* the coastal zone, or even the natural resource *whose ultimate impact* is felt in the coastal zone.<sup>234</sup>

NOAA's transitory effect caveat, however, has far more substance to it than appears at first blush. It is a fundamental canon of statutory construction that a statute must be interpreted to give meaning to the whole, not interpreting individual sections in isolation.<sup>235</sup> In this manner, individual sections are interpreted in a context to ensure that they further the purpose of the entire statute, and are not read in such a manner as to contribute to excesses or illogical outgrowths from what is the core of the statute's design. In the instant case, the CZMA's purpose is to "preserve [and] protect ... the resources of *the coastal zone*[,] "<sup>236</sup> and "to encourage participation ... of ... State ... governments ... in carrying out the purposes of this statute."<sup>237</sup> Thus, it stands to reason that there should be some nexus between the "effect" in question and the coastal zone of the state concerned, even if the effect is not a linear one.<sup>238</sup> There are some activities whose effect is temporary, which start and end outside of the coastal zone, leaving little if any permanent remnant or residue of ever having occurred. For example, a whale moving out of a vessel's path, or the wake of a ship which, once settled, leaves no imprint of the ship's passing. Being of a transitory nature, the effect is never felt in the coastal zone. The effect does not permanently, or even temporarily, impair the state's management of the coastal zone natural resource, does not affect its availability for "succeeding generations,"<sup>239</sup> and, in fact, the temporary effect may never even be noticed. Thus, there is no real effect on the coastal zone resource and, consequently, on the coastal zone itself.

It is doubtful that Congress or NOAA intended, or anticipated, that the CZMA could have such far reaching applicability as to include temporary and

<sup>233</sup> "The term 'effect on any coastal use or resource' means any reasonably foreseeable effect on any . . . resource[.]" 15 C.F.R. § 930.11(g) (2008).

<sup>234</sup> Thus, taken to its logical extreme, the effects test as it is articulated above would subject nearly any and all federal agency activities to a state's consistency determination, without geographic limit, if there are any reasonable and foreseeable effects on a migratory resource of a coastal zone, regardless how trivial or temporary, and regardless where the effect began and ended.

<sup>235</sup> *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291(1988) ("In ascertaining the plain meaning of the statute, the court must look to the particular statutory language at issue, as well as the language and design of the statute as a whole").

<sup>236</sup> 16 U.S.C. § 1452(1) (2008) (emphasis added).

<sup>237</sup> 16 U.S.C. § 1452(4) (2008).

<sup>238</sup> 15 C.F.R. § 930.11(g) (2008).

<sup>239</sup> 16 U.S.C. § 1452(1) (2008).

inconsequential effects that may occur to migratory resources far outside the coastal zone. This is likely because of the very purpose of the CZMA itself. The history of its enactment shows that the "the [Legislature] considered the interests of the groups that brought coastal zone concerns to the fore: advocates of outdoor recreation, marine resource development, estuarine protection, and land use policy. Of these four, the development and land use interests ultimately proved most influential[.]"<sup>240</sup> The statute itself embodies these conflicting demands, of resource protection and concurrent exploitation, by enumerating, in pertinent part, the national policy behind the act:

(a) to preserve, protect, *develop*, and where possible, to restore, to enhance, the resources of the Nation's coastal zone for this and succeeding generations,

(b) to encourage and assist the State ... in the ... development and implementation of management programs to achieve the *use of the land and water resources* of the coastal zone giving full consideration to ecological, cultural, historic, and esthetic values *as well as to needs for economic development, ...*<sup>241</sup>

The CZMA was not intended to be a marine or species conservatory statute akin to the MMPA<sup>242</sup> or Endangered Species Act,<sup>243</sup> but to introduce procedures for responsible development and exploitation of the coastal zone. In effect, the CZMA was intended to encourage more responsible land use planning by the states, and the concept of migratory resources was not a significant consideration at the time of the statute's enactment.<sup>244</sup>

In a judicial context, the issue of CZMA application to migratory resources has been addressed, until recently, only in passing.<sup>245</sup> In both the *Norton* and *Blanco* cases, the activity in question was related to offshore mineral exploration and the impact on marine mammals was mentioned as one of many considerations addressed by the courts.<sup>246</sup> These cases dealt primarily with federally permitted activities that were fixed to relatively static locations, if not

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<sup>240</sup> Lieutenant Patrick J. Gibbons, *Too Much of a Good Thing? Federal Supremacy & the Devolution of Regulatory Power: The Case of the Coastal Zone Management Act*, 48 NAVAL L. REV. 84, 90 (2001).

<sup>241</sup> 16 U.S.C. § 1452(a) and (b) (2008) (emphasis added).

<sup>242</sup> 16 U.S.C. § 1362 *et seq* (2008). It should be noted that the MMPA itself sought species preservation not purely for the sake of preservation, but to support the economic benefit derived from these animals. 16 U.S.C. § 1361(6) (2008).

<sup>243</sup> 16 U.S.C. § 1531 *et seq* (2008).

<sup>244</sup> See generally, Zile, *supra* note 24.

<sup>245</sup> See *supra* text accompanying notes 220 through 222.

<sup>246</sup> *Norton*, 311 F.3d at 1172 n.5; *Blanco*, 2006 U.S. Dist. LEXIS, at \*46.

necessarily within the state's coastal zone, at least within the Exclusive Economic Zone [hereinafter EEZ] of the United States,<sup>247</sup> thus making their potential impact on the coastal zone, ecologically and economically, more directly felt.<sup>248</sup> Nevertheless, these cases do not necessarily break new ground. They were entirely in line with an underlying legislative motivation behind the 1990 amendments, which was to recognize "the importance of the coastal states in the management of the territorial sea and [EEZ]."<sup>249</sup> Hence, as Congress was focused on cases involving lease sales at fixed sites on the OCS, the Congressional record is understandably barren of any evidence the legislature ever considered the interaction of the statute's amendments as it would specifically apply to mobile migratory and transitory resources.

#### IV. MIGRATORY RESOURCES AND MILITARY ACTIVITIES

At the time this article is written, there are four pending lawsuits against the U.S. Navy involving the use of active sonar.<sup>250</sup> Arguably, the case that provides the most substance with regard to CZMA analysis, including the first use of a Presidential exemption, is the case of *Natural Resource Defense Counsel v. Winter*<sup>251</sup> which originated in the District Court for the Southern

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<sup>247</sup> The Exclusive Economic Zone, established by the U.N. Convention on the Law of the Sea, is that area of water 200 nautical miles from the baseline where a nation has enhanced rights to regulate environmental, immigration, resource exploitation, and customs. United Nations Convention on the Law of the Sea, part V, U.N. Doc. A/CONF/62/122, 21 I.L.M. 1261 (Dec. 10, 1982). See *Exclusive Economic Zone and Maritime Boundaries*; Notice of Limits, 60 Fed. Reg. 43,825 (Aug. 23, 1995).

<sup>248</sup> *Id.* See also, *Friends of the Earth*, 841 F.2d 927 (challenge to substantial improvements to naval base); *California Coastal Commission v. Navy*, 5 F. Supp. 2d 1106 (S.D. Cal. 1998) (challenge to Navy ocean disposal of 500,000 cubic tons of ordnance-laden dredge material originally intended for beach replenishment as inconsistent with California CMP).

<sup>249</sup> Edward A. Fitzgerald, *California Coastal Commission v. Norton: A Coastal State Victory in the Seaweed Rebellion*, 22 UCLA J. ENVTL. L. & POL'Y 155 (2004). "Because of their proximity to and reliance upon the ocean and its resources, coastal states have substantial and significant interests in the protection, management, and development of the resources of the exclusive economic zone that can only be served by the active participation of coastal states in all Federal programs affecting such resources and, wherever appropriate, by the development of State ocean resource plans as part of their federally approved coastal zone management programs." 16 U.S.C. § 1451(m) (2008).

<sup>250</sup> *NRDC I*, 2008 U.S. Dist. LEXIS 8110, at \*5. As the Court noted, "In 2005, the NRDC filed suit challenging the sufficiency of the Navy's compliance with environmental laws, with respect to its sonar use. *Natural Res. Def. Council v. Winter*, CV 05-7513 . . . (C.D. Cal.). That case is ending. In June 2006, the same plaintiffs filed suit against the same defendants, seeking to enjoin the Navy from using MFA sonar during its Rim of the Pacific (RIMPAC) war games. *Natural Res. Def. Council v. Winter*, CV 06-4131 . . ., (C.D. Cal.). Following this Court's order granting Plaintiffs' application for a temporary restraining order, the parties entered into a settlement agreement. *Id.*, Temporary Restraining Order (July 3, 2006). . . . In 2007, the California Coastal Commission (Coastal Commission) (intervenor in the present case) filed suit against the Navy. That suit has been stayed pending resolution of the appeal in this case. *Cal. Coastal Comm'n v. U.S. Dep't of the Navy*, CV 07-1899 . . ., (C.D. Cal.)." *Id.*

<sup>251</sup> 2007 U.S. Dist. LEXIS 57909 (C.D. Cal. Aug. 6, 2007), *stay granted by*, 502 F.3d 859 (9th Cir. 2007), *stay vacated by, remanded by*, 508 F.3d 885 (9th Cir. 2007), *appeal after remand at*,

District of California.<sup>252</sup>

### A. Federal Activity, Migratory Resources, and Litigation

The Navy and Marine Corps conduct comprehensive and extensive fleet readiness exercises needed to ensure that they are ready to deploy.<sup>253</sup> These exercises are known as Composite Training Unit Exercises [hereinafter COMPTUEX]<sup>254</sup> and Joint Task Force Exercises [hereinafter JTFEX]<sup>255</sup> and, on the west coast, are conducted "at military installations and operating areas ... in the southwestern United States and offshore of Southern California."<sup>256</sup> A single COMPTUEX can involve upwards of 10 surface ships, including an aircraft carrier, three submarines, 100 aircraft, and 8,000 personnel.<sup>257</sup> In the Western United States, these exercises are conducted at the Southern California (SOCAL) Range Complex.<sup>258</sup> Military forces have been training in the SOCAL

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*remanded by*, 2008 U.S. App. LEXIS 1423 (9th Cir. 2008), *rehearing at, injunction issued*, 2007 U.S. Dist. LEXIS 95983, *rehearing at, stay of injunction vacated*, 2008 U.S. Dist. LEXIS 8110 (C.D. Cal. 2008)[hereinafter *NRDC I*], *affirmed*, No. 08-55054, 2008 U.S. App. LEXIS 4504 (9th Cir. Feb. 29, 2008) [hereinafter *NRDC II*].

<sup>252</sup> Although the District Court's final opinion was reviewed and affirmed by the Court of Appeals, the Court declined to finally rule on the CZMA issues as a result of the Presidential exemption issued in response to this case. While the District Court entered into a lengthy discussion regarding the Constitutionality of the exemption as applied, it declined to rule on the matter. As such, the Circuit Court declined to finally consider the CZMA issues and rested their affirmation of the preliminary injunction on NEPA grounds. *NRDC II*, 2008 U.S. App. LEXIS 4504, at \*5 n3 ("Because the district court did not rule on the likelihood of success of plaintiffs' CZMA claim in light of the President's exemption, we decline to reach that issue.").

<sup>253</sup> DEP'T OF THE NAVY, COMPOSITE TRAINING UNIT EXERCISES AND JOINT TASK FORCE EXERCISES ENVIRONMENTAL ASSESSMENT/OVERSEAS ENVIRONMENTAL ASSESSMENT, at ES-1 (2007) [hereinafter *COMPTUEX/JTFEX EA*].

<sup>254</sup> *Id.* "COMPTUEX is in the Integrated Phase of the FRTP and may involve either a Carrier Strike Group (CSG) or an Expeditionary Strike Group (ESG). A COMPTUEX is conducted as a series of scheduled training events that occur according to a given time schedule against an opposition force. The COMPTUEX provides an opportunity for the Strike Group to become proficient in the myriad of required warfare skill sets. Additionally, it stresses the integration or coordination of the different warfare areas and provides realistic training on in-theater operations. The COMPTUEX is normally more structured than the JTFEX, so it is longer in duration." *Id.*

<sup>255</sup> *Id.* "JTFEX is . . . a scenario-driven, at-sea training exercise designed to evaluate the Strike Group's preparedness for forward deployed contingency and combat operations. JTFEX also utilizes a simulated (mock) opposition force and serves as the venue for ... [the] ... Fleet to assess the readiness, interoperability, and proficiency of naval forces in realistic, free-play scenarios, ranging from military operations other-than-war to armed conflict. As the final certification event of the FRTP, the Strike Group must demonstrate the ability to operate and integrate into a Joint Operations Area under simulated austere, hostile conditions." *Id.* at ES-1, 2.

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

<sup>257</sup> *Id.* at 2-7.

<sup>258</sup> *Id.* at ES-2. The geographic scope of these exercises, and the Range Complex itself, is extraordinary and cuts across all services and numerous installations. For example, U.S. Navy installations include Southern California Operating Areas (SOCAL OPAREAs), San Clemente Island Range Complex (SCIRC), Naval Base (NB) Coronado, CA, Point Mugu Sea Range (PMSR), NB

Range Complex for over 70 years<sup>259</sup> and "supports the largest concentration of naval forces in the world."<sup>260</sup> Use of the SOCAL area is no accident. "SOCAL's unique land and undersea geographic features, close proximity to existing naval bases, and diverse range capabilities, possess elements necessary for effective, integrated training for air, land, sea, and undersea warfare."<sup>261</sup>

The training of naval forces is conducted under the authority of 10 U.S.C. § 5032, which provides:

(b) Under the authority, direction, and control of the Secretary of the Navy, the Office of the Chief of Naval Operations shall--

(1) . . . prepare for such employment of the Navy, and for such recruiting, organizing, supplying, equipping . . ., training, servicing, mobilizing, demobilizing, administering, and maintaining of the Navy[.]<sup>262</sup>

Under this organic legislation, the training clearly falls within the definition of "agency activity" of the CZMA. Moreover, the statute provides for broad discretion in the manner which the Secretary of the Navy, through the Chief of Naval Operations, must implement 10 U.S.C. § 5032 in preparing and maintaining effective naval forces. As noted above, there are no military or defense training exemptions in the CZMA or NOAA regulations,<sup>263</sup> and there is no statutory exemption to CZMA applicability in Title 10 of the U.S. Code. Therefore, this training is subject to a consistency determination to ensure that the training is conducted in a manner that is consistent to the "maximum extent

Ventura County, CA, China Lake Range, Naval Air Weapons Station (NAWS) China Lake, CA, Fallon Range Training Complex (FRTC), and Naval Air Station (NAS) Fallon, NV. U.S. Marine Corps installations include Marine Corps Base (MCB) Camp Pendleton, CA, Marine Corps Air Ground Combat Center (MCAGCC), Twentynine Palms, CA, Marine Corps Air Station (MCAS) Miramar, CA, Bob Stump Training Range Complex (BSTRC), CA and AZ. U.S. Air Force installations include Nevada Test and Training Range (NTTR), Nellis Air Force Base (AFB), NV, Vandenberg AFB, CA. The U.S. Army installation includes the National Training Center (NTC), Fort Irwin, CA. *Id.* at 1-1.

<sup>259</sup> "Historically, major range exercises in the SOCAL OPAREA date back to before World War II. With the transfer in 1934 of San Clemente Island (SCI) from the Department of Commerce to the Department of the Navy, U.S. Fleet Landing Exercises consisting of heavy naval gunfire, air strikes and Battalion-sized amphibious landings occurred in Southern California." *Id.*

<sup>260</sup> COMPTUEX/JTFEX EA, *supra* note 253, at 1-2.

<sup>261</sup> *Id.* The Navy subjects the SOCAL Range Complex to ongoing training. "SOCAL OPAREA uniquely supports training requirements in all warfare areas. In fact, there is no other range complex on the West Coast where a preponderance of military units can simultaneously train in Electronic Warfare (EW), Anti-Submarine Warfare (ASW), Mine Warfare (MIW), Command and Control Warfare (C2W), Air Warfare (AW), Surface Warfare (SUW), Strike Warfare (STW), Amphibious Warfare (AMW), Naval Special Warfare (NSW), and accomplish Fleet Carrier Landing Practice without having to deploy from their home station." *Id.*

<sup>262</sup> 10 U.S.C. § 5032 (2008).

<sup>263</sup> *See Consistency Regulations, supra* note 47, at 36.

practicable" with the enforceable policies of the affected states if the training triggers the effects test.

The exercises are comprised of multiple events that occur both within California's coastal zone, and outside the coastal zone that will nonetheless affect the coastal zone in some fashion, and whose effect is reasonably foreseeable. This includes amphibious operations,<sup>264</sup> naval surface fire support,<sup>265</sup> ship mine countermeasures operations,<sup>266</sup> demolition operations,<sup>267</sup> and mining operations.<sup>268</sup> Consequently, the Navy submitted its consistency determination to the Coastal Commission for these events, finding that its activities were consistent with California enforceable policies.<sup>269</sup> In a supplemental staff analysis, a concern was raised by the Coastal Commission over the impact on marine mammals that could be caused by the use of Mid Frequency Active Sonar [hereinafter MFAS].<sup>270</sup> The use of MFAS was not submitted by the Navy for a consistency determination for two reasons.

First, the Navy noted that MFAS use would occur "beyond 80 nautical miles from shore."<sup>271</sup> Second, the Navy offered that the use of MFAS, and its potential impact on marine mammals, was conducted under the supervision of

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<sup>264</sup> "Amphibious operations involve the movement of Marine Corps combat and support forces from Navy ships at-sea to an objective or an operations area ashore. Amphibious operations may include shore assault, boat raid, airfield seizure, humanitarian assistance, and force reconnaissance." COMPTUEX/JTFEX EA, *supra* note 253, app. O, at 8.

<sup>265</sup> "NSFS operations involve naval surface ships with ... naval gun firing system[s], engaging land and surface targets. NSFS operations are an annual requirement for all naval vessels outfitted with the 5-inch gun system. NSFS is conducted against land targets... . Because ships are firing from sea to land targets ..., the public is restricted in the offshore portion of SHOBA, called Fire Support Area (FSA), during the live-firing portion of the operations. However, the cumulative time that ships are actually firing weapons during these operations is extremely short." *Id.*

<sup>266</sup> "MCM Operations train forces to locate and neutralize inert (non-explosive) mine shapes in shallow-water environments in support of the CSG and ESG. A typical exercise would involve bottom-laid explosive and mid- water column explosive training evolutions." *Id.*

<sup>267</sup> "DEMO provides training in the identification and neutralization or destruction of inert floating or moored mines. This training includes hydrographic reconnaissance of approaches to prospective landing beaches; demolition of obstacles and clearing mines; locating, improving, and marking of useable channels; channel and harbor clearance; and acquisition of operational intelligence during pre-assault operations." *Id.* app. O, at 9.

<sup>268</sup> "Mining Operation consists of airborne mine-laying. The aircraft drop a series of (usually four), non-explosive inert training shapes (MK-76, bomb dummy unit [BDU] 45, or BDU 48) in the water. The aircraft may make multiple passes on the same flight pattern, dropping one or more shapes each pass. The shapes are scored for accuracy as they enter the water. The training shapes are inert and recovered at the end of the operation." *Id.*

<sup>269</sup> COMPTUEX/JTFEX EA, *supra* note 253, app. O, at 8. The Navy's consistency determination identified §§ 30210, 30230, 30231, 30234.5, and 30244 of the California Coastal Act as the enforceable policies applicable to the proposed exercises. *Id.*

<sup>270</sup> *Id.* app. O (California Coastal Commission, Revised Staff Recommendation on Consistency Determination, at 1).

<sup>271</sup> *Id.*

the National Marine Fisheries Service [hereinafter NMFS], and, in coordination with that agency, the Navy established 29 different mitigation measures it claimed lessened or eliminated much of the potential impact from MFAS.<sup>272</sup> These measures included trained lookouts, powerful optic binoculars and night vision equipment to look for marine mammals in the vicinity of the exercise, restrictions on the use of aircraft detection equipment, establishment of safety zones that trigger reductions in sonar power, and aircraft reconnaissance of an area for marine mammals up to 10 minutes before the use of MFAS.<sup>273</sup> In addition, the Navy was required to report the effect of these measures, and any impact on marine mammals to include any strandings, to NMFS and NOAA's Office of Protected Resources<sup>274</sup> [OPR] at the conclusion of the exercises.<sup>275</sup> Based on these two considerations, the Navy concluded that the use of MFAS, occurring far offshore and conducted under the auspices of NMFS, would not have a reasonably foreseeable effect on California's coastal zone.<sup>276</sup> The Coastal Commission disagreed and this disagreement eventually resulted in the Coastal Commission and the Natural Resource Defense Counsel [hereinafter NRDC] filing suit against the Navy, claiming violations of numerous environmental statutes, besides the CZMA.<sup>277</sup>

### B. Active Sonar and the Effects Test

One of the main points of disagreement between the litigants, at least regarding the CZMA,<sup>278</sup> is whether the use of MFAS in the proposed exercises would affect the natural resources of California's coastal zone.<sup>279</sup> The District Court agreed with the Plaintiffs that it would.<sup>280</sup> The Plaintiffs<sup>281</sup> alleged that the

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<sup>272</sup> *Id.* at 5-2. It is not clear from the EA what criteria were used in creating the mitigation measures, or exactly what role NMFS played in their development.

<sup>273</sup> *Id.*

<sup>274</sup> The Office of Protected Resources (OPR) is a headquarters program office of NOAA's National Marine Fisheries Service (NOAA Fisheries Service, or NMFS), under the U.S. Department of Commerce, with responsibility for protecting marine mammals and endangered marine life. *See* NOAA Fisheries, Office of Protected Resources, <http://www.nmfs.noaa.gov/pr/>.

<sup>275</sup> *COMPTUEX/JTFEX EA*, *supra* note 253, at 5-4.

<sup>276</sup> *Id.* app. O (Navy Response to Coastal Commission Revised Staff Recommendation at 2 (Feb. 12, 2007)).

<sup>277</sup> *NRDC v. Winter*, 2007 U.S. Dist. LEXIS 57909 (C.D.C.A. 2007); *Cal. Coastal Comm'n v. U.S. Dep't of the Navy*, CV 07-1899 FMC (FMOx) (C.D. Cal. 2007). The complaint filed by the Coastal Commission has been held in abeyance pending the resolution of the case involving NRDC since the Coastal Commission has joined that case as intervenor. *See supra* note 229.

<sup>278</sup> The litigation has focused extensively on whether the Navy has complied with the National Environmental Policy Act, 42 U.S.C. § 4321 *et seq.*, and less on the Endangered Species Act.

<sup>279</sup> *NRDC I*, 527 F. Supp. 2d, *supra* note 251, at 1216, 1221.

<sup>280</sup> *NRDC v. Winter*, 2007 U.S. Dist. LEXIS 57909, at \*28.

<sup>281</sup> "Plaintiffs (hereinafter referred to as "Plaintiffs" or "NRDC") are: the NRDC, the International Fund for Animal Welfare, Cetacean Society International, League for Coastal Protection, Ocean Futures Society, and Jean-Michel Cousteau. The California Coastal Commission (Coastal Commission) has intervened." *NRDC I*, 527 F. Supp. 2d, *supra* note 251, at 1221 n.1.

use of MFAS would have substantial adverse effects on thousands of marine mammals<sup>282</sup> by causing high-pressure underwater sound waves that would harm marine life, to include the death of marine mammals.<sup>283</sup> In support of their complaint, the Plaintiffs, in addition to evidence from their own experts, relied on the Navy's Environmental Analysis<sup>284</sup> [hereinafter EA] for the proposed exercises.<sup>285</sup> The EA contained extensive analysis regarding the effects of MFAS on various species of marine species.<sup>286</sup> The analysis in the EA was couched in terms of "Level A" and "Level B" takes.<sup>287</sup> This tiered concept of "takes" is not a characteristic of the CZMA, but it is one of the core structures of the MMPA in defining "harassment" of marine mammals.<sup>288</sup> Regardless of its origin, the terminology was used as a convenient vehicle by both the Plaintiffs and the court in analyzing the potential effects on various marine species.<sup>289</sup>

<sup>282</sup> *Id.* at 1221.

<sup>283</sup> *Id.* at 1219. For an explanation of sonar, the different types, and its uses in military operations, the Navy maintains a sonar website, which includes a significant collection of scientific material collected from various educational institutions. See Dep't of the Navy Ocean Stewardship at <http://www.navy.mil/oceans/index.asp>. See also, Amy E. Nevala, *The Sound of Sonar and the Fury about Whale Strandings: Navy and Scientists Join Efforts to Learn About More Marine Mammals' Response to Sonar*, OCEANUS MAGAZINE, Feb. 15, 2008 (discussing Navy-funded scientific research to determine nexus between sonar use and marine mammals).

<sup>284</sup> COMPTUEX/JTFEX EA, *supra* note 253.

<sup>285</sup> *NRDC I*, 527 F. Supp. 2d, *supra* note 251, at 1219-1220.

<sup>286</sup> COMPTUEX/JTFEX EA, *supra* note 253, at ch. 4.

<sup>287</sup> *Id.*

<sup>288</sup> 16 U.S.C. §1362(18)(C), (D). The MMPA defines these "takes" by referring to the definition of "harassment" in the statute. A "Level A" take is "harassment" that "has the potential to injure a marine mammal ...; or ... [in the case of a military readiness activity or scientific research activity] has the potential to disturb a marine mammal ... by causing disruption of behavioral patterns, including, but not limited to, migration, breathing, nursing, breeding, feeding, or sheltering." 16 U.S.C. §1362(18)(A). A "Level B" take is "harassment" that "has the potential to disturb a marine mammal ... by causing disruption of behavioral patterns, including, but not limited to, migration, breathing, nursing, breeding, feeding, or sheltering." Like Level A harassments, Level B provides a different definition for "military readiness activities or scientific research activity." For these activities specifically, a Level B take is defined as, "any act that disturbs or is likely to disturb a marine mammal or marine mammal stock in the wild by causing disruption of natural behavioral patterns, including, but not limited to, migration, surfacing, nursing, breeding, feeding, or sheltering, to a point where such behavioral patterns are abandoned or significantly altered." 16 U.S.C. §1362(18)(B)(ii) (emphasis added to highlight difference in military and scientific Level A and Level B takes).

<sup>289</sup> It can be inferred that the EA's analysis with regard to levels of "takes" was created specifically for compliance with the MMPA. This inference is supported by the fact that the Report's finding of no adverse effects to marine species stocks was included in the section discussing compliance with the MMPA. In fact, this section contains a conclusory final sentence that does not appear to flow naturally within the section. This final sentence states, "Compliance with the Marine Mammal Protection Act (MMPA) for mid-frequency active sonar is satisfied due to the issuance on January 23, 2007, of a National Defense Exemption (NDE) from the Requirements of the MMPA for Certain DoD Military Readiness Activities." This sentence would arguably render the "no adverse" finding somewhat irrelevant because, if the exemption applied, then no finding is required at all. It is possible that, considering that the DOD exemption was enacted one month before the date of the completed report, the sentence was added last minute to the report to document compliance resulting

The EA's analysis concluded that there would be an estimated 4,080 Level B takes and 233 Level A takes per annum.<sup>290</sup> The Level B harassment included an effect called "temporary threshold shift," which is a temporary physiological effect, such as a shift in the mammals' hearing, but specifically excludes any tissue damage to the animal.<sup>291</sup> Consequently, the District Court concluded that, over a two year period, there would be "approximately 8,000 exposures powerful enough to cause a temporary threshold shift in the affected mammals' sense of hearing and an additional 466 instances of *permanent injury* to beaked and ziphiid whales."<sup>292</sup> In analyzing the CZMA effects test, the Court focused primarily on two considerations: 1) the geographic scope of the potential effect; and 2) the consequence on the effects test regarding any alleged temporary nature of the effect.<sup>293</sup>

### 1. Geographic Scope

The court concluded that there was no geographic limitation that would have relieved the Navy from having to obtain a consistency determination from the Coastal Commission. The court's analysis addresses two distinct geographic issues; agency activities conducted outside the coastal zone, but whose effects migrate into the coastal zone itself, and situations where the activity and effect occur entirely outside the coastal zone.

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from the exemption. If this were the case, it would be ironic that the comprehensive MMPA analysis that is relied on so heavily and successfully to date by Plaintiffs in their case against the Navy was compiled unnecessarily. COMPTUEX/JTFEX EA, *supra* note 253, at ES-5.

<sup>290</sup> COMPTUEX/JTFEX EA, *supra* note 253, at 4-47.

<sup>291</sup> *Id.* at 4-22.

<sup>292</sup> *NRDC v. Winter*, 2007 U.S. Dist. LEXIS 57909, at \*4 (emphasis added). The Court in *NRDC v. Winter* repeatedly refers to "over 8,000" Level B takes and 466 Level A takes. The Navy EA covered a two year period of exercises, while the data looked at cumulative impacts. The Court logically doubled the annual data to determine the potential effects on marine mammals for the entire two-year course of exercises.

<sup>293</sup> A third issue was addressed by the Court in lesser fashion in response to arguments offered by the Navy. The Court briefly considered the extent the effects test in the CZMA extends to individual mammals, versus the natural resource as a whole. *NRDC v. Winter*, 2007 U.S. Dist. LEXIS 57909, \*29. *See also*, Federal Defendant-Appellant's Brief at 59, *NRDC v. Winter*, (No. 07-56157). The Court first held that the CZMA does not require population-level effects, but applies to individual mammals. *NRDC v. Winter*, 2007 U.S. Dist. LEXIS 57909, \*29, *citing Norton*, 311 F.3d at 1172 n.5. The Court went on to address population-level effects by holding, "Moreover, Plaintiffs have presented evidence that the use of MFA sonar can detrimentally impact entire populations of species, given its potential to disrupt feeding and mating as well as damaging marine mammals' primary sense." *NRDC v. Winter*, 2007 U.S. Dist. LEXIS 57909, at \*29. Considering the expansive scope of the "effects" test, it appears that the distinction between "individual" and "population-level" effects is somewhat semantic. If the federal agency activity will have an effect on a marine mammal, and that mammal is a resource of the coastal state, then it is an effect on the resource, even if that effect may be *de minimis* when compared to the population as a whole. As noted above, since there is no *de minimis* exception in the CZMA's implementing regulations, it is difficult to see a Court willing to adopt such a distinction under the current state of the law. *See supra* Part II.B.3.(a).

Regarding the first issue, the court concluded that MFA sonar, even when used outside of California's coastal zone, has the potential to travel, or 'bleed into,' the coastal zone itself.<sup>294</sup> This would therefore represent a direct effect on the coastal zone.<sup>295</sup> In addition, the court went on to state that, regardless whether or not sonar waves would enter the coastal zone, a "consistency review is triggered regardless of where the harm occurs if it affects coastal resources, which include marine mammals that are periodically within the coastal zone."<sup>296</sup> With the geographic consideration addressed, the court proceeded to analyze whether there would be an effect in this case.

## 2. Temporary versus Permanent Effects

The Navy argued that the effects resulting from MFAS would have been temporary in nature and would have not have been felt within the coastal zone.<sup>297</sup> In other words, the alleged effect would have started and ended outside the coastal zone. As discussed above, this is the type of temporary effect envisioned by NOAA as potentially not falling within the ambit of the CZMA.<sup>298</sup> Unfortunately, the court declined to address this unsettled area of the law. Instead, the court held that, even if temporary effects outside the coastal zone do not fall within the ambit of the CZMA, "the use of MFA sonar during the SOCAL exercises will cause 466 instances of *permanent* injury to beaked and ziphiid whales."<sup>299</sup> Having recognized a likelihood of permanent injury, the court declined the invitation to analyze temporary effects.

Unfortunately, the court missed an opportunity to address this open question, especially considering that the court's analysis of permanent injury is somewhat incomplete, because it is based on an inaccurate reading of the data in the Navy's EA. The EA does conclude that there may be 225 Level A takes to

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<sup>294</sup> *Id.* at \*27.

<sup>295</sup> This conclusion, while logically reasonable, is somewhat questionable in this particular case. MFAS has "typical ranges of 1-10 nautical miles." Dep't of the Navy, Ocean Stewardship, Understanding Sonar, *available at* <http://www.navy.mil/oceans/sonar.html> (last visited May 29, 2008). The use of MFAS in the instant exercises, however, "would only occur ..., for the most part, beyond 80 nautical miles from shore." COMPTUEX/JTFEX EA, *supra* note 253, at app. O (California Staff Recommendation, at 2). "In no case was MFAS use planned for closer than 12 nautical miles." Brief for Federal Defendant-Appellants at 51, *NRDC v. Winter*, 508 F.3d 885 (9th Cir. 2007). Since it appears that the Navy's activities would have been too far from the coast for its sonar to have migrated into the coastal zone itself, the Court's reliance on this determination in this case is suspect.

<sup>296</sup> *Id.* at \*27, *citing*, 16 U.S.C. § 1456(c)(1)(A) (2008).

<sup>297</sup> Federal Defendant-Appellant's Brief at 58, *NRDC v. Winter*, 508 F.3d 885 (9th Cir. 2007) (No. 07-56157).

<sup>298</sup> *See supra* note 229.

<sup>299</sup> *NRDC v. Winter*, 2007 U.S. Dist. LEXIS 57909, at \*28 (emphasis added).

beaked and ziphiid whales;<sup>300</sup> a Level A take meaning "harassment" that "has the potential to injure a marine mammal ..."<sup>301</sup> This is in contrast to Level B takes, which have "the potential to disturb a marine mammal ... by causing disruption of behavioral patterns..."<sup>302</sup> The EA's analysis of Level A takes for beaked and ziphiid whales, however, carries an important qualification. The EA qualifies this data by stating, "All predicted Level B exposures for beaked whales are counted as Level A[.]"<sup>303</sup> In fact, the Report states more clearly, "Although modeling predicts *non-injurious* Level B exposures, all beaked whale exposures are counted as Level A."<sup>304</sup> In effect, the drafters of the EA treated temporary effects on Beaked whales as artificial permanent effects. The Report justifies this artificial re-characterization as an exercise in caution because of the overall lack of scientific data surrounding the Beaked Whale.<sup>305</sup>

Thus, when this qualification is considered, the Report's data concludes that there will be 8 cases of possible permanent injury or significant harassment of the common dolphin, and none the Beaked and Ziphiid Whales.<sup>306</sup> While I do not suggest that the potential injury of eight animals is to be ignored as unimportant, this significant reduction in numbers of potential permanent effects could have led the court to a very different conclusion regarding the effects test, as well as a more thorough analysis of the "temporary effects" question, and could have resulted in a different outcome when the court balanced the weight of the respective parties' injuries. In addition, it demonstrates the difficulty of using criteria of one statute, whose terms of art are specific to its regime, to

<sup>300</sup> COMPTUEX/JTFEX EA, *supra* note 253, at 4-47.

<sup>301</sup> 16 U.S.C. § 1362(18)(A) (2008). The Court failed to discuss the provisions in the MMPA that specifically apply to military preparedness activities and scientific research. The MMPA identifies a higher threshold for these activities to qualify as a Level A take. The pertinent part of the statute provides, "or ... [in the case of a military readiness activity or scientific research activity] has the potential to disturb a marine mammal ... by causing disruption of behavioral patterns." *Id.*

<sup>302</sup> 16 U.S.C. § 1362(18)(B)(ii) (2008). Level B provides a different definition for "military readiness activities or scientific research activity." For these activities specifically, a Level B take is defined as, "any act that disturbs or is likely to disturb a marine mammal or marine mammal stock in the wild by causing disruption of natural behavioral patterns, including, but not limited to, migration, surfacing, nursing, breeding, feeding, or sheltering, to a point where such behavioral patterns are abandoned or significantly altered." *Id.*

<sup>303</sup> COMPTUEX/JTFEX EA, *supra* note 253, at 4-47.

<sup>304</sup> *Id.* at 4-55 (emphasis added).

<sup>305</sup> *Id.* The EA does offer that because of "the anatomy of the ears of beaked whales, these species may be more sensitive than other cetaceans to low frequency sounds; however, as noted earlier, there is no direct evidence to support this idea." *Id.* at 4-55, 56 (citation omitted). This factual inconsistency in the District Court's opinion was specifically addressed by the Circuit Court, which, unlike the District Court, acknowledged the different treatment in the EA of that particular species. It found that the circumstantial evidence indicating that beaked whales are more susceptible to adverse effects from sonar even if that connection could not yet be scientifically established. Therefore, it was appropriate to treat the beaked whale takes as "level A." *II*, 518 F.3d 659 (9th Cir. 2008), at 666-668.

<sup>306</sup> *Id.* at 4-47.

determine the applicability and scope of another, wholly distinct, statute. Finally, it penalizes the federal agency's cautionary approach. By artificially elevating the characterization of certain non-injurious effects in its EA in order to be more prudent in its ultimate analysis, it created a body of information which was improperly interpreted by the court, and this interpretation contributed to the injunction against the agency's activities.

In sum, the outcome of this case reinforces the premise that the CZMA's application has grown in marked fashion from its initial enactment. It has grown from a statute that was primarily concerned about responsible coastal zone economic development, into a statute limiting federal activities of a unique national flavor, such as military training exercises during times of war. In addition, it demonstrates the coastal state's ability to control activities whose occurrence is far outside the coastal zone, with effects that may be little felt in the coastal zone itself.

## **V. CZMA APPLICATION TO MARINE MAMMALS AND THE MMPA PREEMPTION**

The emerging use of the CZMA by states to regulate the effects on marine mammals may be in conflict with the MMPA, which preempts states from engaging in such regulation. This issue, however, is more complex than would otherwise be the case in a conventional preemption analysis. The complicating factor is that, although the California Coastal Act is state law, it is enacted pursuant to a federal law. The CZMA paradigm, as intended by Congress, is one of a joint federal and state cooperative program and there are few judicial determinations governing this unique hybrid of state/federal regulation when such a regime may be in conflict with a more exclusive federal statute.

There are three ways in which state law may be preempted. The first, and most obvious, is when Congress explicitly preempts state law by "express statement."<sup>307</sup> The second is when Congress enacts legislation that so occupies a field, it leaves no room for state law to operate.<sup>308</sup> Finally, "even if Congress has not occupied the field, state law is nevertheless pre-empted to the extent it actually conflicts with federal law, that is, when compliance with both state and federal law is impossible, ... or when the state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of

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<sup>307</sup> *California v. ARC America Corp.*, 490 U.S. 93, 100 (1985). See also *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218 (1947).

<sup>308</sup> *Pacific Gas & Electric Co. v. State Energy Resources Conservation and Development Comm'n*, 461 U.S. 190, 212-213 (1983).

Congress."<sup>309</sup>

Turning now to the MMPA, § 1379(a) provides, "No State may enforce, or attempt to enforce, any State law or regulation relating to the taking of any species ... of marine mammal ... unless the Secretary has transferred authority for the conservation and management of that species[.]"<sup>310</sup> Courts that have reviewed this provision have held that it explicitly preempts state law governing the "harassment, injury, disturbance, or other taking of a marine mammal."<sup>311</sup>

The California Coastal Act provides, "Uses of the marine environment shall be carried out in a manner that will sustain the biological productivity of ... all species of marine organisms adequate for long-term commercial, recreational, scientific, and educational purposes."<sup>312</sup> Facially, it does not necessarily address marine mammals directly, although it appears to incorporate them through broad applicability to "all ... marine organisms." Consequently,

<sup>309</sup> *ARC America*, 490 U.S., at 100-101, *citing*, *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-143 (1963); *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941) (quotations omitted).

<sup>310</sup> 16 U.S.C. § 1379(a) (2008). Regulations establishing the process for a state to be transferred this authority are found in 50 C.F.R. Part 403. To date, no state has been transferred that authority. This is opposed to cooperative agreements that NOAA has entered into with states pursuant to §6 of the Endangered Species Act. *See* NOAA, Office of Protect Resources, *available at*, <http://www.nmfs.noaa.gov/pr/conservation/states/>. In addition, NOAA has entered with Cooperative agreements under §1381 of the MMPA with other organizations for specified purposes. *See, e.g.*, *Taking of bowhead whales by Indians, Aleuts, or Eskimos for Subsistence Purposes; Cooperative Agreement Between NOAA and the Alaska Eskimo Whaling Commission Tuesday*, 47 Fed. Reg. 20,137 (May 11, 1982).

<sup>311</sup> *Fla. Marine Contractor v. Williams*, 378 F. Supp. 2d 1353 (M.D.F.L. 2005); *UFO Chuting of Haw., Inc. v. Young*, 327 F. Supp. 2d 1220, 1222 (D. Haw. 2004), *dismissed on other grounds*, 380 F. Supp. 2d 1166 (specific federal legislative amendment addressing this case); *Fouke v. Mandel*, 386 F. Supp. 1341 (D. Md. 1974) (state law banning importation of seal hides preempted by MMPA); *Togiak v. U.S.*, 470 F. Supp. 423 (D.C.D.C. 1974) (state law banning Native Alaskan takes of whales preempted by MMPA). *But cf.*, *Alaska v. Arnariak*, 941 P.2d 154 (Alaska 1997) (MMPA preemption does not extend to Alaska law prohibiting entry into state wildlife refuge and discharging firearms). The Alaska case is a departure from MMPA jurisprudence that interprets the statute as having an absolute preemptive effect. The Alaska Supreme Court held that the MMPA, as it was applied, would have raised a significant Constitutional question in that the statute would have limited traditional state's rights to control land and water use. *See Hess v. Port Authority Trans-Hudson Corporation*, 513 U.S. 30 (1994) (holding that land use is a function of local governments). The case is otherwise easily distinguishable from the controversy discussed in this article. The Alaska Court was concerned about federal limitations on state's rights to use their own lands, whereas the case at hand involves no state land or water use at all, but the regulation of marine mammals outside of state boundaries. States do not have a traditional Constitutional right to regulate animals or activities in the oceans. *See, e.g.*, *U.S. v. California*, 332 U.S. 19 (1947) (federal government has complete dominion in territorial seas). Congress permitted a much more limited state role in the territorial sea by granting states ownership of the beds under the territorial sea out to three nautical miles. The Submerged Lands Act was an affirmative statutory, not constitutional, grant of rights over submerged lands given to the states by Congress, a power that can be taken away by subsequent legislation.

<sup>312</sup> CCA, *supra* note 72, at § 30230.

since it does not appear to be preempted explicitly, we must look to whether the law is preempted as applied through the CZMA.

The Coastal Commission demanded that the Navy include additional measures that restricted the use of MFAS for the specified purpose of protecting marine mammals.<sup>313</sup> In justifying its determination that additional measures were needed, the Coastal Commission quite explicitly looked to "the broader regulatory scheme under the Marine Mammal Protection Act (MMPA) ... and Navy planning efforts ... in examining the adequacy of mechanisms in place to protect the potentially affected species[.]"<sup>314</sup> Indeed, the Coastal Commission questioned NOAA's methodology regarding its "take" analysis under the MMPA and, finding it disagreeable, set its own standard to define what is a "take" of a marine mammal.<sup>315</sup> The Coastal Commission's reliance on the concept of a "take," its explicit reference to the regulatory regime of the MMPA, and the restrictions it demanded of the Navy, demonstrate that it intended to regulate the "take" of marine mammals as envisioned in the MMPA. Therefore, as applied, it seems that California is expressly regulating the "taking" of marine mammals, an action otherwise preempted by § 1379(a) of the MMPA.

In the case of *Southern Pacific v Cal. Coastal Comm'n*,<sup>316</sup> the court reviewed whether the consistency provisions in the CZMA were preempted by the Interstate Commerce Act [hereinafter ICA].<sup>317</sup> Specifically, the issue was whether the Coastal Commission could demand a federal consistency determination in a case where a railroad company obtained a permit from the Interstate Commerce Commission to abandon a railroad line, which would allow the removal of railroad track.<sup>318</sup> The court held that the ICA did not preempt the CZMA because the ICA provided that abandonment proceedings would be governed by "the provisions of this section or by the provisions of *any other applicable Federal statute*."<sup>319</sup> Finding the CZMA not explicitly preempted, the court then held that nothing in the ICA's or CZMA's legislative history evidenced Congress's intent to preempt the CZMA by implication.<sup>320</sup> The court went on to note that a finding of preemption by implication is disfavored, and a court should attempt first to determine the legislative purpose underlying the two statutes and see if they can be read in harmony.<sup>321</sup> To this end, the court

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<sup>313</sup> COMPTUEX/JTFEX EA, *supra* note 253, app. O (California Revised Staff Recommendation, at 3).

<sup>314</sup> *Id.*

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

<sup>316</sup> 520 F. Supp. 800 (N.D. Cal. 1981).

<sup>317</sup> 9 U.S.C. § 1a(1) (2008).

<sup>318</sup> *Southern Pacific*, 520 F. Supp. at 802.

<sup>319</sup> *Id.* at 804-805 (emphasis added).

<sup>320</sup> *Id.*

<sup>321</sup> *Id.*

read into the legislative history of the ICA and determined that Congress' intent was to protect interstate commerce against "undue burdens or discrimination."<sup>322</sup> Finding that the "short delays" resulting from consistency determinations for federal-permitted activities to be a minor burden on interstate commerce, when reviewed against Congress' intent behind the CZMA to include all federally-permitted activities, it concluded that the CZMA did not frustrate the legislative design behind the ICA.<sup>323</sup>

In a more recent case of *UFO Chuting of Haw., Inc. v. Young*,<sup>324</sup> the Federal District Court of Hawaii reviewed whether a state law banning certain recreational activities, whose intent was to prevent the harassment of endangered whales, was preempted by the MMPA. The court unequivocally found that the state law was explicitly preempted by the MMPA.<sup>325</sup> The court was not faced with a traditional federal-state preemption case, however. A unique aspect of this case is that Hawaii argued that §6 of the Endangered Species Act,<sup>326</sup> [hereinafter ESA] which allows for the enactment of more stringent state laws protecting endangered species, "implicitly repealed the preemption provision of the MMPA[.]"<sup>327</sup> Much like *Southern Pacific*, the court held that repeals by implication are highly disfavored.<sup>328</sup> Finding no clear legislative intent that Congress intended to repeal the MMPA preemption through § 6 of the ESA, the Court rejected the state's argument of implied preemption.<sup>329</sup> The court noted that Hawaii was attempting to enact legislation that enhanced protection of an endangered species, something it would normally be allowed to do under § 6 of the ESA. As the court stated, "Clearly, the state was seeking to increase protections for an endangered species in Hawaiian

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<sup>322</sup> *Id.*

<sup>323</sup> *Southern Pacific*, 520 F. Supp. at 807. Interestingly, any discussion regarding attendant burdens on interstate commerce that naturally would be a consequence of subsequent state application of the substantive requirements found within its CMP was conspicuously absent from the Court's opinion.

<sup>324</sup> 327 F. Supp. 2d 1220, 1222 (D. Haw. 2004), *dismissed on other grounds*, 380 F. Supp. 2d 1166 (D. Haw. 2005)

<sup>325</sup> *UFO Chuting*, 327 F. Supp. 2d at 1230. The state law in issue banned seasonal parasailing within waters of the island in order to prevent the harassment of marine mammals. *Id.* at 1223.

<sup>326</sup> 16 U.S.C. § 1535(f) (2008). This section provides, in pertinent part:

Any State law or regulation which applies with respect to the importation or exportation of ... endangered species or threatened species is void to the extent that it may effectively (1) permit what is prohibited by this chapter, or (2) prohibit what is authorized pursuant to an exemption or permit provided for in this chapter ... . Any State law or regulation respecting the taking of an endangered species or threatened species may be more restrictive than the exemptions or permits provided for in this chapter[.]

<sup>327</sup> *UFO Chuting*, 327 F. Supp. at 1224.

<sup>328</sup> *Id.* at 1227.

<sup>329</sup> *Id.* at 1228.

waters. Unfortunately, the state employed an unconstitutional method of achieving its goal."<sup>330</sup>

Facing the issue at hand, there is no evidence that Congress intended for the MMPA to repeal portions of the CZMA and, as both Courts noted above, repeal by implication is highly disfavored. There is no evidence, however, that Congress explicitly intended states to circumvent the MMPA preemption through use of the CZMA either. Neither *Southern Pacific* nor *UFO Chuting* provides a wholly satisfactory analogy to California's regulation of marine mammals through the CZMA. *UFO Chuting* is distinguishable because the state statute in question was enacted under the color of the ESA, not the CZMA, and the CZMA provides for a more interactive federal-state relationship. *Southern Pacific*, however, is also not wholly applicable. While the case involved the CZMA and its interaction with another federal statute, the ICA expressly envisioned and allowed for the interplay of other federal laws in the regulation of abandonment proceedings.<sup>331</sup> In the case at hand, the MMPA's preemption is absolute, whereas the ICA's was not.

What can be taken from both cases, however, is that all efforts should be made to harmonize the applicability of two competing federal statutes when there is an absence of an explicit repeal, looking to ensure that the legislative purpose of the two statutes are given the fullest effect possible. Congressional intent behind the CZMA has been discussed in this article.<sup>332</sup> In sum, Congress sought to "motivate and assist the coastal states in developing resource management programs in order to preserve and develop the nation's coastal resources."<sup>333</sup> In enacting the statute, Congress provided for no exemption for any federal activity, including military, and wanted to ensure it was broadly applied.<sup>334</sup>

Likewise, the MMPA was enacted by Congress to protect and preserve optimum population levels of marine mammals.<sup>335</sup> Unlike the CZMA, however, Congress chose a different approach, and "put the federal government in control of matters relating to the taking of marine mammals, recognizing that other policy considerations might at times trump the protection of marine mammals."<sup>336</sup> In addition, "The legislative history of the 1994 amendments [to the MMPA] indicates that Congress understood the preemptive power of the

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<sup>330</sup> *Id.* at 1230.

<sup>331</sup> *See supra* note 319.

<sup>332</sup> *See supra* Part I.

<sup>333</sup> *Southern Pacific*, 520 F. Supp. at 802.

<sup>334</sup> *See supra* Part II.B.1.

<sup>335</sup> 16 U.S.C. § 1361 (2008).

<sup>336</sup> *UFO Chuting*, 327 F. Supp. 2d at 1225.

MMPA as remaining in effect."<sup>337</sup> The statute itself is clear. It succinctly provides, "*No State* may enforce ... *any State law or regulation relating to...*the taking of any species of ... marine mammal."<sup>338</sup> The MMPA, whose amendment in 1994 follows the 1990 Amendments to the CZMA, provides for no exemption for state law enacted pursuant to the CZMA.

Thus, we are faced with an arguably irreconcilable conflict between the use of the CZMA to regulate the taking of marine mammals as a state coastal resource, and the MMPA's prohibition of such regulation. A rigid following of the logic found in *Southern Pacific* would hold that the MMPA cannot repeal by implication the state's ability to act as provided for under the CZMA when such action is pursuant to enforceable policies approved by NOAA.<sup>339</sup> This logic, however, is easily turned on itself. By allowing states to regulate marine mammals under the CZMA, it effectively neuters the federal preemption in the MMPA, repealing by implication § 1379(a) of the MMPA, and negating Congress' express mandate in that federal statute, not to mention the neutering of the express special treatment afforded by Congress to military readiness activities and scientific research. Considering the absolute nature of the MMPA's preemption, it is unlikely that Congress intended this result, just as it does not appear the case that Congress intended the MMPA to repeal the CZMA either.

Still, it is possible to read the two statutes together, albeit requiring that each be applied in a somewhat more narrow fashion than would otherwise be the case. The MMPA does not preempt all state law regarding the marine environment, just as most laws enacted under the CZMA do not involve marine mammals. The MMPA's preemption extends only to state law related to the taking of marine mammals. Thus, states are still free to enact enforceable policies that properly manage the land and water uses, and natural resources of their coastal zones as provided for in the CZMA. The only instance where such laws must give way, and narrowly at that, is when they purposely regulate the

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<sup>337</sup> *Id.* at 1229.

<sup>338</sup> 16 U.S.C. § 1379(a) (emphasis added).

<sup>339</sup> It should be noted that NOAA's policy is that it will not approve a state CMP where that plan purports to regulate conduct that a state is otherwise preempted from regulating. See CZMA Federal Consistency Overview, *supra* note 191, at 6. "OCRM's long-standing interpretation of the definition of 'enforceable policy' under the CZMA (16 U.S.C. § 1453(6a)) is that if a state policy specifically seeks to regulate an activity where state regulation is preempted by federal law, it is not legally binding under state law and would not be an enforceable policy under the CZMA. For example, North Carolina sought to regulate low level aircraft in flight by adopting policies that imposed minimum altitude and decibel levels, and other overflight restrictions. OCRM denied the state's request to incorporate these policies into the North Carolina CMP because the policies were, on their face, preempted by federal law administered by the Federal Aviation Administration." *Id.* It will be curious to see what NOAA's reaction will be, if any, to state regulation of marine mammals as this area of the law develops.

taking of marine mammals, either by design or by application. Even in cases where the subsidiary protection of marine mammals through broad CMP enforceable policies could run afoul of the MMPA in normal circumstances, the need to maintain the strictures of the CZMA demand a somewhat more relaxed reading of the MMPA preemption. This would be wholly consistent with the court's action in *Norton*, where the protection of marine mammals was a subsidiary concern intertwined with the state's concern over more all-encompassing impacts of the coastal zone, such as oil spills.

Such a narrowing of state CMP enforceable policies should, in reality, be of little notice or consequence to most states. The enforceable policies enacted by states will extend management techniques and protections to an entire range of flora and fauna, without needing to address marine mammals explicitly.<sup>340</sup> Nonetheless, even if individual enforceable policies cannot address marine mammals specifically, the subsidiary effect of other state enforceable policies will have nearly the same protective effect for marine mammals as they will for all other marine species. For example, a state law enacted under the CZMA that regulates nonpoint source pollution in order to preserve coastal zone water quality will protect marine mammals just as well as marine fish and birds. Thus, to ensure that neither statute acts to negate the provisions of the other, state enforceable policies, properly enacted under the CZMA, should be curtailed only in those limited instances where the effect of the law, whether on its face or by application, explicitly applies to marine mammals. This approach gives effect to the legislative purpose behind both statutes.

Applying this approach to the use of MFAS by the Navy, we look first to the California statute in question. On its face, § 30230 of the CCA applies to all marine species, not just marine mammals.<sup>341</sup> Therefore, this alone does not run afoul of the MMPA. Moreover, any conditions imposed by the Coastal Commission under this section to protect, for example, migratory sea turtles or sea vegetation, would fall outside the ambit of the MMPA but would likely benefit marine mammals just as well. Only in the instance where the Coastal Commission imposes restrictions on MFAS for the specific purpose of mitigating the alleged harm to marine mammals would Coastal Commission's application of the state law run afoul of the MMPA. This approach would allow California to continue its extensive and successful regulation of its coastal zone, limited only by the narrow proscriptions provided for in the MMPA. It is likely

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<sup>340</sup> See e.g., FLA. STAT. ch. 372 (providing for protection of wildlife of all types); South Carolina Coastal Tidelands and Wetlands Act, S.C. CODE ANN. § 48-39-150 (providing for regulation protecting marine life and wildlife generally); Georgia Endangered Wildlife Act, GA. CODE ANN. § 27-3-130; HAW. REV., STAT. ch. 205A (promoting the protection, use, and development of marine and coastal resources to assure their sustainability generally).

<sup>341</sup> See *supra* note 208.

that the benefits derived from this management will, as a subsidiary matter, benefit marine mammals nearly as much as any other marine species.<sup>342</sup>

Some might argue that such an approach would allow states to circumvent the MMPA merely by generating a facially plausible argument that a particular enforceable policy or demand is intended to protect other interests not related to marine mammals. I am of the opinion, however, that such arguments would be easy to parse and exposed for what they truly are by a court or NOAA. Conversely, claims by the federal agency that any minimal benefit to marine mammals by state enforceable policies are preempted by the MMPA should be critically analyzed, and the court should, like *UFO Chuting*, look at the legislative intent behind the state law or the manner in which it is applied in that specific instance so that appropriate state laws are not discounted inappropriately.

### Recommendations

The CZMA has been a vital source of environmental protection since its enactment. It was desperately needed at a time when local development of the coastal zone was proceeding with little concern over the cumulative degradation to this national resource. In attempting to ensure that the statute remain robust, however, the incremental expansion of its scope, done without a unified approach, may have gone too far. Legislative amendments, while well-intentioned, use very broad language that may not have been well-considered in the long term. Combined with expansive regulatory implementation, and individual Court decisions that have given broad effect to already broad terms, the law has moved well beyond its original purpose, which was to encourage more responsible state land use in the coastal zone.

The unique and careful balance Congress sought to strike in the CZMA is being upset, particularly with its application to migratory resources. The expanding applicability to migratory resources, and its concomitant expansion of the CZMA into a global statute of unlimited substantive application, has upset the careful state-federal balance in favor of the states. This poses newfound, practical dangers as basic federal agency activities, including those that are of

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<sup>342</sup> Some readers may question why this issue was not addressed by the District Court or the Ninth Circuit Court of Appeals in the case of *NRDC v. Winter*. See *supra* note 250. This may be a result of the procedural posture of the case before the courts. As noted above, the initial Plaintiffs were nongovernmental organizations, not the State of California, which joined the case later as intervenor. See *supra* note 281. In addition, the District Court's decision was in response to a motion for a preliminary injunction and was not fully litigated on the merits, meaning that the factual record and legal analysis may not be as fully developed as would otherwise be the case. Arguably, the MMPA issue would have been more prominent if California were a lead plaintiff at the case's outset, or if the case was in a more mature state of litigation.

profound national interest, are increasingly vulnerable to the demands of a particular locality whose concern for the overall national good may or may not be considered.<sup>343</sup>

Opposition to the 1990 CZMA amendments regarding the consistency provisions, opposition which almost prevented its passage, noted that these amendments went "considerably beyond the original intent of the coastal zone plan[.]"<sup>344</sup> These amendments, when combined with NOAA's interpretation of the effects test, and judicial interpretations that have dramatically expanded the scope of the statute's applicability, have morphed the CZMA regime into one of extensive state intrusion into the conduct of the most basic federal activities where the impact on the coastal zone may be insignificant. While some have argued for wholesale repeal of the CZMA's consistency provision,<sup>345</sup> I believe that is a step too far. As noted, the federal Government is one of the largest polluters in the coastal zone and can easily frustrate the most well-intentioned state attempts to properly manage the coastal zone.<sup>346</sup> Instead, the CZMA should be amended to restore a proper state-federal balance.

First and foremost, the geographic scope of the CZMA should be clearly defined. The statute was never intended to have global application, and even the expansion provided in the 1990 Amendments were driven in large measure by a desire to give states more voice over economic activities in the nation's 200 nautical mile EEZ. Thus, the statute's consistency provisions could be amended to reflect this. It should be noted that this proposal is far more modest than those already presented in draft legislation in Congress.<sup>347</sup>

Second, the "effects test," as currently interpreted by NOAA and the judiciary, is so broad that it can include any minimal effect on the coastal zone resource, irrespective of whether that effect is of any consequence. NOAA should redefine the effects test to include a threshold of "significance" to the effect. Understandably, however, in an age of compulsive litigious tendencies, NOAA may be reluctant to do so now without clear Congressional direction. Therefore, Congress should amend the effects test in § 1456 to provide for a substantive threshold.

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<sup>343</sup> See Gibbons, *supra* note 240, at 100.

<sup>344</sup> Fitzgerald, *supra* note 249, at 177.

<sup>345</sup> See Bruce Kuhse, *The Federal Consistency Requirement of the Coastal Zone Management Act of 1972: It's Time to Repeal this Fundamentally Flawed Legislation*, 6 OCEAN & COASTAL L. J. 77 (2001).

<sup>346</sup> See *supra* text accompanying note 17.

<sup>347</sup> See, e.g., Domestic Energy Production through Offshore Exploration and Equitable Treatment of State Holdings Act of 2006, H.R. 4761, 109th Cong. (2006). This House bill would reinstate the "directly affecting" language removed in the 1990 Amendments, and would create a presumption that any activity 25 miles from the shore of the coastal zone would not affect that coastal state.

Third, the potential conflict between the CZMA and MMPA needs to be addressed. Ideally, Congress would clarify, in either statute, which one is the predominant interest. Short of Congressional action, this issue must be addressed by NOAA. In conjunction, NOAA is uniquely positioned to create by rulemaking a regimen that, as best as can be achieved, harmonizes the two statutes. Moreover, the judiciary needs to take note of the potential conflict. To date, no Court has addressed the issue, but the increased use of the CZMA by states to regulate the harassment of marine mammals ensures that, at some point, there will be a challenge to state action on this ground. I have proposed an interpretation that, short of further legislative action, harmonizes the two statutes as best as can be accomplished.<sup>348</sup> It would recognize the validity of state law enacted under the CZMA regime, but that law would yield in the narrow circumstance where it directly regulates marine mammals. In this manner, the state law would remain in force to protect all other aspects of the coastal zone, with the corresponding benefits of such regulation flowing to the marine mammal in any event.

Finally, the CZMA should be amended to provide for different treatment for federal activities that are of paramount national interest and which are not properly within the purview of state regulation. Regulation of military preparedness and national defense is one such activity.<sup>349</sup> I would draw the reader's attention to the excellent proposal provided by one commentator that would amend the CZMA consistency provisions to include a national defense exemption similar to many other environmental statutes.<sup>350</sup> Understanding that such an exemption would be difficult to enact considering political realities of the day, I offer a more modest proposal in the alternative. Much like the MMPA, the CZMA should be amended to provide for deferential treatment of those military activities necessary for military preparedness, and those military operations conducted in defense of the United States. Likewise, this narrow exemption recognizes that many military activities can be adjusted to comport to proper state management of their coastal zone.

Appendix A contains proposed amendments to the statute that I believe would restore the federal/state balance. It would limit state authority to seek a consistency determination for federal agency activities that occur outside of the U.S. EEZ. This limitation would nonetheless allow states to regulate significant expanses of the marine environment far more significantly tied to their coastal interests, and more in keeping with the purpose of the CZMA. In addition, the proposed amendments would recognize that the statute should focus on

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<sup>348</sup> See *supra* Part IV.

<sup>349</sup> See generally, Gibbons, *supra* note 240 (discussing state regulation over matters of paramount federal interest).

<sup>350</sup> *Id.* at 124.

significant coastal effects, thus allowing for *de minimis* activities with no appreciable impact to avoid entanglement in unnecessary regulation unless the cumulative effect of those activities will nonetheless be significant. Finally, it provides for special treatment for activities already recognized by Congress as needing special treatment and which necessarily supersede local considerations, such as scientific research and military activities. By amending the statute in modest fashion, interpreting it such that it does not provide for unreasonable state intrusion into areas that are not traditionally subject to state control, and giving due deference to the mandates of the MMPA, the careful balance between state interests and federal activities can be restored.

**APPENDIX A****Proposed amendments to the CZMA**

*(Changes noted by Italics)*

**§ 1453 Definitions**

For purposes of this chapter-

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(13) *The term "natural resource" means biological or physical resources that are found within a State's coastal zone on a regular or cyclical basis, except that the term does not include biological or physical resources to the extent the regulation of such biological or natural resources by a State is otherwise explicitly prohibited by Federal law.*

[Paragraphs (13) through (18) to be renumbered (14) through (19)].

**§ 1456 Coordination and cooperation**

(1)

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**(c) Consistency of Federal activities with State management programs; Presidential exemption; certification**

(1)(A) Each Federal agency activity within or outside the coastal zone that *significantly* affects any land or water use or natural resource of the coastal zone shall be carried out to the maximum extent practicable with the enforceable policies of approved State management programs. A Federal agency shall be subject to this paragraph unless it is subject to paragraph (2), (3), or (4). *This section does not apply to Federal agency activities which take place outside the Exclusive Economic Zone of the United States as defined by the President or otherwise defined by Federal law.*

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(4)(A) *In the case of a military readiness activity (as defined in section 315(f) of Public Law 107-314; 16 U.S.C. 703), military activities deemed essential to the defense of the United States, or a scientific research activity conducted by or on behalf of the Federal Government consistent with section 1374 (c)(3) of this title, only those activities that substantially and directly affect any land or water use or natural resource of the coastal zone shall be carried out to the extent practicable with State enforceable policies.*

*(i) Military activities in direct support of combat operations, not including those military activities described in paragraph (c)(4)(A) of this section, need not comply with State enforceable policies.*

*(B) A Federal agency conducting an activity under this section must provide*

*written notice to the State of the nature of the Federal agency activity, the reasonably foreseeable effects on the coastal zone resulting from these activities, and of its reliance on this section within 30 days of commencing such activity, or in the case of combat operations, as soon as is practical if notice cannot be provided within 30 days.*

*(C) A State or its designated agency may, upon receipt of notice as provided for in paragraph (B), submit a written objection to the agency's determinations within 30 days. Failure to submit objection within 30 days shall be conclusively presumed to be a waiver of any objections. A Federal agency must respond to a State's written objections within 30 days, or in the case of combat operations, as soon as is practical if a response cannot be sent within 30 days.*

*(D) If the Federal agency and the State or its designated agency cannot agree as to the proper applicability of this paragraph, the dispute shall be submitted to the Secretary<sup>351</sup> for final resolution. If the Secretary determines that the Federal agency improperly relied on this section, the Secretary shall provide written notice to the Federal agency requiring it to submit a consistency determination to the State as provided for in Paragraph (1) of this section.*

*(E) Upon receipt of a finding as provided for in Paragraph (c)(4)(D) of this section from the Secretary, the President may, notwithstanding Paragraph (1)(B) of this section, upon written request from the head of the Federal agency concerned, exempt from compliance those elements of the Federal agency activity that are found by the Secretary to be inconsistent with an approved State program, upon a finding that the activity is in the paramount interest of the United States.*

*(F) Petitions for review of determinations by the Secretary under this Paragraph, or an exemption issued by the President, may be filed only in the United States Court of Appeals for the District of Columbia.*

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351 The term "Secretary" is defined as the Secretary of Commerce. 16 U.S.C. § 1453(16) (2008).

## **THE CONTINUED HEALTH CARE BENEFIT PROGRAM: THE DEPARTMENT OF DEFENSE'S GUARANTEE OF LIFETIME HEALTH CARE TO ALL FORMER MILITARY SPOUSES**

**Lieutenant Junior Grade Jessica Lynn Pyle, JAGC, USN<sup>1</sup>**

Gone are the days of the carefree waiver of a divorce client's interest in a military member's retirement pay with little more than a reminder that they are entitled to payments for the rest of the retiree's life. Waiving a spouse's right to a service member's pension waives their right to a lifetime of health care coverage benefits. The Continued Health Care Benefit Program (CHCBP) provides the opportunity for any former spouse of a military member or former military member, regardless of the length of the marriage, to receive health care coverage indefinitely.<sup>2</sup>

For many military spouses, medical coverage is a major point of concern when they are negotiating a divorce. Military family members are accustomed to receiving nearly unrestricted access to almost any medical service or procedure they need. After a divorce, many former spouses are limited in their ability to obtain comparable health care coverage due to factors such as their inability to find an employer with similar medical coverage, or because of preexisting conditions that may limit their insurability. As a result, some spouses feel compelled to postpone a divorce until they qualify for medical coverage under narrowly defined transitional insurance programs or simply find themselves with no coverage. Congress has responded by creating a program that potentially encompasses every person currently married to a military member or recently divorced from a military member.

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<sup>1</sup> Judge Advocate General's Corps, United States Navy. The author would like to thank Kate Somerville, civilian attorney at Naval Legal Service Office Southwest for bringing this issue to light and for her limitless and compassionate support. Also, the author would like to acknowledge the contributions of Lt. Col. John Camp, USAF/SJA (Retired) in researching and providing material for this article. Also, a special thanks to Mark Sullivan and Greg Sullivan, who were not only a great source of practical knowledge, but who spent countless hours creating the flow chart in Appendix A. Finally, thank you Capt. Charles Hasberry, Jr., USAF, who added his insight to the issues in this article. The positions and opinions in this article are those of the author and do not necessarily represent the views of the United States Government, the Department of Defense, or the United States Navy

<sup>2</sup> 10 U.S.C. § 1078a(g)(4) (2004).

The key to the program lies in the retention of the right to a portion of the military member's retirement pay or Survivor's Benefit Plan (SBP) annuity payments.<sup>3</sup> Absent retaining an interest in a military spouse's retirement pay, a spouse will not be eligible to participate in the CHCBP and will be deprived of the advantages of its lifetime health care coverage. Every spouse seeking to waive his or her rights to military retirement pay must be counseled on the unintended consequence of waiving the right to lifetime medical benefits. This article will discuss the CHCBP as it applies to former spouses of military members and former military members. After briefly discussing in Part I the history of medical benefits for former spouses, Part II will outline the current categories of health care plans available to former spouses. Included in this discussion will be the eligibility requirements for the CHCBP and the statutory requirements on a former spouse's interest in a military member's retirement pay or SBP to qualify for coverage. Part III will discuss in depth the CHCBP program, outlining its benefits, application and enrollment process, and implications. Finally, Part IV of this article will discuss the unsuccessful attempt by the South Dakota Supreme Court to interpret the eligibility requirements of the CHCBP, and why their inaccurate interpretation of the program may be harmful to former spouses seeking to exercise their right to participate in the CHCBP in the future.

## **I. HISTORY OF THE UNIFORMED SERVICES FORMER SPOUSES' PROTECTION ACT & MEDICAL CARE FOR FORMER SPOUSES**

In 1984, Congress passed the Uniformed Services Former Spouses' Protection Act (USFSPA) to provide added protection to former spouses of military members.<sup>4</sup> USFSPA was prompted by a Supreme Court determination that military retirement pay was not divisible as a marital asset in a divorce, leaving former spouses without access to what is often the largest asset in a marriage.<sup>5</sup> Within months, Congress responded to the criticisms of the Supreme Court decision by developing a comprehensive set of protections which acknowledged that the "unique status of the military spouse and the spouse's

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<sup>3</sup> "The Uniformed Services Survivor Benefit Plan (SBP) was created by Congress in 1972 to put an end to the category of destitute survivors. SBP is the sole means by which survivors can receive a portion of military retired pay. Without it retired pay stops on the date of death of the retiree....Every military member is automatically enrolled at no cost while they serve on active duty. Should they die on active duty with an eligible beneficiary, SBP is payable. In conjunction with their retirement, military members must elect to receive reduced retired pay for their lifetime, so as to continue 55 percent of their retired pay to their survivors following their death." Survivor Benefits Plan Frequently Asked Questions, <http://www.dfas.mil/retiredpay/frequentlyaskedquestions/survivorbenefitsplanfaqs/sbpgeneralfaq.html>.

<sup>4</sup> 10 U.S.C. § 1408 (2000).

<sup>5</sup> *McCarty v. McCarty*, 453 U.S. 210 (1981).

great contribution to the defense require that the status of the military spouse be acknowledged, supported, and protected.”<sup>6</sup> In addition to defining military retirement pay as a benefit that can be divided by state courts in a divorce proceeding, the statute also extended many other benefits to former spouses, including commissary and exchange privileges and some medical care for spouses who met the criteria established by Congress.

As initially enacted, USFSPA provided medical benefits only to spouses meeting the 20/20/20 test.<sup>7</sup> Spouses meeting the requirements under the statute received full access to military treatment facilities and access to military pharmacies until they remarried or became eligible for Medicaid.<sup>8</sup> The provisions for medical care were likely limited due to concerns among members of the Department of Defense that the division of military retirement pay was a major concern to military spouses and other benefits should be limited in order to present a fair and balanced set of protections that reflected the concerns of the former spouses, the service members, and the Department of Defense.<sup>9</sup>

In 1985, Congress expanded coverage to include 20/20/15 spouses in a more limited fashion than coverage for 20/20/20 spouses.<sup>10</sup> Rather than receiving full military health care services for the rest of their lives, 20/20/15 spouses were given the same access to full medical coverage as 20/20/20 spouses for one year with the option of an additional year of coverage provided they registered with the Civilian Health and Medical Program of the Uniformed Services (CHAMPUS) program in order to preserve their eligibility.<sup>11</sup> However, the benefits under the second year of the program were limited to those provided

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<sup>6</sup> S. REP. NO. 97-502, at 6-7 (1982), as reprinted in 1982 U.S.C.C.A.N. 1555, 1601.

<sup>7</sup> 10 U.S.C. § 1072(2)(f) (2008). This section reads, “the unremarried former spouse of a member or former member who (i) on the date of the final decree of divorce, dissolution, or annulment, had been married to the member or former member for a period of at least 20 years during which period the member or former member performed at least 20 years of service which is creditable in determining that member’s or former member’s eligibility for retired or retainer pay, or equivalent pay, and (ii) does not have medical coverage under an employer-sponsored health plan.” *Id.*

<sup>8</sup> 10 U.S.C. § 1408 (1984).

<sup>9</sup> S. REP. NO. 97-502, at 7-8, reprinted in 1982 U.S.C.C.A.N. at 1602-3.

<sup>10</sup> Department of Defense Authorization Act of 1985, Pub. L. No. 98-525, § 641, 98 Stat. 256 (1984) (codified at 10 U.S.C. § 1072(2)(G) (1994 & Supp. IV 1998)). The 20/20/15 test requires an overlap of at least fifteen years of marriage with at least twenty years of creditable service towards retirement in a marriage that has lasted at least twenty years.

<sup>11</sup> *Id.* CHAMPUS is the Civilian Health and Medical Program of the Uniformed Services. CHAMPUS is a federally-funded health program that provides beneficiaries with medical care supplemental to that available in military and Public Health Service (PHS) facilities. All CHAMPUS beneficiaries move over to Medicare at age 65. CHAMPUS is like Medicare in that the government contracts with private parties to administer the program.

by TRICARE Standard and did not include access to military treatment facilities.<sup>12</sup>

Congress passed legislation authorizing the Continuing Health Care Benefit Plan (CHCBP) in 1992.<sup>13</sup> The currently underused program extends TRICARE Standard benefits to nearly all former spouses. In creating the CHCBP, Congress developed a system of health care that retained special health care benefits for 20/20/20 spouses and 20/20/15 spouses, and for the first time created a category of beneficiaries whose benefits are derived from the retention of any interest in retirement pay rather than the length of the marriage.

#### **A. Current Categories of Former Spouse Health Care Coverage Beneficiaries**

Former spouses of military members can qualify for continuing health care in one of three ways, depending on the length of the marriage.<sup>14</sup> However, contrary to popular understanding, the length of the marriage never disqualifies a former spouse from continuing health care coverage. Instead, the length of the marriage is only relevant in determining what type of medical coverage a former spouse is entitled to receive.<sup>15</sup>

##### **1. The 20/20/20 spouse**

The first category of health care provides full medical coverage to a select group of former spouses. To qualify, the former spouse must meet what is commonly known as the 20/20/20 test. The test requires a marriage lasting at least 20 years, the military member to have at least 20 years of creditable service towards retirement at the time of the divorce, and at least twenty years of overlap between the marriage and military service.<sup>16</sup>

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<sup>12</sup> TRICARE Standard is a fee-for-service program offered to eligible active duty members, retirees, and former military spouses meeting the 20/20/20 rule. The fee structure is the same for TRICARE Standard and the CHCBP, requiring the participant to pay a monthly fee and offering a cost splitting scheme between the provider and the participant, but does not require the continued enrollment process that is mandated under the CHCBP.

<sup>13</sup> Pub. L. No. 102-484, Div D, Title XLIV, Subtitle A, § 4408(a)(1), 106 Stat. 2708 (1992) (codified at 10 U.S.C. § 1078(a) (2004)).

<sup>14</sup> ADMINISTRATIVE & CIVIL LAW DEP'T, THE JUDGE ADVOCATE GENERAL'S LEGAL CENTER AND SCHOOL, U.S. ARMY, JA 274, Uniformed Services Former Spouses' Protection Act Guide, at 23 (1 Nov. 2005) [hereinafter JA 274] For more information on the rights of a former spouse in a military divorce, see MARK E. SULLIVAN, THE MILITARY DIVORCE HANDBOOK: A PRACTICAL GUIDE TO REPRESENTING MILITARY PERSONNEL AND THEIR FAMILIES (2006).

<sup>15</sup> *Id.* at 23-25.

<sup>16</sup> See *supra* note 7.

If the spouse in question meets the 20/20/20 test, two additional requirements apply before medical benefits accrue in this category. First, the spouse seeking coverage must not be remarried (remarriage will terminate any benefits under this provision permanently).<sup>17</sup> Second, the former spouse must not be enrolled in an employer sponsored health insurance plan or third party carrier.<sup>18</sup> Under any category of coverage, a former spouse may elect to continue with his or her military insurance coverage without penalty if a health care plan is available through an employer so long as no other coverage is elected.

Medical benefits for 20/20/20 spouses is very extensive. Former spouses who meet this test are given access to both CHAMPUS coverage until the age of 62 (or until they qualify for Medicare), inpatient and out patient medical care at military treatment facilities, and the use of military pharmacies so long as they do not remarry before they turn 55.<sup>19</sup>

## 2. The 20/20/15 Spouse

The second category of medical coverage applies to a former spouse who qualifies as a 20/20/15 spouses. This test requires that the marriage must have lasted at least 20 years, that at least 20 years of military service creditable towards retirement, and a minimum of 15 years of overlap between the marriage and the creditable service.

The additional requirements outlined above also apply to the 20/20/15 spouse, namely that the spouse must not be remarried, and cannot participate in an employer sponsored health insurance plan. Spouses who fall into this category receive full medical coverage for one year after the divorce as part of the military's transitional insurance program.<sup>20</sup> For the first year after the divorce, 20/20/15 spouses are given the same full access to medical facilities and TRICARE as 20/20/20 spouses, meaning they are able to use military treatment facilities and pharmacies. After the first year, 20/20/15 spouses are treated as an ordinary spouse for the purposes of medical care. To qualify for

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<sup>17</sup> JA 274, *supra* note 14, at 23. Divorce or death of the subsequent spouse does not revive the benefit, but annulment does.

<sup>18</sup> 10 U.S.C. § 1072(2)(f) (2008).

<sup>19</sup> 10 U.S.C. §§ 1408, 1072, 1076, 1086 (1994 & Supp. IV 1998).

<sup>20</sup> 10 U.S.C. § 1072(2)(f) (2008) ("the unremarried former spouse of a member or former member who performed at least 20 years of service which is creditable in determining the member or former member's eligibility for retired or retainer pay, or equivalent pay, and on the date of the final decree of divorce, dissolution, or annulment before April 1, 1985, had been married to the member or former member for a period of at least 20 years, at least 15 of which, but less than 20 of which, were during the period the member or former member performed service creditable in determining the member or former member's eligibility for retired or retainer pay, and (ii) does not have medical coverage under an employer-sponsored health plan.").

additional coverage, the spouse must enroll in the CHCBP within 60 days of losing eligibility through the transition benefits program in the same manner as a spouse who does not meet the 20/20/15 test.<sup>21</sup> The former spouse will then receive the initial 36-months of medical coverage through the CHCBP, after which time they are eligible for indefinite health care benefits.

### 3. The “Ordinary” Spouse

The final category of beneficiaries potentially includes every spouse enrolled in the military health care system. A careful reading of the convoluted sections of 10 U.S.C. § 1078(a) reveals the existence of a program of potentially indefinite medical coverage for all other former spouses.<sup>23</sup> The plan, named the Continued Health Care Benefit Plan (CHCBP), can be an invaluable resource to a former spouse who may not be able to obtain civilian health insurance or who may prefer the CHCBP military coverage to plans offered by an employer. Appendix A provides a flowchart of the criteria for short term and life time eligibility in the CHCBP.<sup>24</sup> As an initial matter, nearly all spouses are approved for 36-months of medical insurance, after which they can receive indefinite access to the same program by continuing to pay the required monthly premium and maintaining their eligibility in accordance with the statutory requirements for coverage.

Every former spouse, regardless of the length of the marriage, is entitled to participate in the CHCBP so long as they meet the statutory requirements for eligibility.<sup>25</sup> As a preliminary matter, a former spouse of a military member is entitled to enroll in CHCBP if the military member spouse is on active duty, retired, or involuntarily separated from service.<sup>26</sup> If at the time of the divorce the military spouse meets one of the above criteria, the former spouse qualifies for CHCBP coverage provided he or she does not remarry before the age of 55, was enrolled in a DOD approved plan such as TRICARE at any time during the 18 months prior to the date of the divorce, and is receiving

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<sup>21</sup> 10 U.S.C § 1078a(b) (2004).

<sup>23</sup> 10 U.S.C § 1078a(g)(4)(A) (2004). “In the case of a former spouse described in subparagraph (B), continued coverage under this section shall continue for such period as the former spouse may request.” The Humana circulated Continued Health Care Benefit Program Handbook at the outset, in bold type, states that “coverage for unremarried former spouses under CHCBP is limited to 36 months.” HUMANA MILITARY HEALTH CARE SERVICES, INC., CONTINUED HEALTH CARE BENEFIT PROGRAM: PROTECTION FOR YOU AND YOUR FAMILY at 5. [hereinafter HANDBOOK] However, this claim is repudiated later in the same handbook. *Id.* at 23.

<sup>24</sup> The chart in Appendix A was created by Mark E. Sullivan and his son Greg Sullivan. The chart is reproduced here with their permission.

<sup>25</sup> HANDBOOK, *supra* note 23, at 15 “for the purposes of this program, there is no time requirement regarding the length of the time the former spouse was married to the member or former member.”

<sup>26</sup> 32 C.F.R. § 199.20(d)(6)(iv)(B) (2004). This requirement applies only at the time the former spouse enrolls in the CHCBP.

any portion of the retirement pay of the member, or will receive a portion of member's military retirement, or be named as the beneficiary of an annuity plan under a court order or written agreement between the parties.<sup>27</sup>

*a. Remarriage as a Bar to Coverage*

As with all continuing health care coverage for former military spouses, remarriage before the age of 55 terminates the beneficiary's entitlement to participate in the program.<sup>28</sup> More specifically, remarriage is a terminal condition for beneficiaries under the CHCBP; subsequent divorce will not revive the eligibility of the former spouse (though a decree of annulment will allow a spouse who was enrolled in the CHCBP prior to the annulled marriage to regain eligibility).<sup>29</sup>

*b. Enrollment in a DOD-Approved Health Care Plan*

Former spouses seeking to enroll in the CHCBP as a beneficiary under 10 U.S.C. § 1078a(a)(4)(g) are required to show enrollment in an approved military health benefit plan such as TRICARE within the 18 months preceding the divorce.<sup>30</sup> The provision allowing enrollment at any time in the 18 month period is a much more liberal provision than is required for any other category of CHCBP coverage in 10 U.S.C. § 1078a. For example, in the case of a former spouse qualifying as transitional health care beneficiary, the spouse must have been enrolled in an approved military health care plan on the date of the divorce rather than at any time within the preceding 18 month period.<sup>31</sup> The shorter

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<sup>27</sup> 10 U.S.C. § 1078a(g)(4)(B)(i-iii) (2004). “(4)(A) Notwithstanding paragraph (1), in the case of a former spouse described in subparagraph (B), continued coverage under this section shall continue for such period as the former spouse may request.

(B) A former spouse referred to in subparagraph (A) is a former spouse of a member or former member (other than a former spouse whose marriage was dissolved after the separation of the member from the service unless such separation was by retirement) -

(i) who has not remarried before age 55 after the marriage to the employee, former employee, or annuitant was dissolved;

(ii) who was enrolled in an approved health benefits plan under this chapter as a family member at any time during the 18-month period before the date of the divorce, dissolution, or annulment; and

(iii)(I) who is receiving any portion of the retired or retainer pay of the member or former member or an annuity based on the retired or retainer pay of the member; or

(II) for whom a court order (as defined in section 1408(a)(2) of this title) has been issued for payment of any portion of the retired or retainer pay or for whom a court order (as defined in section 1447(13) of this title) or a written agreement (whether voluntary or pursuant to a court order) provides for an election by the member or former member to provide an annuity to the former spouse.”)

<sup>28</sup> 10 U.S.C. §§ 1062, 1078a(a), 1408 (2008).

<sup>29</sup> JA 274, *supra* note 14 at 23.

<sup>30</sup> 10 U.S.C. § 1078a(a)(4)(g)(B)(ii) (2004).

<sup>31</sup> 32 C.F.R. § 199.20 (d)(6)(iii)(B) (2004).

enrollment requirement emphasizes the intention to make the CHCBP available to all spouses, regardless of the length of the marriage because a spouse who is married for only one day can qualify for the CHCBP so long as he or she was enrolled in a military health care plan for that day.

*c. Retirement Pay*

The most essential and commonly overlooked provision of the statute for a spouse considering waiving their right to a military spouse's retirement requires that the former spouse retain an interest in the military spouse's retirement pay or Survivor's Benefit Plan (SBP) payments.<sup>32</sup> Any spouse seeking to waive their interest in the military spouse's retirement pay or SBP rights should be advised that they may inadvertently be waiving their right to a long term health care plan.

Three separate and independent conditions will satisfy the retirement pay requirement. In the case of a retired military member, the former spouse can currently receive a portion of the retirement pay of the military member spouse or an annuity based on the retirement pay of the member, presumably the benefits under the SBP.<sup>33</sup> In the alternative, the former spouse may present a court order for payment of any portion of the retirement pay of the service member spouse which will take effect at some later date, such as the retirement of the military member.<sup>34</sup> Finally, a former spouse can qualify for the CHCBP with a written agreement, either voluntarily undertaken or written pursuant to a court order, which provides an election for the member to provide an annuity to the former spouse.<sup>35</sup> Again, naming the former spouse as the beneficiary of the SBP should satisfy this requirement.

There is no minimally required interest in the military member's retirement to qualify for the CHCBP in the statute, the implementing C.F.R., or in any information disseminated by Humana Military, the company charged with administering the CHCBP benefits, in their handbook or over the phone.<sup>36</sup> As little as one tenth of one percent of the military spouse's retirement pay should qualify the former spouse for indefinite coverage, so long as a court order dividing military retirement pay is issued guaranteeing the interest in a timely

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<sup>32</sup> 10 U.S.C. § 1078a(g)(4)(B)(iii)(I-II) (2004).

<sup>33</sup> 23 C.F.R. § 199.20(d)(6)(iv)(C) (2004). The discussion of an annuity is unclear in the statute and the implementing C.F.R. However, presuming that the annuity must somehow be tied to a benefit provided to the military, it is reasonable to conclude the continuing payments of the Survivor's Benefit Plan is the annuity to which the statute refers.

<sup>34</sup> *Id.* at (d)(iv)(D).

<sup>35</sup> *Id.* at (d)(iv)(E).

<sup>36</sup> The author called Humana in March, 2008 to obtain eligibility requirements for the CHCBP and confirmed that any court order stating any interest would satisfy the retirement interest requirement.

matter so the former spouse can comply with the time limits for establishing eligibility outlined in the statute. Every client should be counseled on the implications of waiving their entire interest as opposed to retaining an interest in as little as one dollar per month of retirement pay. For some, the only option for medical coverage may be participation in the CHCBP.

For example, one typical military divorce client might be a woman who has been married to her service member spouse for nine years. During that time, she did not work, but plans to open an in-home daycare service once the divorce is finalized. She is covered currently by TRICARE, but understands she will need private health insurance after the divorce. In the process of qualifying for private insurance, she discovers she has breast cancer, making her “uninsurable” by any civilian company. However, if, and only if, she retains her right to some portion of her spouse’s military retirement pay, or is named as the beneficiary of his SBP benefits, she will qualify for the CHCBP. In this case, the health care coverage provided by the CHCBP may be her only option and may be more valuable to her than any other asset in the property settlement portion of the divorce.

The CHCBP is unprecedented in the way it makes the length of the marriage irrelevant to how long medical coverage will last and extends coverage to a far wider group of former spouses than under any program in the history of military health care. As a result, all clients seeking a divorce from a military member should be counseled on their rights to receive medical coverage for the rest of their lives and the impact of waiving their interest in the retirement pay of the military spouse will have on their access to the program.

### **III. THE CONTINUED HEALTH CARE BENEFIT PROGRAM: ITS IMPLICATIONS AND IMPACTS FOR SERVING MILITARY SPOUSE DIVORCE CLIENTS**

#### **A. The Program**

The DOD Continued Health Care Benefit Program is designed to provide transitional medical benefits for any member or dependant who loses their entitlement to health care coverage due to divorce or separation from the military.<sup>37</sup> The benefits of the program exist regardless of any pre-existing medical conditions that may disqualify the participant from obtaining civilian health insurance.<sup>38</sup> The program potentially covers all former spouses and all

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<sup>37</sup> 10 U.S.C § 1078a(a) (2008).

<sup>38</sup> HANDBOOK, *supra* note 23, at 23-24.

service members and his or her dependants who leave the service without retiring.<sup>39</sup>

The Continued Health Care Benefit Program is unique from every other medical benefit program offered by the military to former spouses. Unlike CHAMPUS or TRICARE Standard, the CHCBP is designed to be a premium-based “temporary health care coverage program designed to mirror the benefits offered under the CHAMPUS program.”<sup>40</sup> However, there is no time limit for continued medical coverage so long as a former spouse retains eligibility. The CHCBP offers participants the advantages of the negotiated group rates of the analogous health care coverage programs offered by the military without inconvenient time limits, despite the proclaimed purpose of the program.

Rate structures for CHCBP are the same as programs such as CHAMPUS or TRICARE Standard. As with those programs, CHCBP rates are determined by the Assistant Secretary of Defense for Health Affairs.<sup>41</sup> Premiums are paid on a quarterly basis at either a single or family rate. Current rates are \$933 per quarter for a single beneficiary and \$1996 per quarter for a family.<sup>42</sup> While the quarterly premium may seem high to some beneficiaries, \$311 is a reasonable monthly rate when compared to commercial coverage, especially for a former spouse who may have a preexisting medical condition that would raise the cost of insurance. Rates and eligibility for the CHCBP do not change based on the medical history of the person applying for benefits. Beyond the premiums, the program fees continue to mirror the costs and coverage of TRICARE Standard.<sup>43</sup> A statutory limit of \$3000 is placed on the amount of medical bills a beneficiary will pay in a single calendar year.<sup>44</sup> The additional costs are based on the cost sharing system inherent to the program. A beneficiary will pay 15% of the total costs for treatment at an approved health care provider.

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

<sup>40</sup> JA 274, *supra* note 14, at 25. The CHCBP is intended to function under the rules and procedures of the CHAMPUS program. 32 CFR § 199.20 (2004).

<sup>41</sup> JA 274, *supra* note 14, at 25.

<sup>42</sup> Humana Military Health Care Services, CHCBP, <http://www.humana-military.com/CHCBP/details.htm>. Rates are as of 24 March 2008.

<sup>43</sup> As a matter of fact, almost all administrative matters, including the claims process and the determination of benefits follows the guideline set forth for TRICARE Standard. In the “Words of Caution” section of the CHCBP Handbook, Humana states that “because medical benefits under this program are similar to TRICARE Standard benefits, and because CHCBP operates under most of the rules and procedures of the TRICARE Program, reference is made from time to time in this booklet to content contained in the TRICARE Beneficiary Handbook.” HANDBOOK, *supra* note 23, at 2.

<sup>44</sup> 10 U.S.C.S § 1086(b)(4) (2006).

A former spouse who enrolls in the CHCBP receives benefits similar to TRICARE Standard in terms of services and providers.<sup>45</sup> TRICARE administers and governs the CHCBP and handles the claims from services received by beneficiaries. However, the former spouse is *not* enrolled in TRICARE and they will not have a military identification card. Beneficiaries are not allowed to use military treatment facilities or military pharmacies. Participants are limited to the civilian providers and pharmacies certified by TRICARE to receive their full coverage benefits.<sup>46</sup> Using a non-participating provider will result in the former spouse paying up to a 5% premium for services based on the amount charged by the provider.<sup>47</sup>

A second difference between the CHCBP and other DOD sponsored health care plans is that it is intended to be used as a temporary measure while a former spouse transitions to civilian medical coverage.<sup>48</sup> Whatever the intent, however, the program does not have a limit on the amount of time a former spouse may participate in the CHCBP. The difference between the purpose of the program and the lack of enforceable limits leads many spouses to waive their rights to participate in the program because they do not understand that they qualify for long term coverage. Confusion over the statute and inconsistencies in the literature outlining CHCBP eligibility lead many former spouses to believe that the program is limited to 36 months of eligibility.<sup>49</sup> A helpful customer service representative explained that a former spouse enrolling in the CHCBP is initially approved for 36-months of coverage, but after the initial period, the spouse will be eligible for health care benefits as long as they continue to meet the eligibility requirements. Despite the intention that the CHCBP be a temporary, transitional solution to medical insurance, there are no time limits for coverage which allows this program to go from being temporary to a long term solution for former spouses without the means to obtain alternative coverage or who simply prefer the CHCBP to the medical insurance offered by their employer.<sup>50</sup>

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<sup>45</sup> HANDBOOK, *supra* note 23, at 10.

<sup>46</sup> *Id.* at 11.

<sup>47</sup> *Id.* at 12.

<sup>48</sup> 10 U.S.C § 1086(a) (2008).

<sup>49</sup> At the outset in bold type, Humana's CONTINUED HEALTH CARE BENEFIT PROGRAM handbook states that "coverage for unremarried former spouses under CHCBP is limited to 36 months." HANDBOOK, *supra* note 23, at 5. This statement has no statutory basis and is contrary to the provision found in 10 U.S.C. § 1078a(g)(4) (2008).

<sup>50</sup> 10 U.S.C. § 1086(b)(4) (2008). The implementing code section, however, defines the CHCBP coverage for former spouses qualifying for coverage under 10 U.S.C. § 1086(g)(4)(B) as "unlimited" in duration. 32 CFR § 199.20(3) (2008).

## B. Procedural Considerations

Although resolving questions related to eligibility involves statutory interpretation and can be difficult, applying for CHCBP benefits is a relatively simple process governed by both statutorily mandated and the implementing regulations. Humana's handbook and website on these benefits outline eligibility and application requirements.

### 1. The 60-Day Rule

A former spouse seeking to participate in the CHCBP is required to notify the Secretary of Defense for Health Affairs of his or her election to participate in the program before the end of the 60-day period beginning the day after their dependency status is terminated, meaning the day on which the marital status is terminated.<sup>51</sup> The notification requirement is satisfied when the former spouse applies to Humana Military for CHCBP coverage.<sup>52</sup>

The CHCBP statute also contains a notice provision requiring that "the Department of Defense and other Uniformed Services...will notify persons eligible to receive health benefits under the CHCBP."<sup>53</sup> The DOD has delegated this requirement to Humana Military, which is tasked with the responsibility of informing former spouses of their eligibility.<sup>54</sup> Notification to former spouses occurs after the former spouse has declared a change in marital status to the military personnel office, presumably the Defense Enrollment Eligibility Reporting System (DEERS).<sup>55</sup> Notice will likely include a copy of the CHCBP handbook with the most recent information concerning applying for benefits.

The notice requirement applies in a different manner to former spouses satisfying the 20/20/15 test who receive full coverage medical benefits for one year after the date of the divorce. Due to their continued eligibility for services, 20/20/15 spouses are not subject to the rule requiring them to register for CHCBP benefits within 60 days from the date of their divorce. Rather, they are required to register within 60 days from the day after they lose their temporary medical coverage. The 60 day period may begin to run only after proper notification is given.<sup>56</sup>

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<sup>51</sup> 10 U.S.C. § 1978a(d)(2) (2004). The triggering event is when the court terminates the marriage, not when the former spouse is removed from a military member's paperwork as a dependant.

<sup>52</sup> HANDBOOK, *supra* note 23, at 18, 20.

<sup>53</sup> 32 CFR § 199.20(d)(6)(iv) (2004).

<sup>54</sup> *Id.* at (d)(3)(iv).

<sup>55</sup> HANDBOOK, *supra* note 23, at 17.

<sup>56</sup> 10 U.S.C. § 1978a(d)(2)(A)(ii) (2004).

## 2. Enrollment

A final divorce decree or decree of annulment is required before a former spouse can begin the process of enrolling in the CHCBP. As a result, the 60 day time limit may pose a problem for former spouses in states where a change in marital status can occur before a property settlement is approved. In those states, the issue of military retirement pay must be resolved to prove that there is a continuing interest in military pay and thus the CHCBP before the spouse can enroll. If an order dividing military pay is not entered before the 60 day window expires, the former spouse may not be able to enroll in the CHCBP.

After the divorce judgment is issued, the former spouse must disenroll from DEERS and become TRICARE ineligible so Humana Military is put on notice that former spouse benefits are available. After disenrolling, the former spouse will apply to the Humana Military program via DD Form 2837, the Continued Health Care Benefit Plan Application, which is available on the Humana Military website.<sup>57</sup> The form requires that the divorce decree or decree of annulment and first quarter's premium be submitted with the application.<sup>58</sup> After the application has been approved and the former spouse has been reentered into DEERS under the military spouse's social security number, a CHCBP card will be issued to confirm enrollment.<sup>59</sup> Ironically, the beneficiary is classified as being sponsored by the former military spouse and will be required to provide the military spouse's social security number when seeking information from Humana.

If the former spouse is denied access to the CHCBP benefits due to a disputed question of fact concerning eligibility, Humana has no internal appeals process for resolving the complaint.<sup>60</sup> Rather, the former spouse is directed to resolve the issue with the military spouse's service office to resolve the beneficiary's eligibility status.<sup>61</sup> Likely, the spouse will be referred back to the TRICARE office to attempt to resolve the dispute. The former spouse must then appeal to the Chief of the Office of Appeals and Hearings at TRICARE. From there, the decisions are reviewed by the director of OCHAMPUS (Office of the Civilian Health and Medical Program of the Uniformed Services) and can be sent for review by the Assistance Secretary of Defense (Health Affairs). Only after the administrative remedy is exhausted would a former spouse be able to

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<sup>57</sup> HANDBOOK, *supra* note 23, at 20. The application, DD Form 2837 can be found at [www.humana-military.com](http://www.humana-military.com).

<sup>58</sup> DD Form 2837, *supra* note 57.

<sup>59</sup> HANDBOOK, *supra* note 23, at 20.

<sup>60</sup> *Id.* at 21.

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

appeal to the U.S. Federal Court of Claims for review of their eligibility determination.<sup>62</sup>

### 3. Renewal

CHCBP offers an initial period of coverage lasting 36 months, followed by long term insurance for those who continue to need health care benefits. There is no formal process to renew coverage; rather, the only requirement to renew CHCBP benefits is to continue paying the quarterly premiums.<sup>63</sup> Renewal notices will be sent thirty days prior to the expiration of the current coverage period asking for the next quarter's premium.<sup>64</sup> While the process of renewal may be simple, it is the responsibility of the insured to inform the CHCBP administrator when they are no longer eligible for coverage. Failure to do so may result in the liability of the policy holder for payment of debts settled through CHCBP, much like any other health insurance program.

### C. **The Implications**

While the CHCBP statute has existed for fifteen years, the program has gone largely unnoticed by most attorneys. A search for references to the governing statute or the CHCBP in legal, administrative, or even secondary sources is largely fruitless, as issues related to the CHCBP are not being litigated (possibly due to the long administrative process required before a judicial remedy is available in the statute). As economic times change, however, a long term health insurance program will only grow in importance to clients as they begin a life outside of the direct cover of the military health care system.

The effect of the silence concerning the CHCBP has been that for many potential beneficiaries, their first and only notice of eligibility for the program may have been through the Humana handbook, which requires them to read nearly 25 pages before learning they may be entitled to the program. Even more harmful to the client, Humana's handbook is given only after the divorce judgment or decree of annulment is filed with DEERS – long after the issue of retirement pay has been judicially resolved. Moreover, a former spouse may

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<sup>62</sup> 32 C.F.R. § 199.02(j) (2004). *See also* 32 C.F.R. § 199.10 (2004).

<sup>63</sup> HANDBOOK, *supra* note 23, at 8. A recent conversation with a Humana representative yielded mixed results concerning renewal. One customer service representative indicated that in no case would a participant be approved for more than 36 months of coverage, at which time they would need to reestablish their eligibility through a survey that would be sent 60-90 days before the end of the last quarter of the 36 month period. Another representative, however, stated that no action was needed to continue benefits indefinitely other than the continued submission of quarterly payments. Any participant should be prepared to show the circumstances of eligibility as necessary.

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

learn of their right to participate in the CHCBP after expiration of the 60 day enrollment window.

The connection between CHCBP eligibility and retirement pay requires clients be informed of the potentially alarming consequences of waiving their full entitlement to retirement pay before entry of a final judgment. It is incumbent on any attorney assisting a military member's spouse through a divorce negotiation to explain the benefits that will be lost if the client does not retain an interest in the military spouse's retirement pay.

#### **IV. WHEN THE COURTS GET IT WRONG: THE SUPREME COURT OF SOUTH DAKOTA'S MISINTERPRETATION OF 10 U.S.C. § 1078A**

The South Dakota Supreme Court faced the issue of retirement pay as a requirement for CHCBP eligibility in *Lowe v. Schwartz*.<sup>65</sup> In that case, Mary Lowe and Carl Schwartz divorced after Schwartz had retired from the United States Coast Guard.<sup>66</sup> The divorce was preceded by Lowe suffering several serious medical problems, including a heart attack.<sup>67</sup> As a result of her condition, Lowe felt health care coverage through the CHCBP constituted a major benefit for her in the property settlement. When the Schwartz's attorney entered the final findings of fact and conclusions of law, the judgment included a permanent alimony award from Schwartz's retirement so Lowe could receive healthcare benefits under the CHCBP.<sup>68</sup> The judgment did not address Schwartz's Survivor Benefit Plan; the court instructed Lowe to complete any paperwork necessary to remove her as the beneficiary of the annuity and instead place her on a "former spouse protection plan" so she would receive medical coverage through the CHCBP.<sup>69</sup> From the findings of fact and conclusions of law it was clear that the intention of the parties was to ensure that Lowe would continue to have medical care after the divorce was dissolved, and the property settlement was entered into with medical benefits as a major factor in the agreement.

After her application to the CHCBP was rejected, Lowe appealed to reopen the property settlement portion of the divorce to name her as a beneficiary under Schwartz's SBP. However, the court found that Lowe could not reopen the case because her attorney did not provide the requested findings of a fact and conclusions of law at the end of the trial or object to their

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<sup>65</sup> 738 N.W.2d 63 (SD 2007).

<sup>66</sup> *Id.* at 65.

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

<sup>68</sup> *Id.*

<sup>69</sup> *Lowe v. Schwartz*, 716 N.W.2d 777, 778 (SD 2006).

sufficiency at the close of trial. The court also discussed, in dicta, the issue of CHCBP benefits and eligibility. Despite the parties' purpose in the property settlement to provide Lowe with medical care, the South Dakota Supreme Court found that "since retirement payments end upon the death of a retiree, it appears that a former spouse's continued healthcare coverage is then conditioned upon receipt of survivor beneficiary payments."<sup>70</sup> As a result, the South Dakota Supreme Court refused to find that an interest in a military member's retirement pay would satisfy the CHCBP requirements and on procedural grounds refused to reopen the issue of naming Lowe as the beneficiary of Schwartz's SBP, thereby undermining the property division by failing to grant Lowe continuing health coverage.<sup>71</sup>

The South Dakota decision was incorrect in its interpretation of the eligibility requirements and produced dicta that is potentially damaging to future former spouses seeking continued health care benefits.<sup>72</sup> Rather than use the opportunity presented in Lowe to clarify the statutory requirements for participants in the CHCBP, the court failed to read the text of the statute. Consistent with arguments made during the appeal by Lowe, 10 U.S.C. § 1078a(g)(4)(B)(I) and (II) are explicitly written to give *alternative* ways to fulfill the eligibility requirements. The statute states that benefits will be extended to a former spouse "who is receiving any portion of the retired or retainer pay of the member or former member *or* an annuity based on the retired or retainer pay of the member."<sup>73</sup> There is no discussion in the statute concerning the effect of death on the benefits of the former spouse, and certainly no disqualification of a former spouse who is not a beneficiary of SBP benefits while the retiree is still alive. On the contrary, there is no requirement that the military spouse be actually receiving *any* retirement or retainer payments **at the time** the spouse applies for CHCBP coverage.<sup>74</sup>

Even if the court was correct that CHCBP benefits would cease at the time retirement payments ended due to the death of the military member, the court should have found that health care coverage should have been extended to

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<sup>70</sup> *Lowe*, 738 N.W.2d. at 66, n.3.

<sup>71</sup> *Id.* at 66. It is interesting to note that the court does not cite to the statute at any time during their decision. Rather, they state that "information was provided to the circuit court" relating to the eligibility requirements. *Id.*

<sup>72</sup> As further evidence of their misinterpretation of the statute, the court indicated that Lowe was required to be enrolled in TRICARE for "at least" eighteen months prior to the divorce. *Id.* at 66, n.1. While this is a requirement for former spouses under every other section of the statute, 10 U.S.C. § 1078a(g)(4) does not require enrollment in TRICARE for the full eighteen months prior to the divorce. As outlined in the text above, to qualify for coverage as a former spouse, Lowe would have been required to be enrolled in TRICARE for merely one day in the eighteen months prior to the divorce.

<sup>73</sup> 10 U.S.C. § 1078a(g)(4)(B)(I) (2008) (emphasis added).

<sup>74</sup> *Id.* at . § 1078a(g)(4)(B)(II).

Lowe until Schwartz's death. Lowe was receiving alimony payments from Schwartz's retirement pay at the time she applied for CHCBP benefits and as a result satisfied one of the criteria for eligibility set out in the alternative in the statute. Presumably, Lowe also met all of the remaining eligibility requirements and should have received health care coverage.

While the findings of the court, including any determination concerning Lowe's eligibility, are dicta, a correct statement by the court based on careful statutory interpretation would have helped to ensure that former spouses receive the full health care benefits guaranteed by the statute. A contrary finding, especially when this issue has been left largely unlitigated, creates a dangerous, though possibly inadvertent, precedent through dicta that is potentially harmful to former spouses, and was certainly damaging to Lowe. A careful reading of the statute, and not the minimal discussion of the program in the statute, should control decisions in the future related to the eligibility and benefits of former spouses under the CHCBP.

## V. CONCLUSION

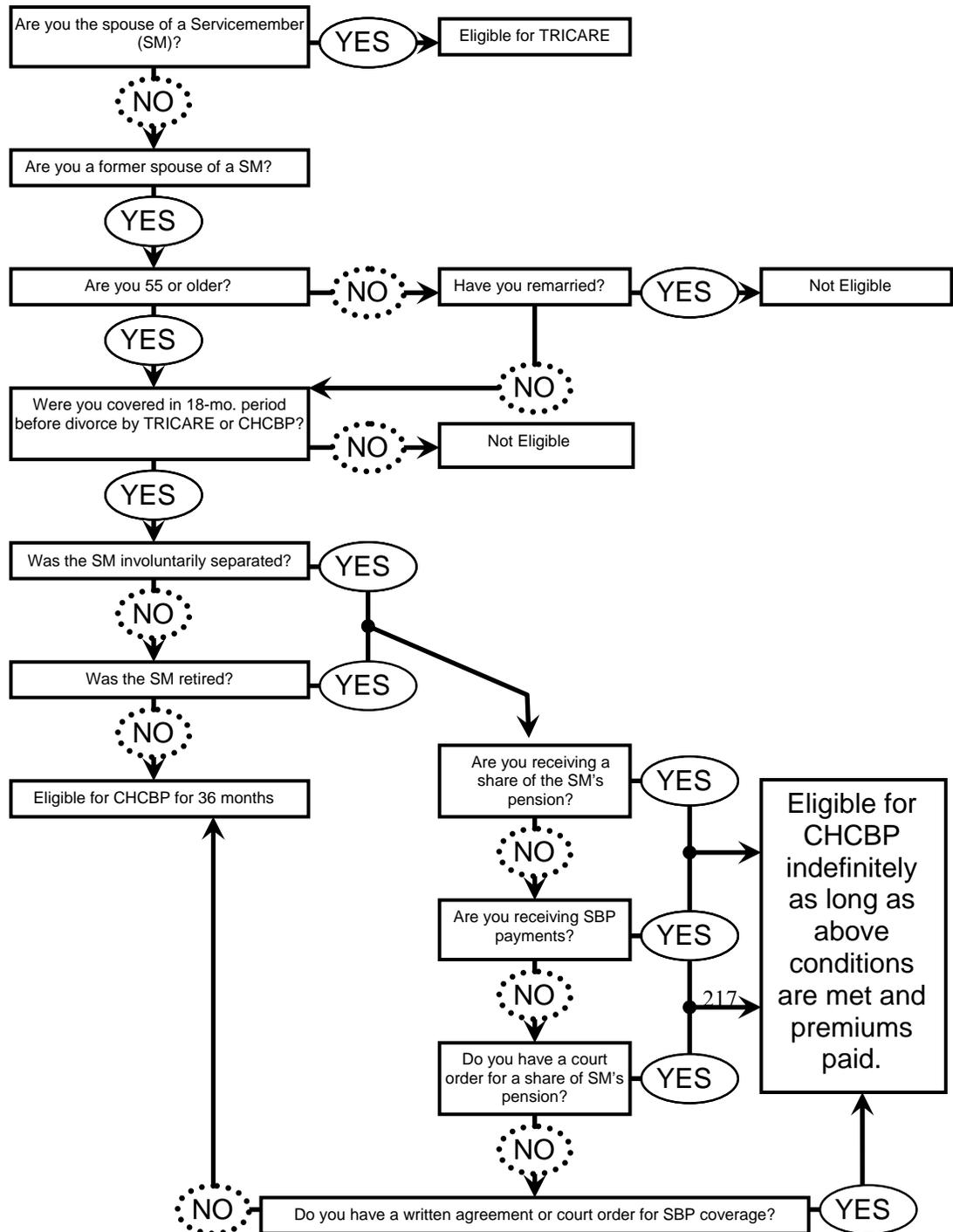
The pattern of Congress since the mid-1980s has been to increase the rights of military spouses and recognize their contribution to the defense effort. In doing so, federal law has become intertwined with state laws governing divorce and its effects on the former spouse. As a result, practitioners within the legal assistance community and civilian attorneys aiding the spouses of military members must keep current on the federal regulations governing former spouse benefits, and the effects programs such as the CHCBP may have on family law issues such as divorce. The federalization of benefits to former spouses and the tendency of these programs to persist for years without being widely litigated or publicized requires vigilance on the part of attorneys to find and understand the federal statutes that grant benefits to clients.

The CHCBP is an unprecedented and valuable benefit to former spouses that potentially redesigns the landscape of military divorce. In addition to increasing the risks of waiving a client's right to military retirement pay, the program also empowers former spouses to seek an alternative to high priced civilian medical coverage plans or going without any health insurance at all. The CHCBP provides an avenue for all former military spouses to receive affordable health care coverage regardless of their medical history. For a former military spouse who has had almost unrestricted access to military medical care, knowing that medical care will be available may bring peace of mind.

All future clients must be informed of their right to participate in the CHCBP before they sign a marital separation agreement or participate in a

proceeding where they waive their rights to military retirement pay or SBP payments. Any client still within their 60-day window of eligibility should be contacted immediately to advise them of the implications of their decisions. A former spouse's first inclination of the benefits of the CHCBP program should never come after an attorney has been consulted concerning the rights of a former military spouse. An attorney who allows a client to waive his or her rights to retirement pay without advising of the consequences to CHCBP eligibility is a recipe for malpractice. A seasoned attorney will protect all the interests of a client by providing a notice of benefits and consequences letter to his or her client before allowing the client to waive this important benefit.

# Health Care Coverage through CHCBP (10 U.S.C. 1078a) for Spouses and Former Spouses





# OUT OF SIGHT, OUT OF MIND? A CASE FOR LONG RANGE IDENTIFICATION AND TRACKING OF VESSELS ON THE HIGH SEAS

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## I. INTRODUCTION

The United States' "National Strategy for Maritime Security" provides that "[i]nterdiction of personnel and materials that pose a threat to the United States or the maritime domain is an essential layer of security."<sup>1</sup> The plan calls for achieving security by directing Executive agencies, including the Coast Guard and Navy, to "patrol, monitor, and extend unambiguous control over its maritime borders and maritime approaches," to "add to warning time," to "influence events at a distance," and to "engage adversaries well before they can cause harm to the United States."<sup>2</sup>

In order to achieve these goals, the United States is attempting, through domestic and international initiatives, to increase its ability to obtain information about vessels located outside of the 12 nautical mile territorial sea.<sup>3</sup> The goal is

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<sup>1</sup> THE NATIONAL STRATEGY FOR MARITIME SECURITY 21 (September 2005), available at: <http://www.whitehouse.gov/homeland/4844-nsms.pdf>, (last visited January 27, 2007) [hereinafter NATIONAL STRATEGY].

<sup>2</sup> *Id.* at 10.

<sup>3</sup> United Nations Convention on the Law of the Sea art.3, Nov. 16, 1982, 21 I.L.M. 1261 (1982) [hereinafter UNCLOS]. Although the United States is not a signatory to UNCLOS, it is United States policy that the provisions relating to navigation and overflight codified existing law and practice and reflect customary international law. See Annotated Supplement to the Commander's Handbook on the Law of Naval Operations (NWP 1-14M/MCWP 5-2.1/COMDTPUB P5800.7A) (1997) (citing Mar. 10, 1983 Statement by the President on United States Ocean Policy *Presidential Documents*, Volume 19, Number 10 (Mar. 14, 1983), 383-385). See *infra* note 58 and accompanying text.

to achieve a comprehensive situational awareness referred to as Maritime Domain Awareness (MDA).<sup>4</sup> Obtaining MDA is essential to detecting threats and to shaping the proper response once a threat is identified. However, the methods for collecting information outside a coastal State's territorial seas (which is essential to establishing Maritime Domain Awareness) challenge conventional notions of the freedom of the high seas and the associated advice of judge advocates that "it is incumbent upon maritime nations," to "exercise their rights actively in the face of constraints on international navigation . . ."<sup>5</sup> With these goals and challenges in mind, this article will examine the recent enactment of international regulations for Long Range Identification and Tracking (LRIT) of vessels, and the interaction of these regulations with the international law of freedom of the high seas.

LRIT regulations are the result of an international recognition of the threats posed by a shipborne attack, and multilateral efforts to address that threat through the International Maritime Organization (IMO).<sup>6</sup> While these regulations reflect the consensus of the IMO, support for them is not unanimous, and what was agreed upon concerns only basic vessel tracking information.<sup>7</sup> Questions remain for many concerned parties about "the ability of a State to track ships not intending to enter a port located within its territory, on a passage in an area under its jurisdiction or on the high seas."<sup>8</sup> There is also concern about "the distance over which such 'coastal State' tracking should be permitted."<sup>9</sup>

The first goal of this article will be to explain the origins of LRIT, what the requirements of the system are, and how it operates.<sup>10</sup> The next goal will be to distinguish the current legal obligations of maritime law from common

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<sup>4</sup> "Maritime Domain is all areas and things of, on, under, relating to, adjacent to, or bordering on a sea, ocean, or other navigable waterway, including all maritime related activities, infrastructure, people, cargo, and vessels and other conveyances." THE NATIONAL PLAN TO ACHIEVE MARITIME DOMAIN AWARENESS 1 (October 2005), available at: [http://www.dhs.gov/xlibrary/assets/HSPD\\_MDAPlan.pdf](http://www.dhs.gov/xlibrary/assets/HSPD_MDAPlan.pdf) [hereinafter MDA PLAN]. "Maritime Domain Awareness is the effective understanding of anything associated with the maritime domain that could impact the security, safety, economy, or environment of the United States." *Id.*

<sup>5</sup> Annotated Supplement to the Commander's Handbook on the Law of Naval Operations (NWP 1-14M/MCWP 5-2.1/COMDTPUB P5800.1) (1997) para. 2-32. [hereinafter COMMANDER'S HANDBOOK].

<sup>6</sup> International Maritime Organization, <http://www.imo.org> (Introduction to IMO) (last visited Mar. 15, 2007).

<sup>7</sup> Efthimios E. Mitropoulos, Secretary-General of the International Maritime Organization, Remarks to Lloyd's List events, London, UK (Apr. 24, 2006), [http://www.imo.org/Newsroom/mainframe.asp?topic\\_id=1322&doc\\_id=6278](http://www.imo.org/Newsroom/mainframe.asp?topic_id=1322&doc_id=6278).

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

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

<sup>10</sup> See *infra* Section II.

perceptions of the nebulous phrase “freedom of the seas.”<sup>11</sup> Having established the true nature of maritime law, the third goal will be to determine whether the recently enacted regulations for LRIT are consistent with the law.<sup>12</sup> Lastly this paper will examine whether those regulations could be expanded in the future to facilitate the collection of additional information about vessels without violating international maritime law and whether LRIT in its current or expanded form has any implications for U.S. defense policy.<sup>13</sup> This analysis will conclude that LRIT does not violate international law, but instead serves essential purposes consistent with the requirements of the law. In doing so, this article will also offer judge advocates a more nuanced approach to freedom of navigation that reconciles the tension between information collection and force projection activities.

## II. LONG RANGE IDENTIFICATION AND TRACKING (LRIT)

### A. Origins of Long Range Identification and Tracking

On December 21, 2004, President George W. Bush issued National Security Presidential Directive 41 / Homeland Security Presidential Directive 13.<sup>14</sup> The directive established that it is the policy of the United States to “take all necessary and appropriate actions, consistent with U. S. law, treaties and other international agreements to which the United States is a party, and customary international law as determined for the United States by the President, to enhance the security of and protect U. S. interests in the Maritime Domain.”<sup>15</sup>

Among other actions, NSPD 41/HSPD 13 required the promulgation of a National Strategy for Maritime Security.<sup>16</sup> The National Strategy was published in September of 2005, and recognized five strategic actions necessary for achieving the goals of NSPD 41/HSPD 13.<sup>17</sup> It determined that “[a] key national security requirement is the effective understanding of all activities, events, and trends within any relevant domain—air, land, sea, space, and

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<sup>11</sup> See *infra* Sections III and IV.

<sup>12</sup> See *infra* Section V.

<sup>13</sup> See *infra* Section VI.

<sup>14</sup> National Security Presidential Directive 41/ Homeland Security Presidential Directive 13, Dec. 21, 2004 [hereinafter NSPD 41/HSPD 13].

<sup>15</sup> *Id.* at 3.

<sup>16</sup> *Id.* at 4.

<sup>17</sup> NATIONAL STRATEGY, *supra* note 1 at 13. The 5 strategic actions are: 1) enhance international cooperation; 2) maximize domain awareness; 3) embed security in to commercial practices; 4) deploy layered security; and 5) assure continuity of the marine transportation system.

cyberspace—that could threaten the safety, security, economy or environment of the United States and its people.”<sup>18</sup>

To address this “key national security requirement,” the National Strategy proposed an international effort to improve monitoring and enforcement capabilities<sup>19</sup> including short and long-range vessel detection and monitoring capabilities to provide persistent monitoring of the maritime domain.<sup>20</sup> These principles serve as the foundation for the National Plan to Achieve Maritime Domain Awareness,<sup>21</sup> one of eight plans<sup>22</sup> formulated to support and implement the National Strategy for Maritime Security. The MDA Plan was published in October of 2005, and sets as a priority enhancing the collection of information.<sup>23</sup> To achieve this goal, the MDA Plan encourages the use of both *passive tools* such as sensors (satellite, radar, camera, sonar, etc.) and *cooperative systems* which require the participation of the vessels being tracked.<sup>24</sup> Cooperative systems include vessel track reporting systems such as the Automated Identification System (AIS) and the Long Range Identification and Tracking (LRIT) system. Both systems require vessels to carry hardware which actively transmits information about the vessel.<sup>25</sup> The AIS system is currently required and active in U.S. waters for certain vessels subject to U.S. regulations.<sup>26</sup> LRIT is a similar system which will soon be required by international regulations for monitoring vessels on the high seas.<sup>27</sup> The fact that LRIT will cover the high seas, and that the system will require vessels to report or disclose information to authorities has raised questions of international maritime law, particularly about how the requirements to fit equipment and provide information on the high seas implicate the longstanding principle of freedom of navigation.

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<sup>18</sup> *Id.* at 16.

<sup>19</sup> *Id.* at 13.

<sup>20</sup> *Id.* at 17.

<sup>21</sup> MDA PLAN, *supra* note 4 at 13.

<sup>22</sup> NATIONAL STRATEGY *supra* note 1 at 13. The eight supporting plans are: 1) National Plan to Achieve Domain Awareness; 2) Global Maritime Intelligence Integration Plan; 3) Maritime Operational Threat Response Plan; 4) International Outreach and Coordination Strategy; 5) Maritime Infrastructure Recovery Plan; 6) Maritime Transportation System Security Plan; 7) Maritime Commerce Security Plan; and 8) Domestic Outreach Plan.

<sup>23</sup> MDA PLAN *supra* note 4, at 14.

<sup>24</sup> *See generally*, William R. Cairns, *On Watch, VesselTracking Technologies for Maritime Security*, THE COAST GUARD JOURNAL OF SAFETY AND SECURITY AT SEA, PROCEEDINGS OF THE MARINE SAFETY & SECURITY COUNCIL, Spring 2006, at 32.

<sup>25</sup> AIS is a line of sight broadcast system which transmits information over VHF radio bands and can be received by any receiver within the transmission range. *See* Cairns, *supra* note 24 at 35. *See also* U.S. Coast Guard Navigation Center AIS Overview, <http://www.navcen.uscg.gov/enav/ais/default.htm> (last visited Mar. 14, 2007).

<sup>26</sup> 33 C.F.R. § 164 (2008).

<sup>27</sup> *See infra* Section II C.

## B. Cooperation and the implementation of LRIT

As mentioned above, LRIT is considered a cooperative system.<sup>28</sup> This is because LRIT requires vessels to use shipboard equipment to transmit information for reception by authorities. LRIT can therefore be distinguished from passive systems such as radar or satellite observation, which collect information about vessels without their express participation or knowledge. A benefit of pursuing a cooperative system is that cooperative systems do not require the presence of collection equipment (i.e. a radar antenna, camera or satellite) to gather information. Instead, a ship carries with it, wherever its location, the ability to transmit information to a known receiver/receptacle. The result is achievement of worldwide coverage with a limited, shared investment by the participants.

Of course, such a benefit cannot be realized without the enforceable or documented agreement of the participants. For this reason, and consistent with the National Strategy, international cooperation was sought. The United States and other countries pursued implementation under the existing multilateral framework of the International Maritime Organization (IMO).<sup>29</sup> Proposals were made to the Maritime Safety Committee<sup>30</sup> of the IMO, which resulted in 2006 in the adoption of new regulations in the form of amendments to the Convention for the Safety of Life at Sea (SOLAS) treaty.<sup>31</sup> These amendments represent a multilateral agreement for the sharing of LRIT information (for security and search and rescue purposes) among SOLAS contracting Governments.<sup>32</sup> They also introduced mandatory requirements for certain vessels to carry and use the equipment necessary to participate in the system.<sup>33</sup>

## C. How LRIT Works

The regulations requiring the installation of LRIT equipment and explaining how the system will function are found in chapter five of the

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<sup>28</sup> See *supra* note 24 and accompanying text.

<sup>29</sup> International Maritime Organization, <http://www.imo.org> (last visited March 15, 2007) [hereinafter IMO].

<sup>30</sup> *Id.* (Most of the IMO's work is carried out in committees and subcommittees. The Maritime Safety Committee (MSC) is the most senior of these).

<sup>31</sup> See Adoption of Amendments to the International Convention for the Safety of Life at Sea, 1974, As Amended, [hereinafter SOLAS Amendments] IMO Res. MSC.202(81) (May 19, 2006) & MSC 81/25/Add.1.

<sup>32</sup> See SOLAS Amendments, *supra* note 31, IMO Res. MSC.202(81) (May 19, 2006) & MSC 81/25/Add.1 Annex 2.

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

Convention for the Safety Of Life At Sea (SOLAS).<sup>34</sup> These regulations create a scheme of phased-in implementation for existing vessels and entered into effect for newly constructed vessels on January 1, 2008.<sup>35</sup> Initially, participation is mandatory for passenger and cargo ships of 300 gross tons or more and mobile offshore drilling units.<sup>36</sup> Vessels covered by the regulations will be required to be fitted with a system to automatically transmit information.<sup>37</sup> For the most part, existing Global Maritime Distress and Safety System (GMDSS) equipment already required under chapter four of the convention<sup>38</sup> can be modified to perform this function, thereby eliminating the need for additional equipment and minimizing costs to shipowners. The modification will enable vessels to transmit their identity, their position in latitude and longitude, and the date and time of the position provided to an orbiting satellite.<sup>39</sup> Transmissions from vessels will be made free of charge. Upon receipt of the information by an orbiting satellite, the information will be transferred to a designated land-based data center.<sup>40</sup> A series of land-based data centers will manage and control all requests for and distribution of information in accordance with the rights and obligations of contracting governments ascribed in regulation.<sup>41</sup> Those contracting governments and search and rescue services that are entitled to receive LRIT information are: the vessel's flag State (irrespective of the vessel's location); the port State which the vessel has indicated an intention to enter; and those contracting coastal States within one thousand miles of the vessel's position.<sup>42</sup> The regulations prohibit monitoring by non-contracting parties as well as contracting parties who have no interest in the vessel's voyage under the

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<sup>34</sup> International Convention for the Safety Of Life At Sea [hereinafter SOLAS], Chap. V, Reg. 19, Nov. 1, 1974, available at <http://www.imo.org> (follow "Site Index" hyperlink; then follow "SOLAS" hyperlink).

<sup>35</sup> *Id.* at Chap. V Reg. 19-4.1.1.

<sup>36</sup> *Id.* at Chap. V Reg. 19-1.2.1.

<sup>37</sup> *Id.* at Chap. V Reg. 19-1.4.1.

<sup>38</sup> The GMDSS provides for automatic distress alerting and locating in cases where a radio operator doesn't have time to send an SOS or MAYDAY call, and, for the first time, requires ships to receive broadcasts of maritime safety information which could prevent a distress from happening in the first place. In 1988, IMO amended the Safety of Life at Sea (SOLAS) Convention, requiring ships subject to it fit GMDSS equipment. Such ships were required to carry NAVTEX and satellite EPIRBs by 1 August 1993, and had to fit all other GMDSS equipment by 1 February 1999. *See* <http://www.navcen.uscg.gov/marcomms/gmdss/default.htm>.

<sup>39</sup> SOLAS, *supra* note 34, at Chap. V Reg. 19-1.5. *See generally*, Long Range Identification and Tracking, [http://www.imo.org/Safety/mainframe.asp?topic\\_id=905](http://www.imo.org/Safety/mainframe.asp?topic_id=905) (last visited Mar. 15, 2006).

<sup>40</sup> *See generally id.*

<sup>41</sup> SOLAS, *supra* note 34, at Chap. V Reg. 19-1.8.1. *See generally*, Long Range Identification and Tracking, *supra* note 39.

<sup>42</sup> The regulation also includes a prohibition against receiving information about a vessel located within the territorial waters of its own flag state. For example, Canadian authorities would not be entitled to receive information about U.S. flagged vessels operating in the U.S. territorial sea off the coast of Maine. *See* SOLAS Chapter V Reg. 19-1.8.1.3.

regulations. The system is expected to be fully operational in December of 2008.<sup>43</sup>

In addition to and simultaneous with international efforts, the United States has worked toward domestic implementation of an LRIT system in internal and territorial waters. Congress included in the Maritime Transportation Safety Act of 2002, section 70115 which permitted the Secretary of the department in which the Coast Guard is operating<sup>44</sup> to “develop and implement a long-range automated vessel tracking system for all vessels in United States waters that are equipped with the [GMDSS] or equivalent technology.”<sup>45</sup> That provision was later modified by section 803(b) of the Maritime Transportation Safety Act of 2004 to require implementation of LRIT.<sup>46</sup> Subsequently, the Coast Guard published a Federal Register notice of its plans to promulgate regulations which will, consistent with international law, require certain vessels to electronically report their identity and position data.<sup>47</sup> As with all domestic regulations, implementation will follow the procedures required by the Administrative Procedure Act including public notice and comment.<sup>48</sup> For this reason, establishment of a domestic system may take several years.

### III. INTERNATIONAL LAW OF THE SEA: AN INTRODUCTION

For do not the oceans, navigable in every direction with which God has encompassed all the earth, and the regular and the occasional winds which blow

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<sup>43</sup> See generally Cairns, *supra* note 24 at 35.

<sup>44</sup> 14 U.S.C. § 3: “Upon the declaration of war or when the President directs, the Coast Guard shall operate as a service in the Navy, and shall so continue until the President, by Executive order, transfers the Coast Guard back to the Department of Homeland Security. While operating as a service in the Navy, the Coast Guard shall be subject to the orders of the Secretary of the Navy who may order changes in Coast Guard operations to render them uniform, to the extent he deems advisable, with Navy operations.”

<sup>45</sup> 46 U.S.C. § 70115 (2008), Pub. L. 107-295 Nov. 25, 2002; 11 Stat 2083. (“The Secretary may develop and implement a long-range automated vessel tracking system for all vessels in United States waters that are equipped with the Global Maritime Distress and Safety System or equivalent satellite technology. The system shall be designed to provide the Secretary the capability of receiving information on vessel positions at interval positions appropriate to deter transportation security incidents. The Secretary may use existing maritime organizations to collect and monitor tracking information under the system.”).

<sup>46</sup> 46 U.S.C. § 70115 (2008), Pub. L. 108-293 Aug. 9, 2004; 118 Stat.1080. (“Section 70115 of title 46, United States Code, is amended in the first sentence by striking ‘may’ and inserting ‘shall, consistent with international treaties, conventions, and agreements to which the United States is a party.’”).

<sup>47</sup> 71 Fed. Reg. 22,688 (Apr. 24, 2006).

<sup>48</sup> 5 U.S.C. § 553 (2008).

now from one quarter and now from another, offer sufficient proof that Nature has given to all peoples a right of access to all other peoples?<sup>49</sup>

### A. Customary International Law

When Hugo Grotius published his eloquent expression of natural law in the early 1600s, the principle of freedom of the sea was anything but a certainty. Only relatively unsettled customary international law governed seaborne activity at the time, and the Spanish and Portuguese fleets were exerting control over vast areas of the oceans.<sup>50</sup> The dialogue initiated by Grotius yielded what is loosely called the “natural law tradition” and his view that all nations (including wholly landlocked nations) were entitled to unencumbered use of the sea became a foundation of customary international law that continued throughout the 17<sup>th</sup>, 18<sup>th</sup> and 19<sup>th</sup> centuries.<sup>51</sup>

This theory of freedom of the sea survived the evolution of ocean navigation from sailing ships of wood and tar to ships of steel and diesel before finally being codified, along with much of the customary law of the sea, in the form of the 1958 Geneva Convention on the High Seas.<sup>52</sup> However, since the 1958 Geneva Convention, the evolution of treaty law has reversed the swing of the pendulum first put into motion by Grotius as treaty law has gradually extended the permissible limits of coastal State jurisdiction away from the land.<sup>53</sup>

### B. Treaty Law

Contemporary law of the sea is expressed in the 1982 United Nations Convention on the Law of the Sea (UNCLOS). The Convention resulted from the third U.N. conference on the law of the sea, which met over a ten-year period.<sup>54</sup> While most of the treaty’s provisions had widespread support, the United States and other industrialized countries did not sign the convention until important changes were negotiated and implemented in 1994.<sup>55</sup> Although President Clinton transmitted the Convention to the Senate for its advice and consent in October of 1994, UNCLOS entered into force on November 16, 1994

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<sup>49</sup> HUGO GROTIUS, *DE MARE LIBERUM (THE FREEDOM OF THE SEAS)* 7-8 (Ralph van Deman Magoffin trans. & James Brown Scott ed., 1916 (1609)).

<sup>50</sup> LOUIS B. SOHN & JOHN E. NOYES, *CASES AND MATERIALS ON THE LAW OF THE SEA*, 1 (2004).

<sup>51</sup> *Id.* at 5.

<sup>52</sup> FREESTONE, BARNES & ONG, *THE LAW OF THE SEA*, 328 (2006).

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

<sup>54</sup> MARJORIE ANN BROWNE, CONGRESSIONAL RESEARCH SERVICE REPORT FOR CONGRESS, *THE LAW OF THE SEA CONVENTION AND U.S. POLICY 1* (Updated May 12, 2006) (“[T]he third U.N. conference on the law of the sea . . . met for a total of ninety-three weeks between 1973 and 1982.”).

<sup>55</sup> *Id.* The U.S. objections centered on the parts of UNCLOS that dealt with deep sea mining.

without U.S. participation.<sup>56</sup> However, Ambassador Sichan Siv<sup>57</sup> explained the current U.S. position on UNCLOS to the U.N. General Assembly in 2001:

The United States has long accepted the UN Convention on the Law of the Sea as embodying international law concerning traditional uses of the oceans. The United States played an important role in negotiating the convention as well as the 1994 Agreement that remedied the flaws in part XI of the Convention on deep sea mining. Because the rules of the convention meet U.S. national security, economic and environmental interests, I am pleased to inform you that the Administration of President George W. Bush supports accession of the United States to the Convention.<sup>58</sup>

Thus, the United States abides by much of UNCLOS, especially the navigational regimes, as reflective of customary international law.<sup>59</sup>

UNCLOS largely retained the concept of the high seas first expressed by Grotius, including the concept that the high seas are open to all States whether coastal or land-locked, and that those States should enjoy freedom of navigation and freedom of fishing.<sup>60</sup> The Convention also extended Grotius' ideas to more modern freedoms, such as freedom of overflight, freedom to lay submarine cables and pipelines, freedom to construct artificial islands and other installations, and freedom of scientific research.<sup>61</sup> At the same time, the Convention codifies the extension of the territorial sea to 12 nautical miles<sup>62</sup> and recognized the concepts of the contiguous zone,<sup>63</sup> and exclusive economic zone,<sup>64</sup> each of which extends some form of coastal State jurisdiction offshore. Similarly, UNCLOS imposes obligations on States to ensure vessels sailing

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

<sup>57</sup> *Id.* at 2. Ambassador Siv is the U.S. representative to the U.N. Economic and Social Council (ECOSOC).

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

<sup>59</sup> See also COMMANDER'S HANDBOOK *supra* note 5 at 1-2 (citing Mar. 10, 1983 Statement by the President on United States Ocean Policy *Presidential Documents*, Volume 19, Number 10 (Mar. 14, 1983), 1-38).

<sup>60</sup> UNCLOS, *supra* note 3 art. 87.

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

<sup>62</sup> UNCLOS, *supra* note 3 art. 3. ("Every State has the right to establish the breadth of its territorial sea up to a limit not exceeding 12 nautical miles, measured from the baseline determined in accordance with this convention.") A nautical mile is a unit of distance used for sea and air navigation based on the length of a minute of arc of the earth's circumference at the equator. A nautical mile is generally considered to be 6076 feet (a statute mile is 5280ft). See Merriam-Webster OnLine, [www.m-w.com](http://www.m-w.com) (last visited Mar. 14, 2007).

<sup>63</sup> UNCLOS art.33, *supra* note 3. ("The contiguous zone may not extend beyond 24 nautical miles from the baseline from which the breadth of the territorial sea is measured.")

<sup>64</sup> UNCLOS art. 57, *supra* note 3. ("The exclusive economic zone shall not extend beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured.")

under their flag “conform to generally accepted international regulations, procedures, and practices”<sup>65</sup> This last requirement has opened the door to further examination and delineation of the freedom of the seas in the form of multilateral regulation.

### C. Multilateral Regulation and the IMO

The “generally accepted international regulations, procedures, and practices” described in UNCLOS<sup>66</sup> are embodied in international conventions adopted primarily under the Auspices of the International Maritime Organization (IMO), which began meeting shortly after the 1958 Geneva Convention. The modern IMO is a specialized agency of the United Nations tasked with developing and maintaining a comprehensive regulatory framework for safety, environmental stewardship, legal concerns, and security on the world’s seas.<sup>67</sup> Regulations developed by the IMO are applicable to virtually all vessels and significantly affect the permissible conduct of vessels on the high seas.

### D. Charting Freedom: The Resulting Picture

The treaty law and multilateral regulation we have discussed have yielded an ocean divided into zones of jurisdiction. In each of these zones, vessels are subject to different degrees of restrictions from absolute freedom of navigation. Generally speaking, restrictions are greatest in the internal waters of a coastal State and become less restrictive as the distance from the coastal States increases. Thus, “[i]n internal waters, foreign vessels normally enjoy no rights of navigation.”<sup>68</sup> Yet in the territorial sea (the area extending seaward of the coast to a distance of 12 nautical miles), “foreign vessels enjoy the right of innocent passage, although the coastal State may temporarily suspend that right in limited areas where necessary for its security.”<sup>69</sup>

Beyond the territorial sea of a coastal State, up to a distance of 24 nautical miles, is an area known as the “contiguous zone” where coastal States may “exercise the control necessary to prevent and punish infringements of its customs, fiscal, immigration, or sanitation regulations committed within its territorial sea.”<sup>70</sup> Extending beyond the contiguous zone up to a distance of 200 nautical miles is the “exclusive economic zone” (EEZ). In the EEZ, freedom of navigation is subject to the coastal State’s jurisdiction relating to pollution and

<sup>65</sup> UNCLOS art. 94(5), *supra* note 3.

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

<sup>67</sup> International Maritime Organization, *supra* note 29. There are 167 member States in the IMO.

<sup>68</sup> R. R. CHURCHILL & A. V. LOWE, *THE LAW OF THE SEA* 263 (Dominic McGoldrick ed., 3d ed.1999).

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

<sup>70</sup> *Id.* at 264.

control over resources (e.g. oil, fish). Beyond 200 nautical miles is the area generally considered to be the High Seas, where “freedom of navigation is [only] subject to the general obligation to have due regard ‘to the interests of other States in their exercise of the freedom of the high seas,’” as well as being subject “to any relevant international obligations undertaken by its flag state.”<sup>71</sup>

#### IV. FREEDOM OF THE SEAS & CONTEMPORARY INTERNATIONAL LAW: A LEGAL ANALYSIS

Opponents of LRIT perceive reporting measures as an infringement on the freedom of the seas guaranteed under article 87 of UNCLOS, and therefore violative of international law.<sup>72</sup> Justifiable concerns expressed by these opponents include preservation of naval mobility, protection of sensitive trade information, and privacy rights. Therefore, it is necessary to examine the scope of freedom of navigation provided under international law.

##### A. What is Freedom? (Freedom of the Seas, Freedom of Navigation, & Innocent Passage)

Article 87 of UNCLOS is entitled “Freedom of the High Seas.”<sup>73</sup> Like its ideological predecessor, Grotius’ “*Mare Liberum*” or “The Free Sea,” it affirms the customary international law principle that the high seas are open to all countries.<sup>74</sup> In doing so, Article 87 of UNCLOS provides a non-exhaustive list of the freedoms which fall within its scope.<sup>75</sup> Included in this list, and most germane to an analysis of LRIT, is the freedom of navigation.<sup>76</sup> The concept of freedom of navigation, however, is not succinctly defined by UNCLOS. Instead this freedom, which may also be expressed as the right of unimpeded passage “is a theme that runs through the convention, taking different forms in different maritime zones.”<sup>77</sup> This freedom of navigation, to borrow a tidal analogy from

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

<sup>72</sup> UNCLOS art. 87, *supra* note 3. (“[F]reedom of the high seas is exercised under the conditions laid down by this convention and by other rules of international law.”); *Id.* art. 89. (“No state may validly purport to subject any part of the high seas to its sovereignty.”) Since the text of the convention does not specifically address vessel reporting, and since the convention specifically limits coastal state sovereignty to the territorial sea, contiguous zone, and eez, opponents regard reporting requirements as an extension of coastal state sovereignty not authorized by UNCLOS.

<sup>73</sup> *Id.* art. 87.

<sup>74</sup> *Id.* (“The high seas are open to all States, whether coastal or land-locked.”).

<sup>75</sup> *Id.* art. 87. These include a) freedom of navigation; b) freedom of overflight; c) freedom to lay submarine cable; d) freedom to construct artificial islands; e) freedom of fishing & f) freedom of scientific research.

<sup>76</sup> *Id.* art. 87(1)(a).

<sup>77</sup> UNITED NATIONS CONVENTION ON THE LAW OF THE SEA 1982, A COMMENTARY, VOL. III 81 (Myron H. Nordquist et al. eds., 1985) [hereinafter NORDQUIST, Vol. III].

American jurisprudence,<sup>78</sup> is at its *lowest ebb* in a coastal State's internal waters, and at its *highest level* in the areas beyond 200 nautical miles. Thus, freedom of navigation should not be viewed as an absolute right possessed by a vessel, but rather a continuum of freedoms available in certain areas.

Included in this continuum of freedoms of navigation is the right of foreign vessels to enjoy *innocent passage* through the territorial sea of a coastal State.<sup>79</sup> The concept is codified in Articles 17 through 21 of UNCLOS, with Article 18 defining "passage," and Article 19 describing what type of passage is "innocent."<sup>80</sup> Article 19 in particular enumerates activities which would render passage "prejudicial to the peace, good order or security of coastal states,"<sup>81</sup> and therefore not innocent. Taken together, the two articles define innocent passage.<sup>82</sup>

The definition of innocent passage in UNCLOS imposes a burden on the transiting vessel to refrain from freedoms that might be enjoyed elsewhere.<sup>83</sup> Additionally, the UNCLOS articles on innocent passage arguably impose a burden on foreign vessels to demonstrate that they are not operating in a manner prejudicial to the peace, good order or security of the coastal State. Specifically Article 20 requires submarines to navigate on the surface and to show their flag.<sup>84</sup> Likewise, Article 21 authorizes coastal States to impose and requires vessels in passage to observe regulations concerning the manner of passage.<sup>85</sup> Such regulations include the creation of traffic separation schemes<sup>86</sup> and regulated navigation areas<sup>87</sup> which limit where vessels can transit.

Since these coastal State regulations are not considered to excessively impede transit, it is not unreasonable to conclude that LRIT requirements imposed within the territorial sea would be consistent with the general restrictions on innocent passage, since they similarly would not unduly impede

<sup>78</sup> *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, (1952) (Frankfurter, J., concurring).

<sup>79</sup> UNCLOS, *supra* note 3 arts. 17-21. *See also* COMMANDER'S HANDBOOK, *supra* note 5 at 2-7.

<sup>80</sup> *Id.* arts. 17-21.

<sup>81</sup> *Id.* art. 19-2.

<sup>82</sup> UNITED NATIONS CONVENTION ON THE LAW OF THE SEA 1982 A COMMENTARY, Volume II 166 (Myron H. Nordquist et al. eds., 1985) [*hereinafter* NORDQUIST Vol. II].

<sup>83</sup> *E.g.* UNCLOS art 19(2)(i), *supra* note 3 (prohibiting fishing by a foreign vessel while engaged in innocent passage through a coastal State's territorial sea); *Id.* art. 56(1)(a) (assigning the exclusive right to exploit natural resources, including fish, within its exclusive economic zone to the coastal State); *Id.* arts. 87(1)(e) and 116 (including "freedom of fishing" as part of the freedom of the high seas, subject to treaty obligations, and the rights, duties and interests of coastal States).

<sup>84</sup> UNCLOS, *supra* note 3 art. 20.

<sup>85</sup> *Id.* art. 21.

<sup>86</sup> *Id.* art. 22.

<sup>87</sup> *See generally* 33 C.F.R. § 165 (2008). (for U.S. Restricted Navigation Areas); INTERNATIONAL MARITIME ORGANIZATION, SHIPS' ROUTING, (8th ed. 2003) (for international areas to be avoided).

the passage of vessels. In fact, information about vessel position would help to ensure these existing schemes and protected zones are honored. Therefore, the freedom that opponents of LRIT suggest is abridged may be more accurately and more narrowly described as the principle of freedom of *navigation*, rather than the more general “freedom of the seas.”<sup>88</sup>

### B. Where is Freedom? (The High Seas)

Article 87 of UNCLOS describes the maritime area which is open to exploitation by all States as the “high seas,” thereby suggesting a geographic component to the extent of high seas freedoms. However, the term “high seas” is, by no accident, undefined in UNCLOS. During negotiation of the treaty, the United States and other major maritime States regarded the exclusive economic zone (EEZ) as part of the high seas, while other States regarded the EEZ as a special zone of the coastal State which is subject to the freedoms of navigation and overflight.<sup>89</sup> Indeed in U.S. parlance the term “international waters” is often used to describe the area including the contiguous zone, the EEZ and the waters beyond the EEZ specifically to avoid the “high seas” question.<sup>90</sup>

This question of where the high seas begin is typical of the clash of interests between coastal States, who wish to extend and tighten their jurisdiction in order to enhance national security, and “user” States whose aim is to maximize freedoms of navigation, overflight and scientific research to preserve their naval mobility and military projection.<sup>91</sup> The problem was addressed as a matter of *applicability* rather than a matter of *definition* in Article 86 by making the high seas part<sup>92</sup> of UNCLOS applicable “in accordance with Article 58 [which defines the ‘[r]ights and duties of other States in the exclusive economic zone’].”<sup>93</sup> The result of combining Articles 58 and 86 of UNCLOS is that all rules relating to navigation and communication are applicable beyond the 12 nautical mile territorial sea, but other rights, in particular those relating to natural resources, are abridged or abrogated entirely in the exclusive economic zone.<sup>94</sup> Since freedom of navigation is one of the rights listed under article 87 that relates to navigation and communication,<sup>95</sup> it is clear that a right to freedom of navigation under UNCLOS exists in all areas seaward of the territorial waters of a coastal State. This is consistent with the conclusion above that vessels

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<sup>88</sup> See *supra* notes 71 - 75 and accompanying text.

<sup>89</sup> REPORTS OF THE UNITED STATES DELEGATION TO THE THIRD UNITED NATIONS CONFERENCE ON THE LAW OF THE SEA 148-49, 174-75 (Myron H. Nordquist & Choon-ho Parks eds., 1983).

<sup>90</sup> COMMANDER’S HANDBOOK, *supra* note 5 at 1-14, n.27.

<sup>91</sup> FREESTONE, BARNES & ONG, *supra* note 52 at 366.

<sup>92</sup> UNCLOS, *supra* note 3 part VII.

<sup>93</sup> *Id.* art. 86.

<sup>94</sup> NORDQUIST Vol. II, *supra* note 82 at 68-70.

<sup>95</sup> UNCLOS, *supra* note 3 art. 87(1)(a).

would be obliged under UNCLOS to comply with LRIT measures within the territorial sea.<sup>96</sup> This conclusion also narrows the necessary analysis to the application of LRIT requirements seaward of the 12 nautical mile territorial sea limit.

**C. How is Freedom Exercised? (Strict Prohibitions, Peaceful Purposes & Inconsistent Use)**

Having narrowed our analysis to the freedom of navigation beyond the territorial sea, it is necessary to examine whether this freedom is absolute, such that LRIT requirements would abridge an existing freedom, or whether requiring LRIT is consistent with existing parameters of this freedom. Such analysis must begin with Article 87 of UNCLOS. While Article 87 is commonly considered to be a codification of the customary right of freedom of the seas, it is more accurately described as a restatement of these rights. Under the Article 87 description, freedom of navigation “is no longer a freedom *simpliciter*” but instead coexists with obligations which govern the activities covered by those freedoms.<sup>97</sup> Language in Article 87 sets out three types of obligations. The obligation that States exercise their freedoms subject to “the conditions laid down by this convention,” subject to “other rules of international law,”<sup>98</sup> and “with due regard for the interests of other states.”<sup>99</sup>

Obligations “laid down by [the] convention” include the definition of certain universal crimes such as piracy, slavery, drug trafficking and unauthorized offshore broadcasting, which, when conducted anywhere, strip a vessel of its rights.<sup>100</sup> Obligations also include specific restrictions in certain locations such as Article 33’s contiguous zone prohibition against any activity that would infringe on the customs, fiscal, immigration, or sanitary laws applicable in the coastal State’s territorial waters.<sup>101</sup> Both of these provisions allow enforcement measures by other parties to the convention including boarding, searching and seizure of vessels found to be in violation.<sup>102</sup>

<sup>96</sup> See *supra* notes 83 - 88 and accompanying text.

<sup>97</sup> NORDQUIST, Vol III, *supra* note 77 at 80-81.

<sup>98</sup> UNCLOS, *supra* note 3 art. 87 (“Freedom of the high seas is exercised under the conditions laid down by this convention and by other rules of international law.”).

<sup>99</sup> *Id.* (“These freedoms shall be exercised by all states with due regard for the interests of other states in their exercise of the freedom of the seas, and also with due regard for the rights under this convention.”).

<sup>100</sup> UNCLOS, *supra* note 3 art. 110 (discussing grounds for “Right of Visit” boarding).

<sup>101</sup> *Id.* art. 33.

<sup>102</sup> *Id.* (“[T]he coastal state may exercise the control necessary to prevent [or punish] infringement of its customs, fiscal immigration or sanitary laws within its territory or territorial sea.”); *Id.* art. 110 (“A warship may proceed to verify the ship’s right to fly its flag. To this end, it may send a boat under the command of an officer to the suspected ship. If suspicion remains after the documents have been checked, it may proceed to a further examination on board the ship. . .”)

Obligations under “other rules of international law” are echoed throughout the convention. They include Article 88’s statement that “[t]he high seas shall be reserved for peaceful purposes,”<sup>103</sup> Article 301’s reference to the United Nations Charter requirement to “refrain from any threat or use of force,” and that article’s prohibition against acting in “any other manner inconsistent with the principles of international law” on the high seas.<sup>104</sup>

The final types of obligations listed in Article 87 of UNCLOS are cooperative obligations. These more general requirements recognize the Charter’s dependence on the collective adherence to and enforcement by the international community. These obligations can be traced to Article 87’s “due regard” language which, put another way, requires all States to “refrain from any acts that might adversely affect the use of the high seas by nationals of another State.”<sup>105</sup>

While the language of Article 87 provides a “test of reasonableness”<sup>106</sup> by which States may evaluate their actions as either cooperative or disruptive, it does not contain specific prohibitions or requirements.<sup>107</sup> Where this reasonableness test is inconclusive, where the U.N. Charter contains no relevant provision, and where no other rules of international law apply, UNCLOS allows for multilateral regulation. Article 94 requires a State to “effectively exercise its jurisdiction and control ... over ships flying its flag” and to “conform to generally accepted international regulations, procedures, and practices and to take any steps which may be necessary to secure their observance.”<sup>108</sup> In other words, UNCLOS permits States to define reasonable conduct through multilateral enactment of regulations or procedures.

The most obvious illustration of this concept is the Convention for the International Regulations for Preventing Collisions at Sea (COLREGS).<sup>109</sup> The COLREGS address the most basic issue of shared use of the sea: when two vessels cross paths, which vessel must give way to the other? No provision of customary international law or of the U.N. Charter answers these questions.

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<sup>103</sup> *Id.* art. 88.

<sup>104</sup> *Id.* art. 301 (“In exercising their rights and performing their duties under this convention, States parties shall refrain from any threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the principles of international law embodied in the charter of the United Nations.”).

<sup>105</sup> NORDQUIST, Vol. III, *supra* note 77 at 86.

<sup>106</sup> *Id.* at 74 (examining the United Kingdom’s proposal to the 1958 Geneva Convention on the High Seas).

<sup>107</sup> UNCLOS, *supra* note 3 art. 87.

<sup>108</sup> *Id.* art. 94.

<sup>109</sup> Convention on the International Regulations for Preventing Collisions at Sea, Oct. 20, 1972, at <http://www.admiraltylawguide.com/conven/collisions1972.html> [hereinafter COLREGS].

UNCLOS offers only that the vessels should exercise “due regard” for each other by not colliding.<sup>110</sup> The COLREGS however assign one vessel the burden of avoiding collision and require the other vessel to maintain its course and speed.

We can conclude from this analysis that the freedom of the seas most likely to be affected by LRIT is the freedom of navigation. We can further conclude that freedom of navigation within the territorial sea of a coastal State may be substantially limited to the lesser standard of innocent passage, a standard under which the coastal State could reasonably adopt regulations requiring LRIT as a means for ensuring safety of navigation and regulation of maritime traffic consistent with UNCLOS.<sup>111</sup> Outside the territorial sea, despite the existence of the contiguous zone and the exclusive economic zone, freedom of navigation is at its zenith and cannot be constrained by unilateral coastal State action.<sup>112</sup> Since no principal of customary international law, nor any article of the U.N. charter addresses LRIT, it may be effected only through multilateral regulation pursuant to Article 94 of UNCLOS.<sup>113</sup>

## V. THE CASE FOR LRIT

To this point we have described the history and origin of LRIT<sup>114</sup> and explained how the system works.<sup>115</sup> We have also identified the body of law applicable to LRIT activities and the particular tenets of that law.<sup>116</sup> Our analysis thus far has been primarily descriptive of the status of the law and its meaning. Against that backdrop we return to the main intent of this article, which is to demonstrate that LRIT does not violate international law, and in fact serves essential purposes consistent with the requirements of the law.

### A. LRIT Complies with UNCLOS

First it is important to note that the implementation of LRIT has been consistent with the structure of UNCLOS. LRIT was introduced through the IMO where it was negotiated and enacted as an amendment to the Convention for the Safety of Life at Sea (SOLAS).<sup>117</sup> SOLAS is the main repository of standards for the construction of ships, fire-safety measures, life-saving appliances, carriage of navigational equipment, other aspects of the safety of

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<sup>110</sup> UNCLOS, *supra* note 3 art. 87.

<sup>111</sup> *See supra* notes 83 - 88 and accompanying text.

<sup>112</sup> *See supra* notes 94 - 96 and accompanying text.

<sup>113</sup> UNCLOS, *supra* note 3 art. 94.

<sup>114</sup> *See supra* notes 14 - 27 and accompanying text.

<sup>115</sup> *See supra* notes 34 - 43 and accompanying text.

<sup>116</sup> *See supra* notes 72 - 114 and accompanying text.

<sup>117</sup> *See supra* notes 29 - 33 and accompanying text.

navigation, and measures to enhance maritime safety.<sup>118</sup> SOLAS is therefore the proper instrument for addressing LRIT. This method of establishing obligations on vessels is squarely within the institutional framework and mechanisms contemplated by Article 94 of UNCLOS. In addition, LRIT is not punitive, nor does it confer any new authority on flag or coastal States.

### B. LRIT is Consistent with the Spirit of UNCLOS

As previously discussed,<sup>119</sup> certain themes which originated in customary law continue to run throughout UNCLOS. These themes include using the sea for peaceful purposes and not impeding the use of the sea by others.<sup>120</sup> Implicit in these themes is a responsibility for vessels and their flag States to demonstrate compliance with the law of the sea. This responsibility predates treaty law. It can be traced back to the time of sailing ships when vessels encountering one another at sea were obliged to show their flag to signal their nationality and intentions.<sup>121</sup> It runs through modern conventions such as the COLREGS convention discussed previously,<sup>122</sup> which requires vessels to be outfitted with specific kinds of lighting to convey the type of vessel and their method of operation.<sup>123</sup> Both the custom of flying a vessel's flag and the COLREGS (like LRIT) depend on the cooperation of vessels and flag States, namely the carriage maintenance and operation of equipment which broadcasts<sup>124</sup> information about the vessel.

In that sense, LRIT is merely the evolution of longstanding conditions placed on freedom of navigation. Opponents of LRIT argue that it imposes new restrictions on freedom of navigation. However, a coastal State's naval forces have always had the authority to operate seaward of their territorial seas. Upon encountering a foreign vessel, a warship would be entitled, at a minimum, to observe or inquire as to the vessel's name, type, location, flag, current course

<sup>118</sup> SOLAS, *supra* note 34.

<sup>119</sup> See *supra* notes 73 – 77 and accompanying text.

<sup>120</sup> See, e.g., UNCLOS *supra* note 3 art. 20; art. 58; art. 88; art. 110; and art. 301.

<sup>121</sup> The display of national flags on the high seas is regulated by customary international law, articles 90-94 of the UN Convention on the Law of the Sea (to which the United States is not a party), and article 5 of the 1958 Geneva Convention on the High Seas ("each State shall fix the conditions for the grant of its nationality to ships, for the registration of ships in its territory, and for the right to fly its flag . . . each State shall issue to ships to which it has granted the right to fly its flag documents to that effect."). Flying a country's flag constitutes a claim by the vessel flying it that it possesses the nationality of the flag and therefore, as the court ruled in *The Fideliter*, 8 F.Cas. 1177(D. Or. 1869), "it is of importance to all maritime powers that the national character borne by a ship [i.e. in the flag she displays] should be her true character". See *Sea Flags, The Law and Flags at Sea* <http://mysite.verizon.net/vzeohzt4/Seaflags/customs/law.html#intl1aw> (last visited Mar. 15, 2007).

<sup>122</sup> See *supra* note 110 and accompanying text.

<sup>123</sup> COLREGS, *supra* note 3, rules 20 - 30.

<sup>124</sup> Merriam Webster OnLine defines broadcast to include "to make widely known" and to "transmit or make public . . ." See <http://www.m-w.com> (last visited Mar. 15, 2007).

and speed at any given time.<sup>125</sup> Based on readily observable information (or perhaps a lack thereof), a warship may establish grounds consistent with Article 110 of UNCLOS to justify boarding the foreign vessel.<sup>126</sup> Upon boarding, officers of the coastal State's warship could observe documents, such as the cargo manifest, crew list, and various certificates required under international law.<sup>127</sup> In this way, LRIT may more accurately be described as a more modern and efficient tool for collecting information that coastal States have always been entitled to observe.

### C. LRIT Facilitates UNCLOS

LRIT is beneficial to flag States wishing to protect vessels under their flag.<sup>128</sup> It is beneficial to coastal States wishing to protect their populations and natural resources,<sup>129</sup> and it has benefits for all parties concerned with preserving the current scheme for maintaining international order.<sup>130</sup>

#### 1. Flag State Benefits

LRIT provides vessels and their flag States with a reliable and efficient means for proving compliance with international law. For example, where a coastal State suspects or accuses a foreign vessel of fishing or conducting surveys or otherwise acting in a manner "prejudicial to the peace, good order or security" of the coastal State,<sup>131</sup> the vessel's flag administration would have access under LRIT to impartial information regarding the route and duration of the suspected vessel's transit. Such potentially exculpatory information may prove to be an essential element to ensuring the vessel's continued passage and to diplomatically resolving the coastal State's concerns.

#### 2. Coastal State Benefits

In addition to providing coastal States with a more efficient means for collecting information, in many cases the benefits of LRIT are shared by both the coastal State and the vessel/flag State. One example is the matter of pollution investigation. As a general statement, international regulations

<sup>125</sup> COMMANDER'S HANDBOOK, *supra* note 5 at 3-8 & 3-26 (discussing "right of approach"; "right of visit"; and "consensual boarding").

<sup>126</sup> *Id.* at 3-8. *See also* UNCLOS, *supra* note 3, art. 110.

<sup>127</sup> *See* COMMANDER'S HANDBOOK, *supra* note 5, at 3-36, n. 92.

<sup>128</sup> *See infra* note 131 and accompanying text.

<sup>129</sup> *See infra* notes 132 – 135 and accompanying text.

<sup>130</sup> *See infra* note 136 and accompanying text.

<sup>131</sup> UNCLOS, *supra* note 3, art. 19. *See also* UNCLOS art. 25.3 (discussing suspension of innocent passage altogether where that action is necessary for protection of its security).

prohibit the intentional discharge of oil into the sea.<sup>132</sup> This stems from the negative effects that oil can have on the beaches and natural resources of coastal States.<sup>133</sup> For this reason, most coastal States investigate oil slicks of unknown origin or “mystery spills” to determine, first if they indicate the loss of a vessel, and secondly to determine if a responsible party can be identified.<sup>134</sup> If a responsible party can be identified by matching the spilled oil with oil samples, this information could potentially be admissible as physical evidence for both civil and criminal prosecution of the polluting vessel and its crew.<sup>135</sup> The most unwieldy aspect of this investigation is narrowing the number of vessels which can be visited, based on terms of resource availability and likelihood of responsibility. In the absence of reliable and impartial information about vessel positions, investigators are inclined to cast a wider net, particularly in a large spill. In addition to inconveniencing innocent vessels and crews, this requires the expenditure of valuable Coast Guard resources and man-hours to investigate, to collect samples, and to analyze those samples. The availability of LRIT information would provide greater accuracy in determining a vessel’s vicinity to the slick and therefore greater efficiency in narrowing the number of vessels to be physically investigated. Consequently, it should reduce the inconvenience of diverting and investigating innocent vessels, which necessarily interferes with those vessels’ commercial interests.

### 3. Benefits to International Order

Perhaps the most unheralded attribute of LRIT (and an unrecognized justification for the system under international law) is its utility to the system of flag State jurisdiction. “The ascription of nationality to ships is one of the most important means by which public order is maintained at sea.”<sup>136</sup> The nationality

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<sup>132</sup> International Convention for the Prevention of Pollution from Ships, 1973, as modified by the Protocol of 1978 relating thereto (MARPOL 73/78), Feb. 17, 1978, 12 ILM 1319 (1973).

<sup>133</sup> See generally Global Marine Oil Pollution Information Gateway, <http://oils.gpa.unep.org/facts/wildlife.htm> (last visited Mar. 15, 2007).

<sup>134</sup> For example, when a slick is reported or detected off U.S. shores, the U.S. Coast Guard will take a sample of the oil. Then Coast Guard investigators, using information about vessels’ last and next ports of call and projected departure and arrival times, assemble a list of vessels that may have transited the area in the vicinity of the slick. Each of those vessels is then visited by Coast Guard officials so that the vessels track line can be verified from shipboard equipment, logs or charts. If the information corroborates the suspicion that the vessel could be responsible, samples of cargo and/or fuel oil are taken from the vessel and sent to the Coast Guard Marine Safety Laboratory for forensic analysis and comparison to the sample taken from the mystery spill. See U.S. DEP’T OF HOMELAND SECURITY, COAST GUARD COMMANDANT INST. MANUAL 16000.11, 25 Aug. 1997, and U.S. DEP’T OF HOMELAND SECURITY, COAST GUARD COMMANDANT INST. MANUAL 16000.10A, 24 Apr. 2008 (both a part of the Coast Guard Marine Safety Manual).

<sup>135</sup> See Dr. Wayne R. Gronuld, *Mystery Oil, Who Spilled It?*, THE COAST GUARD JOURNAL OF SAFETY & SECURITY AT SEA, PROCEEDINGS OF THE MARINE SAFETY & SECURITY COUNCIL, Winter 2004-2005, at 35.

<sup>136</sup> CHURCHILL & LOWE, *supra* note 68 at 257.

or flag of a vessel is often addressed as an indication of what rights the vessel should be afforded, and which country must be notified of, or concur in, any action taken with regard to a vessel.<sup>137</sup>

However, the primary purpose of ascribing nationality has just as much to do with international order as it does with States' sovereignty. By leveraging the legal obligation of a State "not to allow knowingly its territory to be used for acts contrary to the rights of other States,"<sup>138</sup> the customary international law of the sea substitutes State jurisdiction and enforcement in place of international policing. The approach was incorporated into Article 94 of UNCLOS which, as previously discussed,<sup>139</sup> imposes specific requirements to ensure safety at sea, in accordance with generally accepted international regulations.<sup>140</sup> Since no international naval or coast guard force is available to audit or compel compliance by the world fleet, Article 94 places the burden of ensuring compliance on flag States.<sup>141</sup> Flag States are then expected to perform the necessary surveys or investigations related to vessel compliance or suspected violations.<sup>142</sup>

In recent years, this scheme of flag States policing their own vessels has fallen victim to the emergence of "flags of convenience."<sup>143</sup> The flag of convenience phenomenon has led to the migration of the world fleet from a diverse group of large developed industrial countries to a concentration of small and/or developing countries like Panama, Liberia, the Marshall Islands and a few others.<sup>144</sup> These States are often said to be either unwilling or unable to

<sup>137</sup> *E.g.* International Maritime Organization Resolution A.787(19), "Procedures for Port State Control," ("[I]n the case of a detention, notification shall be made to the flag State Administration.").

<sup>138</sup> *See* The Corfu Channel Case, 1949 ICJ LEXIS 4, (holding that Albania was responsible for damage to two British navy ships caused by mines laid in Albanian waters by a third party. Although the case concentrated on the use of the Albanian waters and not Albanian vessels, the principle of territory may be extended to vessels.). *See also* Lauritzen v. Larson, 345 U.S. 571 (1952) (holding that "the law of the flag supersedes the territorial principle, even for purposes of criminal jurisdiction of personnel of a merchant ship" because it "is deemed to be part of a territory of that sovereignty [whose flag it flies], and not to lose that character when in navigable waters within the territorial limits of another sovereignty.").

<sup>139</sup> *See supra* notes 110 – 112 and accompanying text.

<sup>140</sup> UNCLOS, *supra* note 3 art. 94.

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

<sup>142</sup> *Id.* art. 94(4)(a).

<sup>143</sup> The origin of this term is uncertain, but it is commonly used in the maritime industry and related publications. Churchill & Lowe describe "flags of convenience" or "open registry" as follows: "These expressions refer to States that permit foreign shipowners having no real connection with those States to register their ships under the flags of those States. The low fees and taxation levied by such States, together with lower crew costs and in some cases savings from not having to comply with international safety standards, reduce the shipowner's operating costs and therefore give him a significant competitive advantage over shipowners whose vessels are not registered under flags of convenience." CHURCHILL & LOWE, *supra* note 68 at 258.

<sup>144</sup> *Id.* at 256 table 2 (distribution of the world merchant shipping tonnage as of 31 December 1997).

exercise effective jurisdiction over their ships.<sup>145</sup> “The result is that in 1994 flags of convenience accounted for 42.9% of the world fleet but 66% of total lost tonnage.”<sup>146</sup>

The willingness of a flag State to abide by international law cannot be measured empirically. However, the flag State’s ability to police its own vessels can be logically evaluated. Much like the pollution investigation scenario discussed above, the preventative survey of vessels to ensure continuing compliance with international rules, and the investigation of accidents to discover violations of those rules require a significant investment of time and resources. It follows that a flag State’s government may not have the resources to field sufficient personnel and equipment to properly police its vessels. The availability of LRIT information would provide a developing flag State a more efficient means for monitoring vessels registered to its fleet, and a tool for more effective management of the State’s limited resources. It would therefore provide both an increased ability to flag States and a new tool for testing flag State willingness to abide by international law. No longer would lack of resources be an excuse for failure to collect or act on information available through LRIT.

Each of the benefits of LRIT discussed above relates to the increased availability of information which is already required under existing legal norms. In each case, the transparency of vessel operations is the best disinfectant against aggression, criminal acts and mistakes in the maritime environment.<sup>147</sup>

#### **D. Safeguards**

It is worth noting the sensitive nature of the LRIT information being broadcast with regard to the safety of the vessel, and the value of the commodities aboard. The receipt or interception of LRIT information by unauthorized parties could be used to plan and execute terrorist or pirate attacks against a vessel. LRIT regulations attempt to address these concerns in two ways.

First, the LRIT system uses sophisticated satellite transmitting and receiving technology to convey information from the vessel to the satellite and from the satellite to the data centers.<sup>148</sup> Simple VHF and radar equipment would

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<sup>145</sup> *Id.* at 259.

<sup>146</sup> *Id.* at 259 note 4 (quoting ISL, Shipping Statistics Yearbook 1995 Bremen at 51).

<sup>147</sup> “Publicity is justly commended as a remedy of social and industrial diseases. Sunlight is said to be the best of disinfectants; electric light the most efficient policeman.” L. BRANDEIS, OTHER PEOPLE’S MONEY 62 (1933 ed.). *See, also*, L. Brandeis, *What Publicity Can Do*, HARPER’S WEEKLY (Dec. 20, 1913).

<sup>148</sup> *See supra* notes 34 – 43 and accompanying text.

be incapable of receiving LRIT information. As the technical aspects of the LRIT system are developed, the Maritime Safety Committee (MSC)<sup>149</sup> of the IMO will explore methods of encoding information to enhance security.<sup>150</sup> Second, the LRIT regulations contain a provision allowing the master of a vessel “in exceptional circumstances and for the shortest duration possible” to switch off the transmission “where transmission is considered by the master to compromise the safety or security of the ship.”<sup>151</sup> The regulations also require contracting governments to “recognize and respect the commercial confidentiality and sensitivity” of LRIT information and to “protect the information they receive from unauthorized access or disclosure.”<sup>152</sup> While no information can, in a technical sense, be absolutely secure, these regulations create the environment of protection and accountability necessary to make that security as likely as possible.

## VI. LRIT AND THE EFFECT ON MILITARY OPERATIONS (ADVANCE NOTIFICATION?)

Current LRIT regulations are issued under the SOLAS convention.<sup>153</sup> Since the SOLAS convention as a whole is not applicable to public vessels, the LRIT requirements contained therein cannot be applicable to military vessels.<sup>154</sup> Nonetheless judge advocates may be concerned that a rising tide of vessel tracking will create a new standard of customary international law that will one day engulf military vessels. Likewise, the reliance earlier in this paper on (a somewhat expanded view of) Articles 88 and 301 of UNCLOS<sup>155</sup> could be perceived as eroding existing authority to conduct military activities. Such an interpretation could split support for LRIT within the U.S. government as well as within the Department of Defense itself.<sup>156</sup> For these reasons, support for LRIT and its utility in identifying potential threats to coastal security is

<sup>149</sup> See *supra* note 29 and accompanying text.

<sup>150</sup> William R. Cairns, *Keeping Watch, The New SOLAS Regulation on Long Range Identification and Tracking*, THE COAST GUARD JOURNAL OF SAFETY & SECURITY AT SEA, PROCEEDINGS OF THE MARINE SAFETY & SECURITY COUNCIL, Fall 2006, at 35.

<sup>151</sup> SOLAS, *supra* note 34, at Chapter V Reg. 19-1.7.2.

<sup>152</sup> *Id.* at Chapter V Reg. 19-10.2 and 10.3.

<sup>153</sup> See *supra* note 34 and accompanying text.

<sup>154</sup> SOLAS, *supra* note 34, at Chapter I Reg. 3.

<sup>155</sup> See *supra* notes 106-110 and accompanying text.

<sup>156</sup> In 1998, the International Maritime Organization approved a U.S. proposal to establish a mandatory ship reporting system off the northeast and southeast coasts of the United States in order to protect the endangered northern right whale from ship strikes. Some individuals, agencies, services, and departments viewed this MSR, and its reporting requirement for vessels merely transiting designated areas or proceeding to a port, as the top of a “slippery slope” toward a degradation of freedom of navigation. In particular, there was a fear that if the United States lessened its opposition to systems that impede, even if slightly, navigational rights, other countries would respond with more restrictive regimes. See Lieutenant Rachel Canty, *The Coast Guard and Environmental Protection*, NAVAL WAR COLLEGE REVIEW, Autumn 1999.

conditional on the understanding that LRIT will not disadvantage the military's free movement throughout the globe.

### A. Peaceful Purposes

An over-reliance on Article 88's "peaceful purposes" language and on the restrictions on freedom of navigation found in the law of the sea convention might suggest the circumscription of military activities.<sup>157</sup> A better view is that UNCLOS encourages the peaceful uses of the sea, but is *lex generalis*, which must be considered in the context of the *lex specialis* dealing with the use of force in international law.<sup>158</sup> Under such an analysis, the United Nations Charter would reflect the international law for the use of force.

Pursuant to Article 51 of the U.N. Charter, military action is permissible in self-defense, including arguably, anticipatory self-defense.<sup>159</sup> Of course, also included would be any military action specifically permitted by a resolution of the U.N. Security Council.<sup>160</sup> Similarly, customary international law justifications for the use of force, such as preemptive self-defense, may also be considered *lex specialis* specifically considered under the "consistent with international law" clauses found in UNCLOS.<sup>161</sup> This construction of the law entitles parties to carry out military activities that are either non-aggressive activities, or are aggressive activities that are permitted by the U.N. Charter. This view is consistent with the U.S. view expressed at the fourth session of the U.N. Convention on the Law of the Sea in 1976:

The term peaceful purposes did not, of course, preclude military activities generally. The United States had consistently held that the conduct of military activities for peaceful purposes was in full accord with the Charter of the United Nations and with the principles of international law. Any specific limitation on military activities would require the negotiation of a detailed arms control agreement.<sup>162</sup>

This position was later confirmed in a 1985 report of the Secretary-General of the United Nations, who concluded that "military activities which are

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<sup>157</sup> FREESTONE, BARNES & ONG, *supra* note 52 at 352.

<sup>158</sup> See The Legality of the Threat or Use of Nuclear Weapons (advisory opinion), 1996 ICJ 226, para 25 (opining that the law of armed conflict is *lex specialis* or a special law within international law).

<sup>159</sup> U.N. Charter, art. 51. See also THE WHITE HOUSE, THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA (2002) at 15, available at <http://www.whitehouse.gov/nsc/nss.pdf>.

<sup>160</sup> U.N. Charter, art. 42.

<sup>161</sup> E.g. UNCLOS, *supra* note 3 art. 87. See also *supra* notes 156 – 158 and accompanying text.

<sup>162</sup> NORDQUIST, Vol. III, *supra* note 77 at 89.

consistent with the principles of international law embodied in the Charter of the United Nations, in particular with article 2, paragraph 4 and article 51, are not prohibited by the Convention on the Law of the Sea.”<sup>163</sup> In summary, UNCLOS neither expressly *prohibits* military activities on the high seas, nor *excludes* military uses of the high seas that are consistent with the UN Charter.

### B. Freedom of Navigation (FON) Operations

Further cause for DOD sensitivity to the establishment of LRIT is the possibility that it could adversely impact the freedom of navigation rights that negotiators worked hard to secure during negotiation of UNCLOS. Unshakable U.S. negotiating positions included ensuring that “warships did not need to provide prior notice to, or obtain permission from, a coastal State before passing through its territorial sea or EEZ.”<sup>164</sup> The U.S. military’s endorsement in 2004 of U.S. accession to UNCLOS as a “top national security priority”<sup>165</sup> reflects the U.S. view that the resulting convention places minimal restrictions on the passage of military vessels through the territorial seas and exclusive economic zones of other nations.<sup>166</sup> However, there is no textual conflict between the UNCLOS and customary norm that warships need not provide *prior* notice and the LRIT requirement to report a position because a LRIT position can logically only be a current position or past position. Therefore, even if a warship voluntarily participated in LRIT it would not be providing prior notice to the coastal state.

Currently, the Navy maintains the U.S. right to freedom of navigation by making diplomatic assertions of customary international law rights<sup>167</sup> and backing up those assertions through freedom of navigation operations (FON OPS).<sup>168</sup> A typical FON OP entails sailing into a coastal State’s EEZ, or some other disputed zone, and subsequently reporting the vessel’s presence to the

<sup>163</sup> The Secretary-General, *United Nations Disarmament Study Series – The Naval Arms Race, Report of the Secretary-General*, agenda item 68(b), para. 188, UN Doc A/40/535 (1985).

<sup>164</sup> John Norton Moore, *The Regime of Straits and the Third United Nations Conference on the Law of the Sea*, 74 AM. J. INT’L L. 77 (1980).

<sup>165</sup> Letter from General Richard Myers, Chairman of the Joint Chiefs of Staff, to Senator Richard G. Lugar, (Apr. 7, 2004), available at [http://www.globalsolutions.org/programs/health\\_environment/latest\\_news/LOS\\_Support\\_Letters/Myers.pdf](http://www.globalsolutions.org/programs/health_environment/latest_news/LOS_Support_Letters/Myers.pdf) (last visited Mar. 15, 2007).

<sup>166</sup> John E. Noyes, *The United States, the Law of the Sea Convention, and Freedom of Navigation*, 29 SUFFOLK TRANSNAT’L L. REV. 1, at 5-6.

<sup>167</sup> The reason the U.S. can only enforce customary international law rights to freedom of navigation is because the U.S. has yet to ratify UNCLOS. Once the U.S. ratifies UNCLOS, such rights would be a matter of treaty law.

<sup>168</sup> COMMANDER’S HANDBOOK, *supra* note 5 at 2-32. See also U.S. DEP’T OF DEFENSE, Instr. C2005.1, U.S. PROGRAM FOR THE EXERCISE OF NAVIGATION AND OVERFLIGHT RIGHTS AT SEA.

coastal State.<sup>169</sup> Unfortunately, FON OPS are “expensive in terms of dollars, potential confrontations, and prejudice to other U.S. interests in the coastal State.”<sup>170</sup> While LRIT could not completely eliminate this expense, it is notable that voluntary participation by a warship could satisfy and document the notification aspect of FON OPS.

### C. An Illustration of Freedom of Navigation and Peaceful Purposes

A recent example that illustrates both freedom of navigation and peaceful purposes elements of international law is the matter of the USNS BOWDITCH.<sup>171</sup> In October of 2001, the BOWDITCH was engaged in collecting military survey data within the Republic of Korea’s EEZ. She was approached by a ROK Navy patrol ship requesting country of registry, mission of the ship, point of origin, point of destination and length of stay in Korean waters. BOWDITCH responded with only her name and country of registry. The ROK contacted the U.S. embassy in Seoul stating that the BOWDITCH was believed to be conducting marine scientific research in the ROK EEZ without prior permission. The official U.S. response was that “USNS BOWDITCH was conducting a military survey and that its operations in the ROK EEZ were therefore fully consistent with customary international law, as reflected in the United Nations Convention on the Law of the Sea.”<sup>172</sup> The official response also explained that “[T]hese surveys are considered to be military activities and as such can be undertaken in the EEZ of a coastal state without prior notification or consent of the coastal state.”<sup>173</sup> These statements clearly convey the principles of both peaceful military purpose and freedom of navigation which the Department of Defense considers essential to national security. Most relevant to LRIT is the official U.S. response regarding BOWDITCH’s refusal to fully answer the ROK patrol boat’s inquiry. “The U.S. Navy does not disclose the specific nature of its operations when exercising its high seas freedom of navigation. Only general information will be provided in response to a query or challenge.”<sup>174</sup>

### D. Military Benefits of LRIT

The previous discussion has gone to some length to explain that LRIT regulations are not applicable to the Navy, and that no justification for LRIT

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

<sup>170</sup> Noyes, *supra* note 166 at 7-8.

<sup>171</sup> What follows is both paraphrased and, where indicated, directly quoted from 2001 U.S. Digest 698.

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

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

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

should be interpreted as reducing the Navy's right to freedom of navigation.<sup>175</sup> The BOWDITCH example further points out that the Navy has little to fear. To illustrate this point, assume that the BOWDITCH had possessed the necessary equipment in her electronics suite in 2001 to comply with both GMDSS and LRIT specifications. Assume further that BOWDITCH voluntarily broadcast her identity, position, and the time and date of position as LRIT requires other vessels to do. What BOWDITCH would broadcast would be no more than she was willing to provide the ROK patrol boat, or than the patrol boat was in a position to observe anyway. Indeed, BOWDITCH might have avoided all contact with the ROK patrol had the information been available shoreside.

While BOWDITCH's intent was not to conduct a traditional FON OP, similar benefits may be available in those situations. For some FON OPS, LRIT alone may be a sufficient tool for intentionally alerting a coastal State to the presence of a U.S. military vessel and of its intention to exercise its freedom of navigation in that area, without taking more threatening military action, and at a reduced cost to the service and to U.S. taxpayers. Again, this is not to say that military participation can be required under the current scheme, or that participation would be universally desirable, it is only meant to illustrate that fears of LRIT are unwarranted.

#### **E. National Defense / Homeland Defense**

Whereas the "user" State view has dominated U.S. defense policy for much of the Nation's existence, the post 9/11 environment has seen a trend toward the coastal State view such that the United States was a primary proponent of LRIT before the International Maritime Organization. The creation of both Northern Command<sup>176</sup> and the Department of Homeland Security<sup>177</sup> have refocused defense planners on the task of detecting approaching threats. "The same compression of warning, analysis, and response time" that drove the creation of the North American Aerospace Defense Command (NORAD) during the Cold War "may now exist for our maritime forces."<sup>178</sup>

<sup>175</sup> See *supra* note 167 and accompanying text.

<sup>176</sup> As authorized by President George W. Bush on April 17, 2002, the Department of Defense (DoD) announced the establishment of U.S. Northern Command (USNORTHCOM) to consolidate under a single unified command those existing homeland defense and civil support missions that were previously executed by other military organizations. See [http://www.northcom.mil/about\\_us/history.htm](http://www.northcom.mil/about_us/history.htm) (last visited Mar. 15, 2002).

<sup>177</sup> 6 U.S.C. § 111 (2004) (originally enacted as HOMELAND SECURITY ACT OF 2002, Pub. L. 107-296, Nov. 25, 2002, 116 Stat 2135).

<sup>178</sup> Captain Robert Hogan & Dr. Biff Baker, *Need to Share; Information Exchange and NORAD's New Mission*, THE COAST GUARD JOURNAL OF SAFETY & SECURITY AT SEA, PROCEEDINGS OF THE MARINE SAFETY & SECURITY COUNCIL, Fall 2006 at 74 (referring to the Quadrennial Defense Review Report dated 6 Feb. 2006, page 33).

One way in which LRIT will assist in detecting and addressing maritime threats is by creating the ability to analyze a vessels' conduct rather than merely its position when formulating a response. Past practice was to ask where the vessel was located and then to assign the vessel the rights commensurate with that zone. LRIT will provide the proper agencies with an ability to evaluate a vessel's conduct as a tool for assigning rights.

A conduct-based approach begins by asking, what is the vessel doing? Where a vessel's location or movement is inconsistent with normal operations of a vessel of its type or destination, that inconsistent conduct may provide a basis for coastal State action. For example, a vessel's failure to change position could indicate that a vessel is experiencing mechanical difficulties or is in need of assistance. The vessel's location outside the territorial seas of a coastal State would neither relieve that State of its duty to respond nor preclude that State from responding to this need. Similarly, where two vessels report the same position and time, it can only be due to rendezvous or collision, each of which is actionable under international law as an accident, or as a possible universal crime under Article 110 of UNCLOS.<sup>179</sup> Certainly the regulations and restrictions associated with the maritime zones will remain in effect. LRIT would provide additional information upon which to formulate a response.

#### **F. Non-Military Benefits of LRIT**

Vessel tracklines and mechanical difficulties relate to another important benefit of LRIT. In addition to protecting lives and resources from military attack, LRIT would be an important tool for protecting lives and resources from accidental harm.

First, LRIT would enable coastal States to assist in collision avoidance. Search and Rescue (SAR) services would be able to anticipate possible collisions and to communicate with vessels to ensure they are taking action. This could potentially eliminate the large numbers of accidents where anchored vessels are struck while the crew sleeps or where a ship's sleeping or absent bridge crew fails to take control from the vessel's autopilot.

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<sup>179</sup> "Airdrops and mothership operations generally occur in Caribbean waters, the Florida Straits, or the Bahamas. Drug transporters most commonly use go-fast boats and fishing vessels to retrieve airdropped packages of marijuana or to conduct a rendezvous with a mothership; however, other types of vessels also are used. Packages of airdropped marijuana usually are attached to fishing buoys by a cable. Source: Blue Lightning Strike Force." U.S. Department of Justice National Drug Intelligence Center, Florida Drug Threat Assessment at 29, *available at* <http://www.usdoj.gov/ndic/pubs5/5169/marijuan.htm#Transportation> (last visited Mar. 15, 2007).

Second, when a vessel stops reporting, or is known (through the Electronic Position Indicating Radio Beacon, or “EPIRB”)<sup>180</sup> to be lost, SAR services would be able to determine the direction the vessel was traveling relative to the sea state and to determine in which direction to search for the crew and passengers. These benefits are not limited to total loss of a vessel or to human life alone. In the event of “man overboard” or in the loss of a shipping container, for example, both the nearest coastal State and the vessel’s flag State would possess the information necessary to recover the lost person or item. A third type of damage that could be avoided would be environmental damage. When a vessel discovers mid-voyage the existence of hull or cargo tank damage, the vessel’s flag State and potentially affected flag States would know where to search for pollution and have an opportunity to react to prevent coastal contamination. This could greatly reduce or eliminate instances of “tar balls” washing up on coastal beaches from unknown sources.<sup>181</sup>

Lastly, LRIT would provide another source of information for protection of fishing resources. In many cases, LRIT alone would not provide all of the information necessary. Instead it would combine with, or overlay on top of other known information to complete a mosaic of information that would yield a useful picture of the marine environment.<sup>182</sup> These humanitarian benefits alone could arguably justify LRIT systems. As these benefits are realized they may encourage expansion of the types and amount of information collected.

#### **VIII. EXPANDING LRIT: WHAT ADDITIONAL INFORMATION CAN BE REQUIRED?**

Current regulations require that vessels transmit only their identity, their position, and the time of the position provided.<sup>183</sup> However, as discussed earlier, even on the high seas States may be entitled to collect additional

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<sup>180</sup> Electronic Position Indicating Radio Beacon: An EPIRB is a piece of equipment required by SOLAS regulations that is installed on vessels in such a manner that upon sinking, it will float free of the vessel and begin transmitting its location. Once a SAR crew arrives in the location of an EPIRB, it must determine where the equipment is in relation to the actual time and place of the sinking. LRIT would reduce the margin of error by providing the last reported LRIT position and previous trackline.

<sup>181</sup> Tar balls are fragments or lumps of oil weathered to a semi-solid or solid consistency. Tar balls feel sticky and are difficult to remove from contaminated surfaces. They are formed through the combining of viscous hydrocarbons with debris that is present in the water column. They range in size from a pinhead to approximately 30 centimeters in diameter. They are generally believed to originate from offshore petroleum production, drilling, and marine transportation discharges, which includes vessels pumping bilges and tank cleaning. Florida Department of Environmental Protection Information on Tarballs, <http://www.dep.state.fl.us/law/BER/TarBalls.htm> (last visited Mar. 15, 2002).

<sup>182</sup> Cairns, *supra* note 24 at 32.

<sup>183</sup> SOLAS, *supra* note 34, at Chap. V reg. 19-1.5

information about some vessels pursuant to Article 110 of UNCLOS.<sup>184</sup> The key to whether this information can be collected is whether there is a “reasonable ground” for suspecting the vessel of certain universal crimes. There is no definition of reasonable ground in UNCLOS, and no discussion in the commentaries as to its precise meaning. However, it is clear that boarding vessels on the high seas to collect information beyond that information which is visible to a passing vessel, or that is voluntarily transmitted by radio should be considered the exception rather than the rule.

Before additional information can be required, it must be determined whether requiring additional information under LRIT would violate the reasonable ground standard, or whether LRIT would simply raise the level or reliability of “reasonable ground” necessary to invoke Article 110 of UNCLOS in the future. In other words, if additional information could be obtained via LRIT (e.g. crew list, cargo manifest, last port of call, next port of call, names of ship’s owner and master, etc.), that might better support the reasonableness of the “right of visit” under UNCLOS Article 110.<sup>185</sup>

It may be asserted that LRIT could reduce right of visit boardings, or at least mistaken LRIT boardings by providing attending patrol vessels with information they did not have before. For example, where a patrol vessel encounters a vessel it believes to be a stateless vessel, the coastal authority would be able to provide information about that vessel’s LRIT identity which could corroborate the vessel’s claimed or displayed flag.<sup>186</sup> Similarly, where the basis for suspecting that a vessel is engaged in a universal crime (such as drug trafficking or piracy) is information/intelligence about that vessel’s activities, the coastal State can provide LRIT information for comparison, which may either corroborate or refute the intelligence available to the patrol. Hopefully, LRIT would result in more effective boardings and would reduce the infringement on innocent parties.

The result of LRIT, however, would not be limited to a reduction in erroneous boardings. Another result would be that LRIT could change the standard of reasonable grounds. Said another way, flag States would expect coastal authorities to consult LRIT information before establishing reasonable

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<sup>184</sup> UNCLOS, *supra* note 3 art. 110. See *supra* notes 100 & 102 and accompanying text.

<sup>185</sup> UNCLOS, *supra* note 3 art. 110.

<sup>186</sup> Vessels which are not legitimately registered in any one nation are without nationality and are referred to as “stateless vessels”. They are not entitled to fly the flag of any nation and, because they are not entitled to the protection of any nation, they are subject to the jurisdiction of all nations. Accordingly, stateless vessels may be boarded upon being encountered in international waters by a warship or other government vessel and subjected to all appropriate law enforcement actions. See *COMMANDER’S HANDBOOK*, *supra* note 5 at 3-25.

grounds and boarding vessels from their fleet. Where a coastal State ignores exculpatory information, flag States would be likely to protest the action and to attempt to recover damages under Article 110 of UNCLOS. To expand that chain of logic, requiring additional information under LRIT would not violate Article 110 if the additional information gained was information that would have been achieved through a physical examination on board the vessel. Instead, LRIT would actually raise the bar on when Article 110 can be used to gain access to a vessel in the first place. In that sense LRIT would be beneficial to the original intent of Article 110 rather than violative of it.

### VIII. CONCLUSION

Critics regard the requirement under LRIT that vessels passing as far as 1,000 nautical miles from shore are required to submit information for review by the nearest coastal State(s) as an indication that the high seas, and the concomitant rights of freedom of navigation, are shrinking.<sup>187</sup> However, we have seen that those freedoms (which are perceived as barriers to LRIT) are not absolute freedoms.<sup>188</sup> Those freedoms exist within certain norms in the same manner that free speech does not entitle someone to yell “fire” in a crowded theatre,<sup>189</sup> and in the same manner that the European civil law tradition interprets every right as having associated responsibilities.<sup>190</sup> LRIT requirements do not change these norms of freedom of navigation, but merely provide a means to monitor and enforce those norms.

Furthermore, we have seen LRIT to be a tool for monitoring the compliance of maritime traffic with certain obligations such as: 1) the reservation of the seas for peaceful purposes;<sup>191</sup> 2) due regard;<sup>192</sup> and 3) flag State jurisdiction.<sup>193</sup> We have also portrayed LRIT as a tool for vessels to demonstrate their peaceful intent, as required by Articles 21, 88 and 301 of UNCLOS, and by a general customary international law for vessels to conduct themselves peacefully.<sup>194</sup> For the most part this has been expressed as a negative obligation—that is that vessels must refrain from certain activities that are defined as not peaceful. In the end, vessels are left with a burden of proving

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<sup>187</sup> See *supra* note 156.

<sup>188</sup> See *supra* note 77 and accompanying text.

<sup>189</sup> *Schenk v. United States*, 249 U.S. 47 (1919).

<sup>190</sup> Interview with Lieutenant Commander James Benoit, Professor, International & Operational Law Dep’t, The Judge Advocate General’s Legal Ctr. & Sch., in Charlottesville, Va. (Mar. 16, 2007). It is worth noting that the majority of countries that are signatories to UNCLOS adhere to the civil law tradition.

<sup>191</sup> See *supra* notes 153 – 163 and accompanying text.

<sup>192</sup> See *supra* notes 120 – 127 and accompanying text.

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

<sup>194</sup> See *supra* notes 131 & 141 and accompanying text.

a negative, i.e. that they did not engage in one of the enumerated non-peaceful actions. LRIT provides a transparency to vessel operations which can be translated to a presumption of peacefulness. Put simply, a vessel transmitting required LRIT information can be presumed to have nothing to hide.

Finally, we have demonstrated that LRIT does not apply in its current forms to military vessels.<sup>195</sup> We have also demonstrated that judge advocates need not fear that the existence or expansion of LRIT would threaten military options. Instead, we have explored how voluntary participation by the military may even yield significant benefit.<sup>196</sup>

Thus, LRIT's requirement to provide vessel identity, location, and time of position cannot be considered to create any new obligations under international law. Even requiring additional information such as a crew list and cargo manifest are arguably types of information to which other vessels are entitled. LRIT is therefore best seen as advancement in technology and a tool for enforcing the current status of the law that will improve the overall safety, security and protection of the marine environment. It may also serve to bolster national security interests of coastal States, including the United States.

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<sup>195</sup> See *supra* notes 121 & 175 and accompanying text.

<sup>196</sup> See *supra* note 163 and accompanying text.



## THE USE OF FORCE IN HOSTAGE RESCUE MISSIONS

Lieutenant Commander Joseph Eldred, JAGC, USN\*

*“Hostage problems are among the most difficult that the Foreign Office has to deal with... Threats will not help. The answer lies in patient diplomacy.” Sir Andrew Green, former British ambassador to Syria and Saudi Arabia<sup>1</sup>*

*“The best-laid schemes o’ mice an’ men Gang aft agley...”<sup>2</sup> Robert Burns, Scottish poet*

### I. INTRODUCTION

On March 23, 2007, fifteen British Royal Navy personnel (fourteen men and one woman) on duty in the Persian Gulf<sup>3</sup> were seized by Iranian naval forces and taken to an undisclosed location in Iran.<sup>4</sup> Within days of the incident, President Bush referred to the captured Britons as “hostages,” and demanded that Iran give them back.<sup>5</sup> Prime Minister Blair decided to use diplomatic efforts in an attempt to free the hostages by taking Britain’s case to the United Nations (“U.N.”) and requesting that the U.N. Security Council issue a statement deploring Iran’s actions, and urging the immediate release of all fifteen service members.<sup>6</sup> In response, the Security Council instead issued a “watered-down” statement, primarily because of Russia’s opposition to putting blame on the Tehran regime.<sup>7</sup> Prime Minister Blair soon thereafter warned that, while his goal was still to gain release of the service members through

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\* Lieutenant Commander Joseph Eldred is an active duty Navy judge advocate. The positions and opinions in this article are those of the author and do not necessarily represent the views of the United States Government, the Department of Defense, or the United States Navy.

<sup>1</sup> Alan Cowell, *Blair Sharpens Tone over 15 Britons Held in Iran*, INT’L HERALD TRIB, Mar. 27, 2007, available at <http://www.iht.com/articles/2007/03/27/news/iran.php>.

<sup>2</sup> Translated as “The best laid schemes of mice and men Go often askew....”

<sup>3</sup> Alan Cowell, *Iran Broadcasts New Video of Seized Britons*, N.Y. TIMES, Mar. 30, 2007, available at <http://www.nytimes.com/2007/03/30/world/30cnd-britain.htm>. The British Marines and Sailors were approximately 1.7 nautical miles inside Iraqi waters and engaged in routine anti-smuggling patrols under a U.N. Security Council mandate.

<sup>4</sup> *Iranians Protest outside British Embassy*, CNN, Apr. 1, 2007, <http://www.cnn.com/2007/WORLD/meast/03/31/iran.sailors/index.html>.

<sup>5</sup> Cowell, *supra* note 1.

<sup>6</sup> *U.N. Weighs in on Iran-Britain Dispute: Security Council Statement is Less than Britain Wanted*, MSNBC, Mar. 29, 2007, <http://www.msnbc.msn.com/id/17849805/>.

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

diplomatic channels, if their release was not imminent, the situation would move into a “different phase.”<sup>8</sup> On April 14, 2007, in what Iranian President Mahmoud Ahmadinejad termed a surprise “Easter gift to the British people,” all fifteen service members were suddenly released by Iran and sent back to London.<sup>9</sup> Patient diplomacy on the part of the United Kingdom was indeed successful in this situation.

After the Britons were released and safely returned home, the United States (“U.S.”) Chief of Naval Operations, Admiral Michael Mullen, was asked whether U.S. sailors could ever be captured by Iranians in the Persian Gulf. The admiral stated in response, “My expectation is that American Sailors are never seized in a situation like that.”<sup>10</sup> While American sailors may never be seized in a similar situation, the fact remains that many Americans, including military service members, diplomats, and civilians, have been seized as hostages in the past, and, indeed, some are currently being held hostage.<sup>11</sup> In light of this unfortunate reality,<sup>12</sup> perhaps the more relevant question to ask is not whether Americans will ever be seized and used as hostages, but, given this inevitability, what options are available to all States to rescue their nationals – whether military members or civilians – once they are taken hostage?

This paper will analyze the legality of one specific option in hostage scenarios; namely, whether the use of military force is authorized under the U.N. Charter to rescue hostages.<sup>13</sup> Part II will compare and contrast the “Restrictionist” and “Counter-Restrictionist” views as they relate to the possible use of force under the U.N. Charter to rescue hostages. Part III will analyze three case studies (the 1975 Mayaguez incident; the 1976 Entebbe Raid; and the

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<sup>8</sup> *PM Warns of “Different Phase” in Iran Crisis*, THE TIMES, Mar. 27, 2007, [http://www.timesonline.co.uk/tol/news/world/middle\\_east/article1574513.ece](http://www.timesonline.co.uk/tol/news/world/middle_east/article1574513.ece).

<sup>9</sup> *Iran Releases Sailors as a “Gift” to Britain*, MSNBC, Apr. 5, 2007, <http://www.msnbc.msn.com/id/17944210/>.

<sup>10</sup> *Lou Dobbs Tonight*, MSNBC television broadcast, April 5, 2007, available at <http://transcripts.cnn.com/TRANSCRIPTS/0704/05/ldt.01.html>.

<sup>11</sup> *See Colombian Captives’ Plea*, N.Y. TIMES, Apr. 28, 2007, available at <http://query.nytimes.com/gst/fullpage.html?res=9A04EED9123EF93BA15757C0A9619C8B63>.

Three American civilian contractors working for the Department of Defense (apparently conducting aerial drug surveillance) were taken hostage by the Revolutionary Armed Forces of Colombia (FARC) when the contractors’ plane crashed in Colombia in 2003; all three remain in captivity in what has been described as an impenetrable jungle.

<sup>12</sup> SHANE DARCY, COLLECTIVE RESPONSIBILITY AND ACCOUNTABILITY UNDER INTERNATIONAL LAW 129 (2007) (“Despite these considerable developments in international law over the last half century, the spectre of hostage-taking continues to haunt modern armed conflicts, particularly given their increasingly asymmetrical nature, where guerilla tactics are used by small groups against major military powers...Faced by superior military forces, armed groups use hostage-taking as an inexpensive means of waging war.”).

<sup>13</sup> For purposes of this paper, the term “hostage” refers generally to a person who is held against their will by one party to ensure that another party will meet specified terms.

1980 Iranian hostage rescue attempt) in which the use of force was used by States in an attempt to rescue hostages, and subsequently justified in each case as self-defense under Article 51 of the U.N. Charter. Part IV will propose a framework and suggest explicit conditions in which the use of force could be used in a manner consistent with the U.N. Charter to rescue hostages. This proposed theory argues that a State would be on the most solid legal footing in its use of force if it were to follow a framework which does not permit an automatic, immediate, or unlimited use of force; instead, such a framework mandates that there must be an imminent danger of life or limb, a lack of any other non-feasible non-force options, and that any use of force be necessary and proportional.

## II. THE “RESTRICTIONIST” VS. “COUNTER-RESTRICTIONIST” DEBATE

### A. The U.N. Charter: Articles 2(4) and 51

The legality of a State’s intervention using force to protect nationals or rescue hostages abroad is a “much debated and controversial topic in international law.”<sup>14</sup> The starting point for this discussion on the use of force in hostage situations is the U.N. Charter, specifically Articles 2(4)<sup>15</sup> and 51.<sup>16</sup> When the U.N. Charter was adopted, it was generally considered “to have outlawed war.”<sup>17</sup> Under the most widely accepted theory today, Article 2(4), which has been described as containing the “most important principle in international law,”<sup>18</sup> contains “a general prohibition forbidding States to use force or the threat of force in their international relations.”<sup>19</sup> The Charter as a whole contains, just two express exceptions to this prohibition on the use of

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<sup>14</sup> ANTONIO TANCA, FOREIGN ARMED INTERVENTION IN INTERNAL CONFLICT 116 (1993).

<sup>15</sup> U.N. Charter art. 2, para. 4 (“The Organization and its Members, in pursuit of the Purposes stated in Article 1, shall act in accordance with the following Principles...All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.”).

<sup>16</sup> U.N. Charter art. 51 (“Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defense shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.”).

<sup>17</sup> Oscar Schachter, *International Law: The Right of States to Use Armed Force*, 82 MICH. L. REV. 1620, 1620 (1984).

<sup>18</sup> LT COL RICHARD J. ERICKSON, USAF, LEGITIMATE USE OF MILITARY FORCE AGAINST STATE-SPONSORED INTERNATIONAL TERRORISM 112 (1989).

<sup>19</sup> NATALINO RONZITTI, RESCUING NATIONALS ABROAD THROUGH MILITARY COERCION AND INTERVENTION ON GROUNDS OF HUMANITY 1 (1985).

force: force used under Article 51 in self-defense when an armed attack occurs; and armed action authorized by the U.N. Security Council as an enforcement measure.<sup>20</sup> For purposes of this paper, it will be assumed that the Security Council will either refuse to authorize force, or that the hostage scenario requires action in a more timely fashion than the Security Council is able or willing to provide. The challenge presented by Article 51 is one of interpretation, not whether or not such an exception is necessary.<sup>21</sup> As one scholar notes, “There is no consensus on whether Article 51 simply has the function of referring to [the inherent right of self-defense],” or whether Article 51 limits the right in any way.<sup>22</sup>

Because neither the term “rescue of hostages” nor “protection of nationals abroad” appears in the U.N. Charter, scholars continue to disagree whether the use of force to rescue hostages is legal under the Charter. Most scholars tend to espouse one of two theories depending on their belief, either the “Restrictionist” theory or the “Counter-Restrictionist” theory.

### B. The “Restrictionist” Theory

The “Restrictionist” theory, which some argue is embraced by the majority of States and scholars,<sup>23</sup> holds that the use of force to protect nationals generally is *not* permissible under the U.N. Charter.<sup>24</sup> The Restrictionist theory is based on three fundamental tenets. First, the theory holds that the principal goal of the United Nations system is the maintenance of international peace and security. Second, it maintains that the United Nations has a monopoly on the legitimate recourse to force, except in clear cases of self-defense. Finally, it asserts that if States were allowed to employ force for any purpose other than

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<sup>20</sup> Schachter, *supra* note 17, at 1620.

<sup>21</sup> EMANUEL GROSS, *THE STRUGGLE OF DEMOCRACY AGAINST TERRORISM* 36 (2006) (“The legal perception of self-defense originates from the relations between men and women and has been acknowledged since the beginning of history...In the same way that human beings need to survive and are therefore permitted to engage in self-defense, so too States need the device of self-defense in order to protect their national security, the safety of individuals living within their territory, and their basic rights...Accordingly, within the framework of the State’s obligation to preserve the civilian infrastructure it must defend as best it can the lives of its civilians against the dangers facing them.”).

<sup>22</sup> TANCA, *supra* note 14, at 55.

<sup>23</sup> ANTHONY CLARK AREND & ROBERT J. BECK, *INTERNATIONAL LAW AND THE USE OF FORCE: BEYOND THE UN CHARTER PARADIGM* 105 (1993) (“Of the various interpretations of the UN Charter which have been examined here, the restrictionist theory appears most accurately to reflect both the intentions of the Charter’s framers and the ‘common sense’ meaning of the Charter’s text.”). See also CHRISTINE GRAY, *INTERNATIONAL LAW AND THE USE OF FORCE* 84-86 (2000).

<sup>24</sup> AREND & BECK, *supra* note 23 at 105. But see Louis Henkin, *Use of Force: Law and U.S. Policy*, in *MIGHT V. RIGHT: INTERNATIONAL LAW AND THE USE OF FORCE* 41-42 (1991) (noting the “right to liberate hostages” is an exception to Article 2(4)).

individual or collective self-defense, they would merely be provided with a ready legal pretext for geopolitical intervention.<sup>25</sup>

Restrictionists see the language of Article 2(4) as clearly indicating a general prohibition on the use of *any* force by a State, and the exception found in Article 51 is extremely narrow, only allowing a State the use of force in self-defense after an armed attack on State territory.<sup>26</sup> Restrictionists make a distinction between an armed attack on “nationals abroad” and an armed attack upon “sovereign territory.”<sup>27</sup> Restrictionists argue that States may defend themselves, “but only after an actual ‘armed attack’ upon state territory has occurred.”<sup>28</sup> Therefore, a Restrictionist argues that a hostage-taking or an attack on nationals would not legally justify a State to respond using force.<sup>29</sup>

### C. The “Counter-Restrictionist” Theory

“Counter-Restrictionists,” as might be inferred by the name, do not share the Restrictionist point of view. Instead, Counter-Restrictionists rely on four basic tenets in order to find that the use of force to rescue hostages or protect nationals would be legal under the U.N. Charter. First, survival of the pre-Charter customary rule; second, the notion of self-defense under Article 51; third, the idea of permissible force pursuant to Article 2(4); and fourth, the concept of human rights.<sup>30</sup> A varying interpretation of the Counter-Restrictionist theory regarding hostages holds the following:

The argument in favor of rescue attempts contains three elements: (1) an emergency need to save lives; (2) legitimate self-defense; and (3) nonderogation of territorial integrity or political independence of the state in whose territory the action occurred. Waldock, writing in 1952, formulated the conditions under which a state may use force in another state, “as an aspect of self-defense,” as follows: There must be (1) an imminent threat of injury to nationals, (2) a failure or inability on the part of the territorial sovereign to protect them and (3) measures of protection strictly confined to the object of protecting them against injury.<sup>31</sup>

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<sup>25</sup> AREND & BECK, *supra* note 23 at 105.

<sup>26</sup> AREND & BECK, *supra* note 23 at 106.

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

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

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

<sup>30</sup> *Id.* at 106-09.

<sup>31</sup> Schachter, *supra* note 17, at 1629-30.

The scholar D.W. Bowett is one of the leading proponents of the pre-Charter customary rule of self-defense,<sup>32</sup> which has survived to this day:

The reasoning takes the form of an assertion that, because Article 51 says nothing in the Charter forbids or prevents self-defense against an armed attack, it must therefore follow that self-defense is only valid against an armed attack – a complete *non sequitur*. It is tantamount to saying that therefore something in the Charter does prevent self-defense unless there is an armed attack; since the prohibition of Article 2(4) leaves the traditional rights unimpaired this is clearly untrue, for this declaratory clause of Article 51 imports no additional obligation to that contained in Article 2(4). The history of Article 51 suggests nothing of an additional obligation; the *travaux preparatoires*, to which we may legitimately resort in the case of ambiguity, suggest only that the article should safeguard the right of self-defense, not restrict it.<sup>33</sup>

Bowett argues further that there is ample evidence to show that “prior to 1945, States assumed the right to use force abroad for the protection of their nationals when their lives or their property were in imminent danger.”<sup>34</sup> Thus, he argues, the right to rescue nationals was part of the pre-Charter understanding of self-defense, and because of the use of the term “inherent” in Article 51, “if the right to protect nationals was part of the pre-1945 customary right of self-defence, one starts from the premise that it remains part of the post-1945 right to self-defence.”<sup>35</sup>

The second Counter-Restriction tenet holds that an injury to a national in a foreign State which is “unwilling or unable to grant him or her minimum standards of justice and protection is legally tantamount to an injury to the national’s home State.”<sup>36</sup> Counter-Restrictionists argue that such an injury “represents a breach of legal duty to the national’s State, and, as a result, justifies the use of force by the home State.”<sup>37</sup>

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<sup>32</sup> FREDERICK SHERWOOD DUNN, *THE PROTECTION OF NATIONALS: A STUDY IN THE APPLICATION OF INTERNAL LAW* 19 (1932) (“It is only occasionally, where aliens are placed in a situation of grave danger from which the normal methods of diplomacy cannot extricate them, or where diplomatic negotiation for some reason is believed to be useless, that forceful intervention is apt to take place. In such cases, the implication is that the delinquent state is either unable or unwilling to fulfill its obligations under international law, and hence becomes subject to whatever penalties flow from such a failure. In the present stage of organization of the international community, the enforcement of legal obligations is still left in large measure to the individual states, i.e., to what is called ‘self-help’ (a situation that naturally favors the stronger as against the weaker states). Armed intervention is only one of various means of enforcement that have been developed.”).

<sup>33</sup> D.W. BOWETT, *SELF-DEFENCE IN INTERNATIONAL LAW* 188 (1958).

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

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

<sup>36</sup> AREND & BECK, *supra* note 23, at 108.

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

One objection to the argument that the rescue of hostages is legal under Article 51 is that its text only refers to the option of self defense when there is an “armed attack.” Counter-Restrictionists have at least two rebuttals. First, since the article is silent as to the right of self-defense under customary law (which goes beyond cases of armed attack), it should not be construed by implication to eliminate that right.<sup>38</sup> Second, an armed attack of any sort, including the taking of a foreign national as a hostage, is equivalent to an armed attack on the national’s State, therefore justifying the immediate use of force in response.<sup>39</sup> This latter argument has been expressed by Bowett in the following terms:

Political theories of the social contract gave rise to the view that protection, as the duty of the state, afforded the consideration of the *pactum subjectionis*, and that protection of the nationals of the state was, in effect, protection of the state itself. Within the definition of the state the requirement of a community is essential, and without nationals, without the community, the state ceases to exist...Indeed, it may reasonably be argued that the defence of members of the community of a state, of its nationals is as much a part of the defence of the state as the defence of any portion of its territory or of its political independence.<sup>40</sup>

The first Bush Administration arguably relied on this theory in part when referring to Saddam Hussein’s use of civilians as “human shields” prior to the 1991 Gulf War, as stated by the Deputy Legal Adviser to the National Security Council: “The President’s authority to commit U.S. forces to combat in self-defense exists not only with respect to attacks on U.S. territory and U.S. forces, but also with respect to attacks on U.S. citizens and property abroad.”<sup>41</sup>

The third Counter-Restrictionist tenet holds that Article 2(4) does not contain an absolute prohibition on the threat or use of force; specifically, its prohibition does not cover, for example, intervention for protection of nationals abroad.<sup>42</sup> Counter-Restrictionists reach this conclusion by adopting a literal interpretation of the Charter and by asserting that it has to be interpreted

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<sup>38</sup> Schachter, *supra* note 17, at 1633.

<sup>39</sup> See RONZITTI, *supra* note 19, at 4 (“It has been held, for example, that nationals are an extension of the State and that they represent one of its essential elements, of the same importance as the State’s territory. It follows, therefore, that an offense against the citizens of the State amounts to an offense against the State itself.”).

<sup>40</sup> BOWETT, *supra* note 33, at 91-92.

<sup>41</sup> CAROL K. WINKLER, IN THE NAME OF TERRORISM: PRESIDENTS ON POLITICAL VIOLENCE IN THE POST-WORLD WAR II ERA 102-03 (2006).

<sup>42</sup> RONZITTI, *supra* note 19, at 1-5.

according to the necessities of the present-day system.<sup>43</sup> Under the “literal interpretation” argument, the use of force to rescue hostages and protect nationals is:

not inconsistent with the first clause of Article 2(4), which forbids the use of force against territorial integrity and political independence of any State, as long as the use of force does not involve a separation of part of the State which is the object of the intervention (otherwise its territorial integrity would be violated) or a prolonged presence of the intervening State’s troops in the State where the use of force has taken place.<sup>44</sup>

This tenet holds that a limited use of force that does not involve “a loss of territory by the target State; a regime change of the target State; or any actions inconsistent with the purposes of the United Nations would fall below any 2(4) threshold, and would therefore be legally permissible.”<sup>45</sup> Many Counter-Restrictionists state that such a use of force to rescue hostages may in fact be “contrary to the inviolability of the State” which is the object of the intervention; however, they argue, “Article 2(4) does not set out to protect the inviolability of the State, but only its territorial integrity and political independence.”<sup>46</sup> Use of force for protection of nationals, therefore, “if confined within the limits prescribed by customary international law, is not inconsistent with the purposes of the Charter.”<sup>47</sup>

The final tenet often cited by Counter-Restrictionists regarding the use of force to rescue hostages is that of human rights. Those who support this theory argue that the Charter is designed not only to maintain international peace and security, but also to protect human rights.<sup>48</sup> This interest, therefore, indicates that the use of force for the urgent protection of such human rights is no less authorized than other forms of self-help.<sup>49</sup> To argue otherwise would require Security Council action, prohibit individual States from using use force to protect the human rights of their nationals, and contradict the “explicit purposes for which the United Nations was established.”<sup>50</sup>

This is not to say that the rescue of hostages is the same as “humanitarian intervention,” which has a separate and distinct meaning under

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

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

<sup>45</sup> AREND & BECK, *supra* note 23, at 108.

<sup>46</sup> RONZITTI, *supra* note 19.

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

<sup>48</sup> AREND & BECK, *supra* note 23, at 108.

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

<sup>50</sup> *Id.* at 109.

international law.<sup>51</sup> There are a couple key distinctions between hostage rescue and humanitarian intervention. First, humanitarian intervention typically involves the use of force to protect the citizens of another State from threatening situations within their own State. Second, unlike rescue operations or missions to protect nationals, humanitarian intervention “typically involves a prolonged military action that may result in a new government in the target State.”<sup>52</sup> As we shall see, a prolonged military action resulting in a new government during a hostage rescue mission will raise serious doubts as to the legality of such a mission.

**D. The 1979 International Convention Against the Taking of Hostages: The “Restrictionist” v. “Counter-Restrictionist” Debate Continues**

In an attempt to try to eliminate the growing threat of hostage-taking, the International Convention Against the Taking of Hostages was adopted by the U.N. General Assembly on December 17, 1979, and entered into force on June 3, 1983. As of September 2002, it had 110 Parties.<sup>53</sup> This Convention (which has been described as primarily a law enforcement measure<sup>54</sup>) defines hostage-taking as the seizure or detention by a person of another person (‘the hostage’) coupled with a threat to kill, injure, or continue to detain that person unless a third party performs or abstains from a particular act.<sup>55</sup> This was the first international Convention to contain “a general prohibition on the taking of hostages, whether committed in peacetime or during war, and regardless of the identity of the victims.”<sup>56</sup>

Article 14 of this Convention states: “Nothing in this Convention shall be construed as justifying the violation of the territorial integrity or political independence of a State in contravention of the Charter of the United Nations.”<sup>57</sup> This clause was originally suggested by the states that were opposed to the rescue mission to Entebbe in 1976,<sup>58</sup> which will be discussed in greater detail later in this paper. The original proposal by those States (which included Tanzania, Algeria, and a number of other Arab and African States) “would specifically have prohibited States from undertaking operations designed to

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<sup>51</sup> *Id.* at 94.

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

<sup>53</sup> International Convention Against the Taking of Hostages, G.A. Res. 146, U.N. GAOR, 34<sup>th</sup> Sess., Supp. No. 46, U.N. Doc. A/34/46 (Dec. 17, 1979), available at UNITED NATIONS OFFICE ON DRUGS AND CRIME, [http://www.unodc.org/pdf/crime/terrorism/Commonwealth\\_Chapter\\_7.pdf](http://www.unodc.org/pdf/crime/terrorism/Commonwealth_Chapter_7.pdf).

<sup>54</sup> ERICKSON, *supra* note 18, at 77.

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

<sup>56</sup> JOSEPH J. LAMBERT, TERRORISM AND HOSTAGES IN INTERNATIONAL LAW 5 (1990).

<sup>57</sup> International Convention, *supra* note 53.

<sup>58</sup> Schachter, *supra* note 17.

rescue hostages held in the territory of another State.”<sup>59</sup> Other States, primarily from the West, argued against including such a provision as submitted because they did not believe that this Convention was “a suitable instrument” for dealing with the issue of force in hostage situations.<sup>60</sup>

Some commentators have argued that the terms of the original draft were “tempered” by the addition to the U.N. Charter, which extended the inherent right of a state to defend itself to the use of force in another state for the purpose of protecting one’s nationals when the other state is unable or unwilling to take necessary action.<sup>61</sup> On the other hand, one scholar, Natalino Ronzitti, argues that the drafting history of this Convention “demonstrates that a theory stating that the use of force to protect nationals abroad is strictly forbidden does not command a sufficiently general acceptance for it to be officially codified as a rule of international law.”<sup>62</sup>

At least one scholar argues that the language of this article as ultimately adopted has no effect whatsoever on the issue of the use of force by a State as an option to a hostage-taking scenario.<sup>63</sup> Lambert states that the Convention, by “simply echoing” the words of Article 2(4), keeps the “Restrictionist” vs. “Counter-Restrictionist” debate in exactly the same unsettled position as before the adoption of the Convention.<sup>64</sup> Lambert further argues:

Thus, on the one hand, if no right exists unilaterally to use force to rescue hostages held in another State, the prohibition against the taking of hostages contained in this Convention, and attendant obligations imposed in relation thereto, cannot be used to justify such an action. On the other hand, if such a right exists, it is not curtailed by this Article.<sup>65</sup>

Thus, the issue still remains open to a difference of opinion. This paper now applies the preceding theoretical discussion toward three different case studies where a “Counter-Restrictionist” justification was offered by States that used force to rescue (or attempt to rescue) hostages abroad.

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<sup>59</sup> LAMBERT, *supra* note 56, at 313. The original proposal from those States listed was: “States shall not resort to the threat or use of force against the sovereignty, territorial integrity or independence of other States as a means of rescuing hostages.”

<sup>60</sup> LAMBERT, *supra* note 56, at 314.

<sup>61</sup> Schachter, *supra* note 17.

<sup>62</sup> RONZITTI, *supra* note 19, at 53.

<sup>63</sup> LAMBERT, *supra* note 56, at 322.

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

<sup>65</sup> LAMBERT, *supra* note 56, at 323.

### III. THREE CASE STUDIES REGARDING THE USE OF FORCE TO RESCUE HOSTAGES

#### A. The *Mayaguez* Incident (1975)

On May 12, 1975, the *S.S. Mayaguez*, a U.S. registered merchant vessel with forty American crewmembers, was steaming in international waters, en route from Hong Kong to Thailand, when it was fired upon and boarded by Cambodian-manned gunboats.<sup>66</sup> The vessel was subsequently forced to anchor at the island of Koh Tang off the coast of Cambodia, and the vessel's captured crew was moved to Kompong Song on the Cambodian mainland.<sup>67</sup>

Upon being informed that the ship had been seized, President Ford immediately convened the National Security Council ("NSC"), which agreed on the U.S.'s two foremost objectives: to recover the ship and its crew; and to do so in a way as to demonstrate clearly to the international community "that the United States could and would act with firmness to protect its interests, in this case its right of passage in international waters."<sup>68</sup> At the time of the initial NSC meeting on May 12, the exact location and the status of the *Mayaguez* and its crew were not known.<sup>69</sup> When the NSC convened on May 13, the location and status of the ship and crew were still not known; however, the President was "convinced of the urgency" of deploying appropriate U.S. military forces to the scene in case military action "should become necessary."<sup>70</sup>

At that May 13 meeting, the President further ordered the State Department to deliver a letter to the United Nations Secretary-General "seeking help in securing the release of the ship and crew."<sup>71</sup> On May 14, the U.S. Ambassador to the U.N. delivered this letter, which noted the ongoing diplomatic efforts to reach a satisfactory solution, but also reserved the right to take whatever measures were appropriate to protect American lives and property.<sup>72</sup> This letter specifically cited Article 51 of the U.N. Charter as justification for any appropriate and necessary measures of self-defense.<sup>73</sup> The letter also requested the Secretary-General's assistance in securing the release of

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<sup>66</sup> RICHARD G. HEAD, FRISCO W. SHORT, & ROBERT C. MCFARLANE, *CRISIS RESOLUTION: PRESIDENTIAL DECISION MAKING IN THE MAYAGUEZ AND KOREAN CONFRONTATIONS* 101-08 (1978).

<sup>67</sup> *Id.* at 105.

<sup>68</sup> *Id.* at 110.

<sup>69</sup> *Id.* at 111.

<sup>70</sup> *Id.* at 115.

<sup>71</sup> *Id.* at 118.

<sup>72</sup> *Id.* at 119.

<sup>73</sup> RONZITTI, *supra* note 19, at 36.

the ship and crew.<sup>74</sup> President Ford did not seek a Security Council session or according to at least one commentator, use U.N. back-channel routes to negotiate a release of the captured crew.<sup>75</sup>

Convinced that diplomatic measures were not effective, President Ford issued orders on May 14 to execute the military plan to recover the *Mayaguez* and crew.<sup>76</sup> This order was given despite the fact that the exact location and status of the crew were still uncertain.<sup>77</sup> One hundred and thirty-one U.S. Marines stormed the island of Koh Tang, and subsequently boarded and secured the *Mayaguez*.<sup>78</sup> U.S. Navy aircraft simultaneously struck targets on the Cambodian mainland in order to prevent Cambodian reinforcements from interfering with the operation on Koh Tang.<sup>79</sup> What was unknown to the U.S. at the time was that the *Mayaguez* crew had almost simultaneously been released from Kompong Som and was en route to the *Mayaguez* in a Thai fishing boat.<sup>80</sup> The crew was picked up by U.S. naval forces, and President Ford directed cessation of all offensive operations.<sup>81</sup>

The U.S. subsequently reported to the U.N. Security Council on the measures taken against Cambodia, declaring that all actions had been in self-defense and in accordance with Article 51 of the Charter.<sup>82</sup> Perhaps not surprisingly, Cambodia characterized the American use of force as a “brutal act of aggression,” and China charged that America’s actions constituted an “act of piracy.”<sup>83</sup>

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<sup>74</sup> ERICKSON, *supra* note 18, at 119.

<sup>75</sup> JOHN ALLPHIN MOORE, JR. & JERRY PUBANTZ, *TO CREATE A NEW WORLD? AMERICAN PRESIDENTS & THE UNITED NATIONS 208* (1999). But compare this to President Ford’s version of events during the 1976 Presidential election debate: “Let me assure you that we made every possible overture to the People’s Republic of China and through them to the Cambodian Government. We made - diplomatic - protests to the Cambodian government through the United Nations. But at the same time, I had a responsibility, and so did the National Security Coun-Council, to meet the problem at hand.” A debate transcript available at [http://www.pbs.org/newshour/debatingourdestiny/76debates/2\\_d.html](http://www.pbs.org/newshour/debatingourdestiny/76debates/2_d.html).

<sup>76</sup> HEAD, SHORT, & MCFARLANE, *supra* note 66 at 123.

<sup>77</sup> *Id.* at 131.

<sup>78</sup> *Id.* at 133.

<sup>79</sup> *Id.* at 138. (“Navy attack aircraft struck Ream airfield about 9:57 a.m., cratered the runway, damaged the hangar, and destroyed numerous aircraft. An hour later, the third wave hit the Ream Naval Base and the Kompong Som naval facilities, damaging a fuel storage area, two warehouses, and the railroad marshalling yard.”). The number of Cambodian casualties – military or civilian – remains unknown.

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

<sup>81</sup> *Id.* at 131.

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

<sup>83</sup> AREND & BECK, *supra* note 23, at 98.

Interestingly, in the United States presidential election of 1976, Democratic candidate Jimmy Carter seemed to endorse President Ford's actions in the *Mayaguez* incident, stating:

When something happens that endangers our security, or when something happens that threatens our stature in the world, or when American people are endangered by the actions of a foreign country, just forty sailors on the *Mayaguez*, we obviously have to move aggressively and quickly to rescue them.<sup>84</sup>

President Carter's actions during the Iranian hostage crisis will be analyzed later in this paper.

### **B. The Entebbe Raid (1976)**

At least one commentator calls the 1976 Israeli raid on Entebbe the "most important example of such a unilateral use of force" in a hostage-rescue scenario.<sup>85</sup> The operation itself has been described as "[o]ne of the most spectacular acts of counter-terrorism."<sup>86</sup> The incident started when, on June 27, 1976, a French aircraft bound from Tel Aviv to Paris was hijacked by four Palestinian terrorists.<sup>87</sup> The aircraft ultimately landed in Uganda, where ninety-six Israelis were kept hostage onboard the plane with a demand for the liberation of several terrorists located around the world.<sup>88</sup> On July 3, 1976, in an extremely daring raid, Israeli commandos landed at Entebbe and freed the hostages.<sup>89</sup> The commandos killed all the hostage-takers, "destroyed ten Ugandan military aircraft, and killed some Ugandan soldiers."<sup>90</sup>

The Organization of African Unity called for an urgent meeting of the U.N. Security Council, where African States expressed outrage at the Israeli action in what they claimed was an unlawful violation of Uganda's sovereignty and territorial integrity.<sup>91</sup> At the Security Council Meeting, Israel justified its intervention under both the right to take military action to protect its nationals in

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<sup>84</sup>Transcript of October 6, 1976 Presidential debate, [http://www.pbs.org/newshour/debatingourdestiny/76debates/2\\_d.html](http://www.pbs.org/newshour/debatingourdestiny/76debates/2_d.html).

<sup>85</sup>LAMBERT, *supra* note 56, at 317.

<sup>86</sup>SYDNEY D. BAILEY, THE UN SECURITY COUNCIL AND HUMAN RIGHTS 95 (1994).

<sup>87</sup>RONZITTI, *supra* note 19, at 37.

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

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

<sup>90</sup>AREND & BECK, *supra* note 23, at 99.

<sup>91</sup>*Id.* at 96. Some of the African States condemning Israel's actions included Uganda, Mauritania, Cameroon, Libya, Benin, Somalia, and Tanzania.

mortal danger, as well as the right of self-defense, which was “enshrined in international law and in the Charter of the United Nations.”<sup>92</sup>

The U.S. was the only country to explicitly agree with Israel on the lawfulness of its use of armed force at Entebbe.<sup>93</sup> William Scranton, U.S. Ambassador to the United Nation, stated:

Israel's action in rescuing the hostages necessarily involved a temporary breach of the territorial integrity of Uganda. Normally, such a breach would be impermissible under the Charter of the United Nations. However, there is a well established right to use limited force for the protection of one's own nationals from an imminent threat of injury or death in a situation where the State in whose territory they are located is either unwilling or unable to protect them. The right, flowing from the right of self-defense, is limited to such use of force as is necessary and appropriate to protect threatened nationals from injury. The requirements of this right to protect nationals were clearly met in the Entebbe case. Moreover, the actions necessary to release the Israeli nationals or to prevent substantial loss of Israeli lives had not been taken by the Government of Uganda, nor was there a reasonable expectation such actions would be taken...It should be emphasized that this assessment of the legality of Israeli actions depends heavily on the unusual circumstances of this specific case. In particular, the evidence is strong that, given the attitude of the Ugandan authorities, co-operation with or reliance on them in rescuing the passengers and crew was impracticable. It is to be hoped that these unique circumstances will not arise in the future.<sup>94</sup>

As a result of the dichotomy of opinion among the States regarding Israel's actions, “no resolution could be passed by the Security Council at the conclusion of the debate.”<sup>95</sup> Those States condemning Israel's actions withdrew their draft resolution, realizing it would not be adopted.<sup>96</sup>

Oscar Schachter, author of the Michigan Law Review article regarding the right of states to use armed force, states that the Israeli rescue action in Entebbe was the clearest example of the application of the Counter-Restrictionist Theory because there was no doubt as to the imminent peril of

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<sup>92</sup> RONZITTI, *supra* note 19, at 37.

<sup>93</sup> *Id.* at 38-39. Other non-African states that believed Israel had committed an act of aggression included China, Yugoslavia, India, Pakistan, the Soviet Union, Panama, Rumania, and Cuba.

<sup>94</sup> U.N. Doc. S/PV.1941 (1976).

<sup>95</sup> RONZITTI, *supra* note 19, at 40.

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

death of the Israeli captives, it was clear that the forcible capture was intended as an attack on Israel, and there was no reason to consider the rescue as a pretext for political interference in Uganda.<sup>97</sup> This view has been echoed by other scholars.<sup>98</sup>

### C. The Iranian Hostage Rescue Attempt (1980)

On November 4, 1979, at approximately 10:00 AM, approximately 300 Iranian students seized the U.S. Embassy in Tehran, taking all the Americans inside the Embassy hostage.<sup>99</sup> On November 18 and 19, Iran released thirteen of the hostages.<sup>100</sup> Endorsed by revolutionary leader Ayatollah Khomeini,<sup>101</sup> the students kept the remaining hostages captive despite several non-military initiatives by the U.S. government, which included seeking action by the U.N. Security Council<sup>102</sup>; instituting proceedings before the International Court of Justice (“ICJ”)<sup>103</sup>; and freezing all Iranian assets in the U.S.<sup>104</sup>

When all of the non-military efforts to release the hostages appeared to be ineffective, President Carter decided to use military force to rescue the hostages.<sup>105</sup> President Carter signaled this intention at a news conference on April 17, 1980, when he stated:

If this additional set of sanctions that I’ve described to you today, and the concerted action of our allies, is not successful then the only next step available that I can see would be some sort of military action which is the prerogative and the right of the United States under these circumstances.<sup>106</sup>

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<sup>97</sup> Schachter, *supra* note 17, at 1630.

<sup>98</sup> CHRISTOPHER C. JOYNER, INTERNATIONAL LAW IN THE 21<sup>ST</sup> CENTURY 171 (2005) (“If a state’s assets are indeed threatened, then its government may use armed force to protect them – for example, the use of force by Israel against Uganda at Entebbe in 1976.”).

<sup>99</sup> ANDREAS F. LOWENFELD, LAWRENCE W. NEWMAN, & JOHN M. WALKER, REVOLUTIONARY DAYS: THE IRAN HOSTAGE CRISIS AND THE HAGUE CLAIMS TRIBUNAL 7-9 (1999).

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

<sup>101</sup> RONZITTI, *supra* note 19, at 42. The Iranian authorities did not intervene to prevent the seizure or assist in freeing the hostages.

<sup>102</sup> Schachter, *supra* note 17, at 1631. Soon after the Embassy was seized, the U.S. referred the matter to the U.N. Secretary-General. On December 4, 1979, the Security Council passed a resolution condemning the seizure as illegal and urging immediate release of the hostages. Another similar resolution was passed on December 31, 1979. Iran ignored both Security Council resolutions.

<sup>103</sup> *Id.* The International Court of Justice issued an order in December calling for release of the hostages, but Iran refused to comply with the order.

<sup>104</sup> AREND & BECK, *supra* note 23, at 100.

<sup>105</sup> *Id.* at 100-01.

<sup>106</sup> RONZITTI, *supra* note 19, at 43.

On April 24, 1980, eight U.S. Navy helicopters carrying special operations forces were launched from the aircraft carrier USS Nimitz in what has been described as a “grueling and technical operation” and a “highly complex...high-risk venture.”<sup>107</sup> Ultimately, the mission failed before completion due to myriad technical and operational malfunctions, resulting in an in-air collision between one of the helicopters and a refueling aircraft.<sup>108</sup> On April 25, 1980, President Carter went on national television to announce that the rescue mission had failed, and he took personal responsibility for the failure.<sup>109</sup>

In President Carter’s report of the operation to Congress, he stated: “In carrying out this operation, the United States was acting wholly within its right, in accordance with Article 51 of the United Nations Charter, to protect and rescue its citizens where the government of the territory in which they are located is unable or unwilling to protect them.”<sup>110</sup> Interestingly, when President Carter reported the U.S. measures taken to the U.N. Security Council, he used slightly different language, including the term “armed attack.”<sup>111</sup>

As might be expected, the reaction of States was varied.<sup>112</sup> The Iranians violently condemned the rescue attempt as “a blatant act of invasion”; however, perhaps not surprisingly, they did not call upon the Security Council regarding the matter.<sup>113</sup> The varying opinions once again prevented the Security Council from adopting any sort of resolution regarding the U.S. action.<sup>114</sup> As noted earlier in this paper, however, the hostage incident was before the ICJ at the time of the failed rescue mission, and the Court stated:

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<sup>107</sup> WARREN CHRISTOPHER ET AL., AMERICAN HOSTAGES IN IRAN 154-62 (1985) (“Under cover of darkness, eight RH-53D helicopters and six C-130 aircraft were to depart from different locations, fly into Iran, and rendezvous at an airstrip some 500 miles inland. This airstrip, near the small town of Tabas, had been secretly prepared in advance and was known as ‘Desert I’ in the plan. At Desert I, the helicopters were to be refueled and loaded with the men and equipment transported by the fixed-wing aircraft. Following the refueling and loading, the C-130s would leave Iran. The helicopters, still under cover of darkness, would proceed to a remote site in the mountains above Tehran, where they would be camouflaged and remain in hiding throughout the following day. This delay was required to insure that the assault on the embassy itself could be carried out under the cover of darkness. Because of the distances involved, it was impossible to insert the necessary forces, release the hostages, and depart in a single night.”).

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

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

<sup>110</sup> RONZITTI, *supra* note 19, at 45.

<sup>111</sup> *Id.* (The U.S. stated that the operation was undertaken “in exercise of its inherent right to self-defense with the aim of extricating American nationals who have been and remain the victims of the Iranian armed attack on our Embassy.”)

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

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

<sup>114</sup> *Id.*

Before drawing the appropriate conclusions from its findings on the merits in this case, the Court considers that it cannot let pass without comment the incursion into the territory of Iran made by United States military units on 24-25 April 1980, an account of which has been given earlier in this Judgment (paragraph 32). No doubt the United States Government may have had understandable preoccupations with respect to the well-being of its nationals held hostage in its Embassy for over five months. No doubt also the United States Government may have had understandable feelings of frustration at Iran's long-continued detention of the hostages, notwithstanding two resolutions of the Security Council as well as the Court's own Order of 15 December 1979 calling expressly for their immediate release. Nevertheless, in the circumstances of the present proceedings, the Court cannot fail to express its concern in regard to the United States' incursion into Iran...At the same time, however, the Court must point out that neither the question of the legality of the operation of 24 April 1980, under the Charter of the United Nations and under general international law, nor any possible question of responsibility flowing from it, is before the Court.<sup>115</sup>

Based on the Court's opinion, some commentators have suggested that the Court was not prepared to say that the operation was either morally blameworthy or legally impermissible.<sup>116</sup> Others have suggested that, "in not condemning the rescue mission, the Court to some extent strengthened the theory that the use of armed force" for the rescue of hostages or protection of nationals abroad is lawful, arguing that the Court could have stated its position by virtue of an *ober dictum*.<sup>117</sup>

Having compared the "restrictionist" and "counter-restrictionist" views, and analyzing three case studies in which the use of force was used and justified under Article 51, this paper will now propose a modified counter-restrictionist framework and suggest explicit conditions in which the use of force could be used in a manner consistent with the Charter to rescue hostages.

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<sup>115</sup> Case Concerning United States Diplomatic and Consular Staff in Tehran (U.S v. Iran), 1980 I.C.J. REP. 3.

<sup>116</sup> Ted L. Stein, *Contempt, Crisis, and the Court: The World Court and the Hostage Rescue Attempt*, 76 A.J.I.L. 499, 499 (1982).

<sup>117</sup> RONZITTI, *supra* note 19, at 61.

#### IV. A RECOMMENDED FRAMEWORK AND ITS APPLICATION

##### A. Recommended Framework: The “Medium-Restrictionist” Theory

When States are the victims of hostage-taking, they should legally be permitted to respond with the use of force under certain limited and specific situations. This limited approach could be considered the “Medium-Restrictionist” Theory. This theory has elements of both the “Restrictionist” and “Counter-Restrictionist” theories, without reaching either extreme. The Medium-Restrictionist theory has several key tenets.

First, and perhaps foremost, the use of force to rescue hostages cannot necessarily be utilized in every scenario. There must be a case-by-case analysis to determine if force can be used. Second, the use of force to rescue hostages can be justified solely on an Article 51 claim of self-defense. This tenet is premised on the notion that the act of hostage taking is an attack on the State itself, particularly in those cases where an individual who directly represents the State (such as a diplomat or military member) is taken hostage.

Third, in addition to the Article 51 basis, the Medium-Restriction Theory would place seven further restrictions on a State before it could resort to force.<sup>118</sup> First, a use of force can only be used if the hostages are in imminent danger of loss of life or limb. Second, there must be no other *feasible* “non-force” options such as diplomatic efforts or economic sanctions. Third, the State where the hostages are being held must be unwilling or unable to protect the hostages or effectively assist in their release. Fourth, the use of force cannot be punitive in nature nor with the purpose of reprisal. Fifth, wherever and whenever possible, the consent of the territorial sovereign should be requested prior to the use of force.<sup>119</sup> Sixth, no additional force may be used beyond that which is required to rescue the hostages. Seventh, and finally, the purpose of any use of force by a state must be strictly limited to rescuing its hostages and be “proportional” to the mission of rescuing the hostages; consequently, force cannot be used as a pretext for any other activities in the target State.<sup>120</sup>

<sup>118</sup> These further restrictions have been previously suggested in similar forms by other scholars. *See, e.g.,* AREND & BECK, *supra* note 23, at 201; ERICKSON, *supra* note 18, at 182-86.

<sup>119</sup> This may not be feasible in most, if any, successful hostage-rescue operations due to the obvious need for operational security; however, consent of the territorial State would most likely ease the concerns of the community of nations regarding the legality of such an act.

<sup>120</sup> *See, e.g.,* CHRISTINE GRAY, INTERNATIONAL LAW AND THE USE OF FORCE 109-10 (2000) (noting that the U.S. invasions in Grenada and Panama involved situations where the degree of danger to U.S. nationals was controversial, and “went far beyond the protection of nationals,” including installation of a new government)..

The notions of “necessity” and “proportionality” are key components of the use of force in self-defense, and they merit a discussion in relation to the Medium-Restriction Theory.<sup>121</sup> First, regarding the requirement of “necessity” for self-defense, Schachter states:

The requirement of necessity for self-defense is not controversial as a general proposition, and that, as a matter of principle, there should be no quarrel with the proposition that force should not be considered necessary until peaceful measures have been found wanting or when they clearly would be futile. However, to require a state to allow an invasion to proceed without resistance on the ground that peaceful settlement should be sought first, would, in effect, nullify the right of self-defense. One is compelled to conclude that a state being attacked is under a necessity of armed defense, irrespective of probabilities as to the effectiveness of peaceful settlement. We reach a similar conclusion in the case of an imminent threat involving danger to the lives of persons coupled with unreasonable demands for concessions. It would be hard to deny the necessity for forcible action in that case on the ground that a peaceful means might succeed.<sup>122</sup>

Schachter’s argument above, bolsters the Medium-Restriction Theory in that force may be used if there are no *feasible* non-force options, even if the hostages are not in imminent danger of loss of life or limb. Without such an exception, a situation can be envisioned where unrealistic diplomatic negotiations drag on for unreasonable periods of time. Hostages could be kept under lock and key for an undetermined amount of time and the State of which they are nationals would not be able to take forceful measures to recover them without the Medium-Restriction exceptions.

Second, regarding the concept of “proportionality,” Schachter states that it is closely linked to “necessity” as a requirement of self-defense,<sup>123</sup> with the general rule being that “acts done in self-defense must not exceed in manner or aim the necessity provoking them.”<sup>124</sup> Lieutenant Colonel Richard J. Erickson, another commentator on the use of force, has stated:

The purpose [of the use of force] is to secure one’s nationals. Force that is excessive, unreasonable, or unnecessary does not serve this

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<sup>121</sup> *Id.* at 110 (“The requirements of necessity and proportionality are often traced back to the 1837 Caroline incident, involving a pre-emptive attack by the British forces in Canada on a ship manned by Canadian rebels, planning an attack from the USA.”).

<sup>122</sup> Schachter, *supra* note 17, at 1635.

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

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

purpose, but is rather outside of it. When proportionality is not observed, there is a strong indication that force is being misapplied beyond its purpose for other improper goals. This principle of proportionality imposes a threshold. It requires a balance between the minimum force required and the interest threatened. At times such a balance cannot be achieved. When this occurs, intervention must be rejected as an option.<sup>125</sup>

The rule of proportionality does not necessarily present clear answers to every situation; indeed, Schachter states that “this general formula obviously leaves room for differences in particular cases.”<sup>126</sup> He further notes that “when defensive action is greatly in excess of the provocation, as measured by relative casualties or scale of weaponry, international opinion will more readily condemn such defense as illegally disproportionate.”<sup>127</sup>

Several factors should be applied to determine whether self-defense in hostage rescue operations meets the proportionality requirement. First, what military action is being taken and against whom? An act of self-defense to rescue hostages is more likely to meet the proportionality requirement if military force is directed specifically at the site where the hostages are being held, or against military sites that have counter-attack capabilities. Second, to use Schachter’s terminology, what is the “scale of weaponry,”? This question would analyze the number of troops and weaponry used to rescue the hostages. Third, what is the collateral damage? The answer does not rely on an objective mathematical equation (e.g., “x # of hostages + y # of casualties = proportional”). Every rescue operation will almost guarantee casualties, but to meet the proportionality requirement, casualties, especially civilian casualties, should be minimized to the absolute extent possible.

### **B. Application of the “Medium-Restrictionist” Theory to the Case Studies**

Do the three case studies previously described satisfy the requirements of the “Medium-Restriction” Theory? The Mayaguez Incident is an example where the U.S.’s use of force was one of necessity, but not consistent with the Medium Restriction Theory. There was no belief that the hostages were in imminent danger of loss of life or limb, nor was there any serious attempt to engage Cambodia in any non-force options prior to the rescue operation being launched. Instead, this rescue attempt seemed to be more of a political decision than a legal decision. On the other hand, this rescue operation appeared to

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<sup>125</sup> ERICKSON, *supra* note 18, at 186.

<sup>126</sup> Schachter, *supra* note 17, at 1637.

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

clearly meet the requirement of proportionality,<sup>128</sup> and once the operation was over and the hostages rescued, U.S. forces withdrew from Cambodian territory. The Entebbe raid arguably is the best example of a rescue attempt meeting the requirements of the Medium-Restriction Theory, because in that situation the hostages apparently faced an actual imminent danger of loss of limb or life, and Uganda either could not or would not assist in the hostages' release. The Israelis also satisfied the proportionality requirement, sending in small team of elite commandos to accomplish the mission (and attacking only the site of the actual hostage-taking), inflicting minimum casualties, and then immediately departing the territory.

The Iranian hostage rescue attempt of 1980 presents more difficult issues, specifically regarding the necessity requirement. The hostages had been seized six months prior to the rescue attempt. The situation had not changed to require the attempted use of force at that particular point in time. Was there an imminent peril at that point, or had all other effective non-force options been exhausted? Regarding the imminent peril question, Schachter states that "the pertinent point is whether, at the time, the U.S. government had reason to fear that in the emotional atmosphere of Iranian revolutionary ferment the hostages would be executed, with or without a trial."<sup>129</sup> The necessity requirement would have been satisfied at the point in time of the attempted rescue if there had been some solid indication (or intelligence) that the hostages were immediately going to in trial with a possibility of execution as a punishment. This would have met the "imminent peril" requirement. On the other hand, if the circumstances had not really changed in the six months since the hostages were taken, it becomes more difficult to make the "necessity" argument for action at that particular moment in time.

As it pertains to the issue of proportionality, because of the very small number of U.S. forces being used and the planned target site (i.e., only the location of the hostages), the mission appeared to meet the requirement. Because there was no evidence that the hostages were going to be subject to the

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<sup>128</sup> This argument is made in part based on the analysis above in Part IV regarding proportionality. In the Mayaguez Incident, the use of force was directed solely against the captors themselves and proximate military targets capable of likely counter-attack (i.e., the military airfield and assets contained therein). A different argument might have been made if the U.S. launched air raids deep inside Cambodia against cities hundreds of miles away from the site of the hostage-taking. Regarding the issue of excessive casualties, although the exact number of enemy forces killed in the attack is apparently unknown, no sources could be located that claimed either the number of enemy troops killed was excessive based on the situation, or that any Cambodian civilians were killed in the action. While Cambodia and China condemned the action, there is no record of them condemning the attack based on a violation of proportionality.

<sup>129</sup> CHRISTOPHER ET AL., *supra* note 107, at 334 ("Faced with this fact and the not unrealistic conclusion at the time that peaceful means offered no promise of release, the United States had reasonable grounds to consider military action necessary to effect a rescue.").

possibility of death, it should be concluded that this incident did not meet the necessity argument under the Medium-Restrictionist Theory.

This brings the discussion to the scenario that opened this paper: the British service members seized by Iran in March 2007. Would the Britons have been legally justified in using force under the Medium-Restriction Theory to rescue or attempt to rescue the service members? The facts suggest not. Images and reports from Iran seemed to indicate that the hostages were not in imminent danger of loss of life or limb. Iran was apparently not seriously threatening to put them on trial, as Iran allegedly was planning to do in 1980 with the embassy hostages. Further, there appeared to be feasible non-force avenues of diplomacy that were available and actively being pursued by the British government. The lack of imminent danger, and the availability of non-force options suggests that there was no necessity for the use of force.

Regarding the issue of proportionality, it seems almost impossible to imagine what kind of force would have been required to rescue fifteen extremely well-guarded people in an unknown location or locations in a country the size of Iran. Unlike in 1980 where the exact location of the hostages was known, the 2007 version makes it unclear if a force of even 50,000 British soldiers would have been able to locate and rescue the fifteen service members without causing massive military and civilian casualties. An unfocused and unplanned British invasion covering all of Iran to search for the hostages would have been disproportionate (especially depending on the number of Iranian military and civilian casualties that would result from such an invasion) and could be perceived and condemned as a pretext for an attempt to overthrow Ahmadinejad.

## V. CONCLUSION

Recent headlines from around the globe leave no doubt that the practice of hostage-taking is a modern reality that states must anticipate. There are a number of non-force options available to a state that finds itself a victim of hostage-takers, and perhaps in a perfect world (or at least in the perfect world of some Restrictionists) the use of force would not be required for a state to ensure the safe return of its nationals who have been taken hostage. This paper has attempted to demonstrate, however, that states are in fact legally justified under Article 51 of the United Nations Charter to use force in order to rescue hostages, based on the principle that an attack on a national of a state may be construed as an attack on the State itself.

This paper has further attempted to persuade that a state would be on the most solid legal footing in its use of force if it were to follow the tenets of the Medium-Restrictionist Theory, which does not permit an automatic,

immediate, or unlimited use of force as soon as hostages are taken. While this theory allows a state to have the use of force as an option to rescue its hostages, this theory also mandates that there must be an imminent danger of loss of life or limb, or a lack of any other feasible non-force options available. Additionally, states must strictly adhere to the requirements of “necessity” and “proportionality” if force is ultimately used.

Ultimately, from a legal perspective, no state should fault the Britons for the non-force path they chose in order to achieve the safe return of their nationals, especially given the very successful end results. At the same time, all states – whether a state such as Iran that takes hostages, a state such as Uganda that fails to assist with a hostage scenario in its own territory, or any state that sees its nationals taken as hostages -- must realize and have confidence that the use of force to rescue hostages remains an option that is legally available under the United Nations Charter.



# ENSURING “FAIR WINDS AND FOLLOWING SEAS”: A PROPOSAL FOR A SINO-AMERICAN INCIDENT AT SEA AGREEMENT

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“There can be no peace without law.” -Dwight D. Eisenhower

## I. INTRODUCTION

On the morning of April 1, 2001, a U.S. Navy EP-3 plane was flying a routine surveillance flight seventy nautical miles southeast of Hainan Island.<sup>1</sup> Two People’s Liberation Army (PLA) F-8 jets were scrambled to trail the EP-3 and monitor its activity. Tensions were elevated after several near collisions had occurred between the two forces during similar flights in previous months.<sup>2</sup> The shadowing took a turn for the worse when, around 0900, the EP-3 and one of the F-8s collided over the South China Sea.<sup>3</sup> The EP-3 was forced to undertake an emergency landing at a Chinese military base on Hainan Island while the crew destroyed as much sensitive information and equipment on board as they could.<sup>4</sup> The Chinese F-8 broke apart upon impact and the pilot was never found.<sup>5</sup> A two week international incident ensued in which the Navy crew was held by the

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\*J.D. UCLA School of Law, 2008; M.A. Columbia University, 2006; B.A. University of California, Los Angeles, 2004. For sharing their invaluable time and insight with me during the writing of this article, I would like to thank RADM William H. Butler, USN (Ret.), Professor William Murray of the United States Naval War College, Professor Richard Steinberg of UCLA School of Law, Dr. David F. Winkler of the Naval Historical Foundation and Mr. David Griffiths of the Centre for Foreign Policy Studies. The positions and opinions in this article are those of the author and do not necessarily represent the views of the United States Government, the Department of Defense, or the United States Navy.

<sup>1</sup> For an informative summary of the 2001 EP-3 incident and a discussion of state responsibility for the event see Margaret K. Lewis, Note, *An Analysis of State Responsibility for the Chinese-American Airplane Collision Incident*, 77 N.Y.U. L. REV. 1404 (2002).

<sup>2</sup> Steven Lee Myers, *U.S. Tape Is Said to Show Reckless Flying by Chinese*, N.Y. TIMES, Apr. 13, 2001, at A6 and James Dao, *China Shadowing Had Annoyed U.S.*, N.Y. TIMES, Apr. 2, 2001, at A1.

<sup>3</sup> Lewis, *supra* note 1, at 1409.

<sup>4</sup> Elisabeth Rosenthal, *China Says It Won’t Let U.S. Spy Plane Fly Home*, N.Y. TIMES, May 9, 2001, at A12.

<sup>5</sup> John Kifner, *A Warm, If Quick, Heroes’ Welcome, Then on to Long Hours With Debriefing Team*, N.Y. TIMES, Apr. 13, 2001, at A10.

Chinese for eleven days and the U.S. government apologized for the loss of the pilot's life and for the EP-3's unauthorized landing on Chinese soil.<sup>6</sup> The EP-3 was returned three months later, after the Chinese had likely reaped substantial intelligence from the plane and its contents.<sup>7</sup>

Such incidents at sea endanger lives and vessels because they elevate tensions between heavily armed naval forces, increasing such encounters' inherent potential for unintended and disastrous consequences. The 2001 EP-3 event is not the only report of tense incidents between the U.S. Navy and the People's Liberation Army Navy (PLAN) in recent years. A somewhat precarious encounter took place between the USS KITTY HAWK (CV 63) and a PLAN Song-class attack submarine in October 2006, when a U.S. Navy surveillance crew spotted the Chinese submarine close to the surface and within firing range of the carrier and its battle group.<sup>8</sup> An incident was averted in this case, but Admiral William Fallon, then commander of U.S. Pacific Command, acknowledged the inherent risk that incidents at sea have to "escalate into something very unforeseen."<sup>9</sup> Such events between the U.S. and Chinese navies will likely become more frequent in the future as the PLAN's naval capabilities grow.

And grow they will. According to official Chinese statistics, the annual budget of the Chinese military has increased by an average of fifteen percent every year from 1990 to 2005.<sup>10</sup> In both 2007 and 2008, it grew by over seventeen percent.<sup>11</sup> Furthermore, though high, these figures may actually be underestimations. Many military analysts believe official Chinese statistics represent only a fraction of actual expenditures.<sup>12</sup> Indeed, the U.S. Department of Defense estimates that the Chinese military enjoyed a total of between 97 and 139 billion dollars in defense related expenditures in 2007, an estimate two to three times higher than the official Chinese defense budget.<sup>13</sup> Whatever China's exact military expenditures may be, it is clear that the budget is being put to

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<sup>6</sup> David E. Sanger & Steven Lee Myers, *Delicate Diplomatic Dance Ends Bush's First Crisis*, N.Y. TIMES, Apr. 12, 2001, at A1.

<sup>7</sup> Henry Chu, *Rest of Spy Plane Leaves China*, L.A. TIMES, July 4, 2001, at A3.

<sup>8</sup> For an overview of public information regarding this incident, see Bill Gertz, *China Sub Stalked U.S. Fleet*, WASH. TIMES, Nov. 13, 2006, at A1 and Bill Gertz, *Admiral Says Sub Risked a Shootout; Beijing Denies Awareness of It*, WASH. TIMES, Nov. 15, 2006, at A1.

<sup>9</sup> Audra Ang, *Admiral Plays Down China Sub Incident*, ASSOC. PRESS, Nov. 12, 2006.

<sup>10</sup> INFO. OFFICE OF THE STATE COUNCIL OF THE P.R.C., CHINA'S NATIONAL DEFENSE IN 2006 (2006), <http://www.fas.org/nuke/guide/china/doctrine/wp2006.html>.

<sup>11</sup> Jill Drew, *China's Military Budget Reported at \$59 Billion*, WASH. POST, Mar. 5, 2008, at A17.

<sup>12</sup> Jim Yardley & David Lange, *Beijing Accelerates Its Military Spending*, N.Y. TIMES, Mar. 5, 2007, at A1.

<sup>13</sup> OFFICE OF THE SEC'Y OF DEF., ANNUAL REPORT TO CONGRESS: MILITARY POWER OF THE PEOPLE'S REPUBLIC OF CHINA 31, 32 (2008), available at [http://www.defenselink.mil/pubs/pdfs/China\\_Military\\_Report\\_08.pdf](http://www.defenselink.mil/pubs/pdfs/China_Military_Report_08.pdf).

good use. The military is streamlining its forces, acquiring increasingly advanced weaponry, and pushing for a more educated military force.<sup>14</sup>

Perhaps nowhere is this military modernization and expansion more apparent than with the PLAN. Over the past fifteen years, the PLAN has made large gains in its efforts to become a first rate, blue water navy.<sup>15</sup> For example, the PLAN has been upgrading its submarine capabilities, bolstering its fleet with more advanced and stealthier Russian-made Kilo-class submarines, and Chinese Yuan and Song-class submarines.<sup>16</sup> Additionally, the PLAN has purchased aircraft carriers from the Russians and Australians.<sup>17</sup> The PLAN is not likely to put any of these carriers into operation,<sup>18</sup> but instead likely garnered design information from the vessels to aid in the possible construction of China's own carrier within the coming decades.<sup>19</sup>

Though the implications of the acquisition of this more advanced weaponry are unclear,<sup>20</sup> one thing is for certain: the expansion of the PLAN and its growing power projection capability make it inevitable that the areas of operation of the PLAN and the U.S. Navy will increasingly overlap. As the two navies come into more regular contact, the probability for dangerous encounters between them will increase.

Faced with this future, it is important that the U.S. Navy and the PLAN work together to decrease the probability and frequency of dangerous maritime incidents between them. One of the most promising avenues for progress in this area is for the two navies to negotiate an incident at sea agreement (ISA). Such an agreement would establish guidelines for interaction between the PLAN and the U.S. Navy in international waters and thereby avert potentially dangerous open ocean contacts.

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<sup>14</sup> See generally *id.* For a comprehensive overview of the current status of the PLA see DENNIS J. BLASKO, *THE CHINESE ARMY TODAY: TRADITION AND TRANSFORMATION FOR THE 21<sup>ST</sup> CENTURY* (2006).

<sup>15</sup> The term "blue water navy" is a colloquialism used to describe a maritime force capable of operating with significant strength across the deep waters of open oceans.

<sup>16</sup> Lyle Goldstein & William Murray, *China Emerges as a Maritime Power*, *JANE'S INTELL. REV.*, Oct. 2004, at 34-36.

<sup>17</sup> Andrew S. Erickson & Andrew R. Wilson, *China's Aircraft Carrier Dilemma*, *NAV. WAR C. REV.*, Autumn 2006, at 21.

<sup>18</sup> *JANE'S FIGHTING SHIPS 2006-2007*, at 126 (Stephen Saunders ed. 2006).

<sup>19</sup> OFFICE OF THE SEC'Y OF DEF., *ANNUAL REPORT TO CONGRESS: MILITARY POWER OF THE PEOPLE'S REPUBLIC OF CHINA 24* (2007), available at <http://www.defenselink.mil/pubs/pdfs/070523-China-Military-Power-final.pdf>.

<sup>20</sup> For an overview of competing theories about the implications of the growth of Chinese power, including military power, see Aaron L. Friedberg, *The Future of U.S.-China Relations: Is Conflict Inevitable?*, *INT'L SEC.*, Fall 2005, at 7-45.

This article attempts to both evaluate the prospects for a Sino-American ISA as well as suggest the form that such an agreement, and its negotiations, should take. Section II gives a brief definition of an ISA. Section III then details the highly successful ISA negotiated between the U.S. and the Government of the Union of Soviet Socialist Republics (USSR) during the Cold War. This agreement is important because it provides a framework for how to construct a successful Sino-American ISA. Section IV assesses the current prospects for negotiating a Sino-American ISA. Section V concludes by detailing how such an agreement can be successfully negotiated, analyzing the legal character the agreement should take, and outlining the rules and regulations that should be written into the agreement.

## II. INCIDENT AT SEA AGREEMENTS

An incident at sea agreement is an agreement between two or more navies that establishes a framework to regulate interactions in international waters. By bringing structure to these interactions, an ISA decreases the danger of unintended escalation when navies encounter each other on the open ocean. ISAs achieve this goal by implementing regulations to govern open ocean encounters and by establishing channels of communications between the two navies.

Dangerous incidents at sea are normally the result of deliberate naval activities. One such activity is the practice of close air surveillance, or “buzzing.” During “buzzing” activities, naval aircraft fly close passes over vessels of an opposing navy for reconnaissance purposes.<sup>21</sup> The close-quarters maneuvers increase tensions between the two forces as they present a real potential for a dangerous, or possibly even deadly, mishap.

Other maneuvers include “shouldering,” in which one vessel runs along the side of an opposing naval vessel to run that vessel off its course. During the Cold War, shouldering incidents were frequent between the U.S. and Soviet Navy and occasionally led to collisions.<sup>22</sup> Naval vessels also engage in “shadowing” activities, in which they closely track the movements of an opposing navy’s vessels. Such activities, though practical, can lead to dangerous incidents at sea because they increase tensions between forces if done in a brazen manner.<sup>23</sup>

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<sup>21</sup> Sean M. Lynn-Jones, *A Quiet Success for Arms Control: Preventing Incidents at Sea*, INT’L SEC., Spring 1985, at 156.

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

<sup>23</sup> For an instance in which a U.S. Navy vessel “shadowed” a Soviet submarine, and subsequently encountered seven different Soviet naval vessels attempting to “shoulder” it off the submarine’s course, see Robert P. Hilton, Sr., *The U.S.-Soviet Incidents at Sea Treaty*, 6 NAV. FORCES 1, 30-31 (1985).

In addition to these acts, navies have engaged in acts of intentional harassment that, unlike close air surveillance and ship maneuvers, serve a less practical purpose. For instance, navies have illuminated the bridges of opposing forces' ships with powerful spot lights in an attempt to blind or intimidate the opposing crew.<sup>24</sup> They have also simulated attacks on opposing naval forces by aiming guns, torpedo tubes and other weapons at the rival's vessels.<sup>25</sup>

ISAs attempt to regulate, or even proscribe, these activities.<sup>26</sup> The hope is that by bringing order to the chaos that can result from these deliberate acts and by increasing communication between the two signatory forces, such incidents will occur less frequently and in a more regulated and less tense environment.

### III. THE 1972 U.S.-SOVIET INCIDENT AT SEA AGREEMENT

The most notable example of an ISA is the Agreement between the United States and the USSR on the Prevention of Incidents on and over the High Seas (INCSEA), signed in 1972.<sup>27</sup> Though it is one of the lesser-known Cold War agreements between the two superpowers, INCSEA has done much to calm tensions and reduce the risk of escalating crises between these two naval forces.

#### A. Negotiating INCSEA

In the late 1960's and early 1970's, collisions and near collision between the U.S. and Soviet navies were occurring at an average of one a month.<sup>28</sup> One such example occurred in May 1967, when the USS WALKER (DD 517) was operating in the Sea of Japan with a submarine-hunting task force. On consecutive days, the vessel undertook provocative maneuvers with Soviet destroyers, leading to two separate collisions. Sailing aggressively, the WALKER cut across the path of one Soviet destroyer and then collided with another. The following day the WALKER holed a second Soviet vessel.<sup>29</sup> Tensions rose and formal protests were made between the embassies of the

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<sup>24</sup> Lynn-Jones, *supra* note 21 at 157-158.

<sup>25</sup> *Id.* at 157.

<sup>26</sup> See generally Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Union of Soviet Socialist Republics concerning the Prevention of Incidents at Sea Beyond the Territorial Sea, July 15, 1986, U.K.-U.S.S.R., U.K.T.S. No. 5 (1987), (Cd. 57) [hereinafter U.K.-U.S.S.R. Incident at Sea Treaty].

<sup>27</sup> Agreement between the Government of the United States of America and the Government of the Union of Soviet Socialist Republics on the Prevention of Incidents on and over the High Seas, U.S.-U.S.S.R., May 25, 1972, 23 U.S.T. 1168 [hereinafter INCSEA].

<sup>28</sup> Thomas B. Allen, *Incidents at Sea*, U.S. NAV. INST. PROCEEDINGS, September 1990, at 41.

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

respective states.<sup>30</sup> After a year of escalating tensions, in April 1968 the U.S. invited the Soviets to discuss ways to curtail these dangerous encounters.<sup>31</sup>

The Soviets did not accept this invitation until 1970. Surprised by the acceptance, the U.S. decided not to respond immediately, but first assembled an interagency team to formulate U.S. proposals and objectives.<sup>32</sup> The team represented a wide array of expertise and viewpoints and was comprised of personnel from the U.S. Navy, Department of Defense, State Department and National Security Council.<sup>33</sup> The team first identified two major issues that would not be up for negotiation. First, the U.S. would not accept any limits on submarine activities in the agreement. Second, the U.S. did not want to include specific distance and approach formulas for surface ships in the agreement. With these two issues identified, the U.S. team then drafted specific proposals and contacted the Soviets to set-up negotiations.<sup>34</sup>

The first round of talks took place in Moscow and was conducted in air and surface working groups.<sup>35</sup> The negotiating participants were primarily uniformed naval officers from each country.<sup>36</sup> Though the Soviets pressed proposals for a distance formula against American objections, the first round of talks went well and some progress was made. A memorandum of understanding was signed between the two parties that listed points of agreement and outstanding issues to be discussed at the next meeting. Plans were made to meet again to finalize an agreement.<sup>37</sup>

The two sides then met in Washington, D.C. in early May 1972. During this negotiation, the distance formula was the principal point of contention and adamantly voiced by the Soviets.<sup>38</sup> However, giving in to their desire to avoid future incidents at sea, the two sides agreed to disagree on its incorporation and the final version of INCSEA contains no specific distance formulas.<sup>39</sup> INCSEA was formally signed on May 25, 1972, by then Secretary of the Navy John Warner and then commander-in-chief of the Soviet Navy Admiral Sergei G. Gorshkov.

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<sup>30</sup> *Id.*

<sup>31</sup> David F. Winkler, *The Evolution and Significance of the 1972 Incidents at Sea Agreement*, 28 J. STRATEGIC STUD. 361, 366 (2005).

<sup>32</sup> Lynn-Jones, *supra* note 21, at 170.

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

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

<sup>35</sup> *Id.* at 171.

<sup>36</sup> Hilton, *supra* note 23, at 37.

<sup>37</sup> Lynn-Jones, *supra* note 21, at 172.

<sup>38</sup> *Id.* at 173.

<sup>39</sup> Articles II and III of INCSEA address distance issues in general terms. However, INCSEA does not codify any specific distance formulas.

## B. Content of INCSEA

INCSEA is concise and comprehensive. It attempts to decrease dangerous incidents by fostering increased communications at sea between the two navies and prohibiting or regulating certain activities in international waters.

Article I of the agreement defines the vessels that it regulates: ships and aircraft.<sup>40</sup> It defines ship as both a warship belonging to the naval forces of the parties as well as naval auxiliaries of either party.<sup>41</sup> Aircraft are “all military manned heavier-than-air craft, excluding spacecraft.”<sup>42</sup> Thus, military planes of any branch of these states’ armed forces flying over international waters are covered by this agreement, not just naval aircraft.

Article II reaffirms that the two navies are to follow the “Rules of the Road” while in international waters.<sup>43</sup> The Rules of the Road are a set of regulations published by the International Maritime Organization that regulate the navigation and movement of ships.<sup>44</sup> Commonly called COLREGS, these rules are extensive and regulate, among other things, shipboard activities to avoid collisions between ships, navigation of vessels in various weather conditions, and signals to be used by ships.<sup>45</sup> Article II also reaffirms the freedom of both navies to conduct operations in international waters as ensured by international law.<sup>46</sup>

Article III regulates or prohibits a number of maritime activities that could lead to dangerous incidents. For instance, Article III prohibits simulated attacks of one warship on another and proscribes the use of powerful spotlights to blind a ship of the opposing navy.<sup>47</sup> It thereby explicitly proscribes activities that had increased tensions between the two navies in the 1960’s and early 1970’s. It also contains provisions that reassert the navies’ obligation to follow mutually agreed signals in various situations, such as when conducting exercises with submerged submarines.<sup>48</sup> Most interestingly, Article III allows the two

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<sup>40</sup> In 1985, the Office of the Chief of Naval Operations extended INCSEA to cover U.S. submarines operating on the surface. Allen, *supra* note 28, at 44. However, INCSEA does not regulate the activities of submerged submarines.

<sup>41</sup> INCSEA, *supra* note 27, art. I, §§ 1-2.

<sup>42</sup> *Id.* at art. I, § 1, cls. a, b.

<sup>43</sup> *Id.* at art. II.

<sup>44</sup> The Rules of the Road are embodied in the Convention on the International Regulations for Preventing Collisions at Sea, Oct. 20, 1972, 28 U.S.T. 3459 [hereinafter COLREGS]. A copy of these rules is kept on the bridge of all U.S. Navy ships.

<sup>45</sup> For a brief overview of COLREGS, see THOMAS J. SCHOENBAUM, ADMIRALTY AND MARITIME LAW 760-765 (4th ed. 2004).

<sup>46</sup> INCSEA, *supra* note 27, art. II.

<sup>47</sup> *Id.* at art. III, § 6.

<sup>48</sup> *Id.* at § 7.

navies to continue to conduct reconnaissance on each other. However, it requires that they do so from a safe distance and avoid “maneuvers embarrassing or endangering the ships under surveillance.”<sup>49</sup> This practicality is a hallmark of INCSEA.

Article IV pertains to aircraft approaching ships and planes of the opposing force. It mandates aviators use the “greatest caution” in approaching ships and planes of the opposing force, particularly ships launching or landing aircraft.<sup>50</sup> It prohibits simulated attacks by aircraft on planes and vessels of the opposing navy and forbids other “various acrobatics” that may be hazardous to ships.<sup>51</sup>

Article V requires aircraft to display navigation lights when feasible.<sup>52</sup> It also requires that naval vessels operating in sight of each other signal their intent to launch and land aircraft.<sup>53</sup> There is an inherent danger in launching aircraft from ship decks because of the frequent maneuvering the ship must undertake to ensure wind velocities over the launch deck. Requiring the use of these signals does much to quell the potential for collision between ships and aircraft during these activities since, hopefully, the navies will see the signals and stay well clear of each other during these activities.

Article VI requires the navies to use an established system of radio broadcasts to give notice of actions that represent a danger to navigation or aircraft in flight.<sup>54</sup> It also calls for increased use of the international code of signals,<sup>55</sup> especially during nighttime activities.<sup>56</sup> Most notably, it calls for the creation of special signals to be used between the two navies, in addition to internationally recognized signals.<sup>57</sup> The two navies in fact followed this provision and established special visual signals. They used these signals until 1987, when they adopted bridge-to-bridge radio communications, in English, to relay their activities.<sup>58</sup>

Article VII requires the navies to exchange information about incidents at sea through the naval attachés of the respective navies.<sup>59</sup> This is important

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<sup>49</sup> *Id.* at § 4.

<sup>50</sup> *Id.* at art. IV.

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

<sup>52</sup> *Id.* at art. V, § 2.

<sup>53</sup> *Id.* at § 1.

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

<sup>55</sup> *Id.* at §2.

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

<sup>57</sup> *Id.* at § 3.

<sup>58</sup> Allen, *supra* note 28, at 42.

<sup>59</sup> INCSEA, *supra* note 27, at art. VII.

because by communicating incidents through naval attachés rather than politicians, provocative incidents will not be exploited for the benefit of a political agenda. This removal from politics fosters frank discussions between the two sides and increases the chances for INCSEA's success.<sup>60</sup>

Article VIII lays out the process for the agreement to enter into force and the process for its termination.<sup>61</sup> Article IX establishes annual reviews of INCSEA by U.S. and Soviet delegations.<sup>62</sup> Article X creates a committee to "consider the practical workability of concrete fixed distances to be observed in encounters between ships, aircrafts and ships and aircraft."<sup>63</sup> This article is the result of the lack of agreement between the U.S. and the Soviet Union on the codification of specific distance formulas in INCSEA.

### C. Success of INCSEA

INCSEA has proved extremely successful. Navy leaders have lauded the agreement for increasing communication between the two navies and reducing dangerous incidents at sea. Speaking a decade after the implementation of INCSEA, then Secretary of the Navy John F. Lehman, Jr., noted the increased communication between the two navies that INCSEA had provided, stating that when the Soviets engaged in dangerous activities, "we sat down, discussed them around the table and those practices stopped. Similarly, [the Soviets] have expressed some concerns about [U.S. operations]...and we've discussed them and changed our procedures to accord with them."<sup>64</sup> Almost two decades after the implementation of INCSEA, then Chief of Naval Operations Admiral Carlisle A.H. Trost said, "Soviet naval leaders took the opportunity to express their satisfaction with the benefits that [INCSEA] has provided to both navies and the extremely effective communication channels which have resulted through our naval attachés."<sup>65</sup> Perhaps most illustrative of INCSEA's success is that the agreement is still in effect today. Though the Cold War has ended, the two navies continue to hold their annual reviews and use INCSEA's communication channels to discuss a variety of maritime issues.<sup>66</sup>

This praise is well-founded. INCSEA has proved its merit by keeping peace during the tensest times the two navies have experienced since the agreement was signed in 1972. The 1973 Arab-Israeli War serves as such an

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<sup>60</sup> Sean M. Lynn-Jones, *The Incident at Sea Agreement*, in U.S.-SOVIET SECURITY COOPERATION 489 (Alexander L. George, et al. eds., 1988).

<sup>61</sup> INCSEA, *supra* note 27, at art. VIII.

<sup>62</sup> *Id.* at art. IX.

<sup>63</sup> *Id.* at art. X.

<sup>64</sup> Allen, *supra* note 28 at 42.

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

<sup>66</sup> Winkler, *supra* note 31, at 371.

example. During this conflict, the Soviets had ninety-four naval vessels operating in the Mediterranean.<sup>67</sup> The U.S. had roughly the same number deployed in the Mediterranean, including the aircraft carrier USS JOHN F. KENNEDY (CV 67).<sup>68</sup> Tensions between the two superpowers were high, as evidenced by the alert status of U.S. forces being raised to DEFCON III during the standoff.<sup>69</sup> However, despite the enormous number of vessels and aircraft in a relatively small area, and the escalated tensions between the two superpowers and their navies, no collisions or serious incidents occurred. As Admiral Worth Bagley, then Commander of U.S. Naval Forces in Europe, noted, “[The] Soviets weren’t overly aggressive. It looked as though they were taking some care not to cause an incident.”<sup>70</sup>

This is not to imply that all incidents have been eliminated or that INCSEA has created a perfect maritime environment. Indeed, a handful of “shouldering” or other close-call incidents are almost always raised between the two navies during annual INCSEA talks. But, the fact that the two navies have met and worked together to reduce incidents at sea for thirty-five years is a testament to the remarkable success of the agreement. As one prominent U.S. Navy rear admiral who was involved in annual INCSEA meetings noted, INCSEA calmed tensions during “[the Soviet invasion of] Afghanistan, Soviet walkouts from START and INF talks, deployment of SS 20s, Pershing IIs and GLCMs, U.S. fulminations against the ‘evil empire,’ and Soviet attacks against President Reagan and ‘Star Wars.’”<sup>71</sup>

#### IV. A SINO-AMERICAN INCIDENT AT SEA AGREEMENT

As the PLAN acquires greater power projection capability, the areas of operation of the PLAN and the U.S. Navy will increasingly overlap, increasing the likelihood of dangerous incidents at sea between the two forces. In an effort to decrease the severity and likelihood of these incidents, it is important to assess a Sino-American ISA, keeping in mind the U.S.-Soviet INCSEA. As INCSEA was successful at reducing incidents at sea between two powerful navies, it is an instructive example of how a Sino-American agreement can be successfully negotiated and constructed.

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<sup>67</sup> Barry M. Blechman & Douglas M. Hart, *The Political Utility of Nuclear Weapons: The 1973 Middle East Crisis*, INT’L SEC., Summer 1982, at 137.

<sup>68</sup> *Id.* at 140; Lynn-Jones, *supra* note 21, at 176.

<sup>69</sup> Blechman & Hart, *supra* note 67, at 139.

<sup>70</sup> Lynn-Jones, *supra* note 21, at 177.

<sup>71</sup> Hilton, *supra* note 23, at 33.

### A. Prospects for a Sino-American Incident at Sea Agreement

Before discussing the logistics of a Sino-American ISA, it is necessary to address the current possibility and desirability of implementing such an agreement. From the present standpoint of the United States Navy, there appear to be four main arguments against negotiating a Sino-American ISA.

#### 1. Bestowing Legitimacy

One argument against negotiating a Sino-American ISA is that such an agreement would bestow upon the PLAN a level of legitimacy that the U.S. Navy would rather the PLAN not have. The negotiation of such an agreement, the argument contends, would carry with it an implicit acknowledgement that the PLAN is a reputable force that has the real possibility of becoming a peer of the U.S. Navy. Such an acknowledgement, though implicit, carries much weight as it comes from the world's most powerful maritime force. Similar arguments were made against negotiating INCSEA. Some in the U.S. government questioned entering into any agreement that could be viewed as bestowing legitimacy on the USSR or the Soviet Navy.<sup>72</sup>

This argument overlooks a few key points. First, the argument does not focus on what is important: protecting lives and vessels from unnecessary and preventable harm. Bestowing legitimacy should be a secondary concern to protecting U.S. Sailors and U.S. Navy ships from avoidable dangers. U.S. naval officers recognized this point during the Cold War, arguing that the risk to American lives and vessels by not negotiating INCSEA was far greater than any implicit legitimacy that may come with INCSEA. Rear Admiral Ronald J. Kurth, who was involved in negotiating INCSEA, summed up the position by asking, "How many lives and what size ship is that fear worth?"<sup>73</sup> This logic is not confined to Cold War history and is not specific to U.S.-Soviet naval interactions. It still holds true today. To paraphrase Rear Admiral Kurth's statement, withholding legitimacy from the PLAN in exchange for U.S. lives and vessels is not a good, or proper, bargain.

Further, the U.S. military and Department of Defense have already done much to implicitly and explicitly recognize the PLAN as a capable force. The U.S. Navy and Air Force are shifting attention and forces away from

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<sup>72</sup> David F. Winkler, *U.S.-Soviet Confidence Building Measures*, in MARITIME CONFIDENCE BUILDING IN REGIONS OF TENSION REPORT, NO. 21, 6 (ed. Jill R. Junnola), May 1996, available at <http://www.stimson.org/southasia/pdf/Report21.pdf>.

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

Europe and toward the Pacific region.<sup>74</sup> These branches' recent interest in moving forces to Guam is illustrative of this movement.<sup>75</sup> The implicit message in this shift is that the U.S. military believes China is a formidable force and is preparing for the consequences of Chinese military expansion in the region.<sup>76</sup>

In fact, the Department of Defense, in the Quadrennial Defense Review Report, states, "of the major and emerging powers, China has the greatest potential to compete militarily with the United States and field disruptive military technologies that could over time offset traditional U.S. military advantages."<sup>77</sup> There is nothing ambiguous or implicit about this message. The Defense Department is explicitly telling the Chinese that their military is growing at a rate that concerns the U.S. defense community. Thus, the U.S. Navy and Defense Department have done much to recognize the PLAN as a reputable military force and signal to the Chinese that it is on the U.S. military's mind. A Sino-American ISA would hardly be the great bestowal of legitimacy that the argument contends.

## 2. Unintentional Creation of an Adversary

A second argument against negotiating a Sino-American ISA is that the agreement would unintentionally create an adversarial relationship between the U.S. Navy and the PLAN.<sup>78</sup> Since it is only adversaries that "buzz" each others' vessels, "shoulder" each other's ships off course, and undertake other actions that necessitate an ISA, such agreements inherently signal that an adversarial relationship exists between two navies. Adding support to this argument is the fact that ISAs are normally signed by adversaries. For example, the Soviet Navy signed ISAs with many NATO member navies during the Cold War.<sup>79</sup>

Though cogent, this argument focuses on the relationship between the two navies as it existed before the agreement was signed. However, when analyzed from the point of negotiation onward, an ISA actually signals a warming of relationships between the two forces. An ISA requires that the two

<sup>74</sup> Edward Cody, *Shifts in Pacific Force U.S. Military to Adapt Thinking*, WASH. POST, Sept. 17, 2005, at A01.

<sup>75</sup> James Brooke, *Looking for Friendly Overseas Base, Pentagon Finds It Already Has One*, N.Y. TIMES, Apr. 7, 2004, at A1.

<sup>76</sup> See generally Cody, *supra* note 74.

<sup>77</sup> OFFICE OF THE SEC'Y OF DEF., U.S. DEPT. OF DEF., QUADRENNIAL DEFENSE REVIEW REPORT 2006, at 29 (2006), [hereinafter QDR 2006], available at <http://www.defenselink.mil/qdr/report/Report20060203.pdf>.

<sup>78</sup> Winkler, *supra* note 31 at 372; see also Julian Schofield, *The Prospects for a Sino-American Incidents at Sea Agreement*, KOREAN J. DEF. ANALYSIS, Summer 1999, at 96.

<sup>79</sup> Timothy J. Nable, *The Dangerous Military Activities Agreement: A Minimum Order and Superpower Relations on the World's Oceans*, 31 VA. J. INT'L L. 125, 142 (1990). For an example of such an agreement see U.K.-U.S.S.R. Incident at Sea Treaty, *supra* note 26.

navies sit down together, discuss matters honestly, compromise, and respect their mutual pact. This is hardly behavior that characterizes deeply adversarial navies. Rather, it is the behavior of navies striving to understand each other and work together to ensure safety in international waters. When analyzed from this vantage point, an ISA signals a relationship characterized by a concerted effort between the two forces to understand each other, respect each other, and cooperate.

Furthermore, though the relationship may currently be marked by mutual uncertainty of intentions,<sup>80</sup> the PLAN and the U.S. Navy do not presently have an adversarial relationship. To the contrary, U.S. Navy flag officers<sup>81</sup> consistently state that they hope to deepen ties with the PLAN. Admiral William Fallon was a vocal proponent of increasing Sino-U.S. naval ties during his tour as commander of U.S. Pacific Command.<sup>82</sup> He often quashed the media's speculations about Sino-U.S. naval tensions, stating that he strongly believed that a growing Chinese PLAN did not mean inevitable conflict for the U.S. Navy.<sup>83</sup> Admiral Timothy Keating, current commander of U.S. Pacific Command, makes similar statements about the relationship between the PLAN and U.S. Navy.<sup>84</sup> With no extant adversarial relationship and with the desire to strengthen relations in the future, it is doubtful that an ISA would signal that an adversarial relationship existed in the past or that tensions are presently high. Rather, such an agreement would likely be viewed as an accord between a powerful navy and a rapidly expanding navy, proactively cooperating to avoid dangerous encounters and ensure safety in international waters.

### 3. Lack of Reciprocity from the PLAN

A third argument against negotiating a Sino-American ISA is based on what the U.S. Navy perceives as a lack of Chinese reciprocity in the military-to-military relationship. For more than a decade, the U.S. military has complained that though they seek substantive communication and meaningful exchanges with their Chinese counterpart, the Chinese military does not reciprocate such feelings or gestures.<sup>85</sup> For instance, the U.S. military complains that they give

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<sup>80</sup> See generally Peter Spiegel, *China's Military Must Open Up, U.S. Says*, L.A. TIMES, Aug. 17, 2007, at A6.

<sup>81</sup> A U.S. Navy flag officer is a naval officer that has attained the rank of Rear Admiral (lower half) or higher.

<sup>82</sup> Michael R. Gordon, *To Build Trust, U.S. Navy Holds a Drill With China*, N.Y. TIMES, Sept. 23, 2006, at A5; Edward Cody, *U.S. Aims to Improve Military Ties with China*, WASH. POST, May 16, 2006, at A14.

<sup>83</sup> Cody, *supra* note 74.

<sup>84</sup> Edward Cody, *Pacific Commander Stresses China Ties*, WASH. POST, May 13, 2007, at A16.

<sup>85</sup> See generally Kurt Campbell & Richard Weitz, *The Limits of U.S.-China Military Cooperation: Lessons from 1995-1999*, WASH. Q., Winter 2005/2006, at 175-176.

Chinese military personnel high level access to bases, technology, and information during official visits, but when U.S. military personnel visit Chinese military installations on similar trips, the Chinese do not return the favor.<sup>86</sup> In short, the U.S. military feels the relationship with the Chinese military is one-sided, with the U.S. military putting in all the effort. With this lack of reciprocity, how can the U.S. Navy trust the PLAN to fulfill its commitment and abide by an ISA?

There are a number of responses to this argument. First, there are recent signs that the Chinese military, including the PLAN, is doing more to open itself up to the U.S. military and fulfill its responsibilities in the joint relationship. For instance, the U.S. Navy and the PLAN recently conducted a two-phase joint exercise in which ships and planes from both navies worked together to conduct mock search and rescue operations. This came after PLAN vessels made port calls to U.S. naval bases at Pearl Harbor and San Diego, interacting with U.S. sailors.<sup>87</sup> In addition, the two forces recently established a military-to-military hotline in an effort to increase trust and further open communications.<sup>88</sup> These steps demonstrate that the Chinese military, including the PLAN, is increasing reciprocity and openness with the U.S. military, if incrementally.

Second, the alleged lack of reciprocity should not be a deterrent to the U.S. Navy negotiating an agreement with the PLAN. Rather, it should be the impetus for such negotiations because it would create an incentive for the PLAN to become more accountable. An ISA would compel the PLAN to follow its obligations under the agreement or risk looking like an irresponsible actor to other navies in the region. This is especially important for the Chinese, who are always promoting their “peaceful rise” to great power status.<sup>89</sup> Any deviation from the agreement could be used as evidence by one of the region’s powers to portray China as an irresponsible actor that cannot be trusted. Faced with these choices, the PLAN would likely decide it is in its best interest to follow the regulations of the agreement. A Sino-American agreement would steer the PLAN toward greater dependability and accountability, which is what the U.S. desires.

Furthermore, an ISA will give force to U.S. Navy protestations against dangerous Chinese naval activities. By locking the Chinese into the agreement, the U.S. Navy can vocalize their frustrations to the PLAN, and other navies in the Pacific, with the weight of a formal agreement behind their complaints.

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<sup>86</sup> Spiegel, *supra* note 80.

<sup>87</sup> *Navy Forging Ties With Beijing*, HONOLULU ADVERTISER, Nov. 13, 2006, at 1B.

<sup>88</sup> Edward Cody, *China and U.S. To Establish Military Hotline*, WASH. POST, Nov. 6, 2007, at A16.

<sup>89</sup> For an overview of China’s “Peaceful Rise” doctrine see Zheng Bijian, *China’s Peaceful Rise to Great-Power Status*, FOREIGN AFF., Sept/Oct 2005, at 18-24.

Currently, when the U.S. Navy vents its frustrations to the PLAN about dangerous maneuvers, the PLAN can respond that such maneuvers took place in international waters, where ships have broad freedom of navigation.<sup>90</sup> An ISA would remove this shield by obligating the PLAN to follow certain standards, thereby holding them responsible for their actions.

4. No Current Need for a Sino-American Incident at Sea Agreement

A fourth and final argument against negotiating an ISA is that the present capabilities of the PLAN do not necessitate such an agreement. At the time INCSEA was signed between the U.S. and Soviet navies, the Soviets had more of a blue-water force,<sup>91</sup> and collisions and near collisions between the two forces were occurring at an average of one a month.<sup>92</sup> Though undergoing rapid modernization and growth, the PLAN is not currently a full-fledged, blue-water navy capable of projecting substantial force far on to the open ocean. Rather, it “continues to steam in the littoral for the most part.”<sup>93</sup> Dangerous interactions between the PLAN and the U.S. Navy are thus not frequent, so an ISA is currently unnecessary.

This argument overlooks a few important points. First, though incidents at sea between the U.S. Navy and PLAN may not be frequent, any one of them possesses the capability to spiral out of control and threaten lives. Efforts should be made to reduce all such incidents that can increase tensions to unsafe levels.

Second, as China’s economic growth continues, there is little doubt that PLAN capacity will grow apace. The Chinese military believes sea power has a profound influence on a nation’s national security and economic prosperity.<sup>94</sup> Consequently, the PLAN will endeavor to increase its power projection capability to keep potential threats farther from its shores.<sup>95</sup> It will also work to secure sea routes for its growing energy demands and trade. Both of these goals mean a growth in PLAN size and strength, becoming a maritime force that focuses beyond the Taiwan Straits and toward the Pacific and Indian Oceans.

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<sup>90</sup>United Nations Convention on the Law of the Sea arts. 58, 87, Nov. 16, 1982, 21 I.L.M. 1261 (1982).

<sup>91</sup>For the power projection capability of the Soviet Navy in 1972 see JANE’S FIGHTING SHIPS 1972-73, at 576-659 (Raymond V.B. Blackman ed. 1972).

<sup>92</sup>Allen, *supra* note 28, at 41.

<sup>93</sup>Eric A. McVadon, *China’s Maturing Navy*, NAV. WAR. C. REV., Spring 2006, at 95.

<sup>94</sup>See generally Xu Qi, *Maritime Geostrategy and the Development of the Chinese Navy in the Early Twenty-First Century*, NAV. WAR. C. REV., Autumn 2006, (Andrew S. Erickson & Lyle J. Goldstein trans.) at 48-52.

<sup>95</sup>*Id.* at 60-61.

Why wait until the PLAN reaches such levels of parity with the U.S. Navy, and dangerous incidents inevitably become more frequent, to push for the negotiation of an ISA? It is better to negotiate an agreement now, when incidents are fewer and tensions are lower. In the current calm environment, both parties are likely more amenable to negotiation and cooperation than they would be in a tense environment. Such was true with INCSEA. INCSEA was negotiated and signed in 1971 and 1972, during the period of détente, a time President Nixon called the “era of negotiation.”<sup>96</sup> During this period, Cold War tensions were relaxed, likely making negotiations easier.

Finally, by negotiating and concluding an agreement early, norms of safety and restraint will take root between the two forces. A precedent of order and cooperation between the two navies will be extremely beneficial should they drift toward rivalry in the future.<sup>97</sup>

## **B. Logistics of a Sino-American Incident at Sea Agreement**

While it is uncertain whether the U.S. Navy and PLAN are currently ready to negotiate an ISA, the negotiation of such an agreement will become inevitable as PLAN power projection capability grows and the two forces’ areas of operation overlap. It is thus imperative to discuss the logistics of such an ISA.

### **1. Forum for Negotiations**

The U.S. Navy and the PLAN have an ideal forum in which to negotiate a Sino-American ISA. In 1998, the U.S. and China signed the Agreement between the Department of Defense of the United States of America and the Ministry of National Defense of the People’s Republic of China on Establishing a Consultation Mechanism to Strengthen Military Maritime Safety.<sup>98</sup> This agreement, commonly called the Military Maritime Consultative Agreement (MMCA), aims to promote common understanding between the U.S. and Chinese militaries by “encourag[ing] and facilitat[ing]” annual consultations between military and defense delegations from the two states.<sup>99</sup> The MMCA creates merely a forum for discussion, and does not detail specific “rules of the

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<sup>96</sup> RAYMOND L. GARTHOFF, DÉTENTE AND CONFRONTATION: AMERICAN-SOVIET RELATIONS FROM NIXON TO REAGAN 4 (rev. ed. 1994).

<sup>97</sup> Julian Schoffield, *We Can’t Let This Happen Again*, U.S. NAV. INST. PROCEEDINGS, June 2001, at 59.

<sup>98</sup> Agreement Between the Department of Defense of the United States of America and the Ministry of National Defense of the People’s Republic of China on Establishing a Consultation Mechanism to Strengthen Military Maritime Safety, U.S.-P.R.C., Jan. 19, 1998, 37 I.L.M. 530 [hereinafter MMCA].

<sup>99</sup> *Id.* at art. I.

road” or regulations like would be contained in a Sino-American ISA. However, the plain language of the MMCA creates the ideal environment in which to negotiate such an ISA. At annual MMCA consultations, discussion topics are to include “measures to promote safe maritime practices..., communications procedures when ships encounter each other [and] interpretation of the Rules of the Nautical Road and avoidance of accidents-at-sea.”<sup>100</sup> Given these topics of discussion, it is a logical and natural step for the U.S. to propose a Sino-American ISA at an MMCA meeting.<sup>101</sup>

## 2. Key Negotiators Should be Naval Officers

A Sino-American ISA negotiation process should involve both military and civilian defense personnel. As part of the defense community, civilian defense personnel should lend their advice and expertise to the negotiation process. The INCSEA negotiation process saw contributions from civilian personnel from the U.S. State Department, Department of Defense, Department of the Navy and the National Security Council.<sup>102</sup> Their contributions to the planning and strategy stages of the negotiation process were particularly noteworthy.<sup>103</sup>

Furthermore, by law, civilians must be consulted in an ISA negotiation process, as no international agreement of the United States may be signed or concluded without prior consultation with the Secretary of State.<sup>104</sup> Additionally, the United States has a civilian-controlled military, which includes the U.S. Navy.<sup>105</sup> Uniformed naval officers therefore cannot make such agreements unchecked by civilian leaders.<sup>106</sup>

However, though civilian defense personnel will be involved in the negotiation process, the primary negotiators of a Sino-American ISA should be uniformed naval officers. It is telling that of the eight men who comprised the delegation that conducted the actual INCSEA negotiations in Moscow, five were uniformed military officers.<sup>107</sup> Uniformed officers of all navies share a common language and personal bond that will likely facilitate negotiations. INCSEA

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<sup>100</sup> *Id.* at art. II, § 1.

<sup>101</sup> *See generally* Schofield, *supra* note 97.

<sup>102</sup> Lynn-Jones, *supra* note 21, at 170.

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

<sup>104</sup> 1 U.S.C. § 112b (c) (2007).

<sup>105</sup> *See generally* U.S. CONST. art I, § 8, cls. 11, 13, 14 (Congressional authority over the U.S. Navy) and U.S. CONST. art. II, § 2, cl. 1 (Presidential authority over the U.S. Navy). *See also* 10 U.S.C. § 113(a) (2007) (Secretary of Defense must be a civilian) and 10 U.S.C. § 5013(a)(1)-(a)(2) (2007) (Secretary of the Navy must be a civilian).

<sup>106</sup> *See generally* 10 USC § 113(b) (2007) and 10 USC § 5013(c)(2) (2007).

<sup>107</sup> Lynn-Jones, *supra* note 21, at 171.

reveals this truth. During INCSEA negotiations, talks had been tense due to the parties' different objectives for rules regulating military aircraft. To highlight the hazards of dangerous aircraft maneuvers, a U.S. Navy captain involved in the negotiation told a story of how he once had the responsibility of returning the recovered body of a Soviet aviator after the aviator crashed doing dangerous aircraft aerobatics. Across the negotiating table, a Soviet officer replied that he knew this story well because he was the Soviet aviator's father. With this personal bond established, previous barriers were overcome and negotiations proceeded.<sup>108</sup>

Additionally, naval officers should be the primary negotiators because they bring a wealth of practical experience to the negotiations. Their many deployments provide them invaluable insight into the positive and normative aspects of open ocean naval encounters. Such practical experience should be the foundation upon which a Sino-American ISA is based. The MMCA recognizes the need for this practical insight to be a component of Sino-American discussions. It calls for both delegations at MMCA annual meetings to have "professional officers engaged in activities at sea" as part of the teams.<sup>109</sup>

### 3. Legal Character of the Agreement

There are many options for the legal character of a Sino-American ISA because international agreements come in a wide variety of forms. They can be bilateral or multilateral, formal or informal, oral or written, legally binding or not.<sup>110</sup> International agreements of the United States, so long as certain criteria are met, can take the form of a treaty, an executive agreement, an oral agreement or an exchange of notes, among other forms.<sup>111</sup>

INCSEA provides guidance on the legal character for a Sino-American ISA. First, like INCSEA, a Sino-American ISA must be a bilateral agreement. Although in theory a multilateral ISA between the navies of the Asia-Pacific region could be negotiated,<sup>112</sup> a bilateral Sino-American ISA is the better option

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<sup>108</sup> DAVID F. WINKLER, *COLD WAR AT SEA: HIGH SEAS CONFRONTATION BETWEEN THE UNITED STATES AND THE SOVIET UNION* 88, 89 (2000).

<sup>109</sup> MMCA, *supra* note 100, at art. II, § 1.

<sup>110</sup> Kal Raustiala, *Form and Substance in International Agreements*, 99 AM. J. INT'L L. 581, 581 (2005).

<sup>111</sup> 22 C.F.R. § 181.2 (2008).

<sup>112</sup> A proposal for an Asia-Pacific ISA was circulated to the region's navies in the early 1990s. However, for various reasons the navies rejected the proposal. Thus, the successful negotiation of such an agreement would likely be extremely difficult. See David Griffiths and Peter Jones, *Afterword* to DAVID F. WINKLER, *COLD WAR AT SEA: HIGH SEAS CONFRONTATION BETWEEN THE UNITED STATES AND THE SOVIET UNION* (2<sup>d</sup>. ed. 2008) (forthcoming May 2008).

for reducing dangerous incidents at sea between the U.S. Navy and the PLAN.<sup>113</sup> To curtail such incidents, a one-on-one, navy-to-navy dialogue must be established to find solutions to the issues and incidents that are specific to the U.S. Navy–PLAN relationship. Involving multiple navies would only muddle this dialogue and distract the navies from addressing their unique issues.

Additionally, like INCSEA, a Sino-American ISA should be an international agreement, as defined by the United States Code of Federal Regulations (CFR).<sup>114</sup> Most importantly, this means the document must not express merely the “hopes” or “desires” of the parties. Rather, the language of a Sino-American ISA must manifest an intention of the parties to be legally bound to the contents of a specific and significant accord.<sup>115</sup>

This intent to be bound will not only bring the agreement within the criteria of the CFR, it will also signal that the parties take the agreement seriously and intend to abide by it.<sup>116</sup> The more binding an international agreement, the higher the political and reputational costs of noncompliance for the signatories.<sup>117</sup> Thus, by making the agreement binding, the Americans and Chinese signal to each other, and to third parties, that they are committed to the agreement and will not break it. This will make compliance with the agreement more likely, hopefully leading to a more successful agreement.<sup>118</sup> It should also assuage the fears of those who contend that the PLAN’s current lack of reciprocity will mean Chinese noncompliance with a future Sino-American ISA.

Finally, to eliminate political obstacles, a Sino-American ISA should take the form of a sole executive agreement, like INCSEA.<sup>119</sup> Unlike a treaty, a sole executive agreement does not require the advice and consent of the U.S. Senate to take effect.<sup>120</sup> The U.S. Senate takes a somewhat “hawkish” stance on

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<sup>113</sup> It should be noted that some multilateral maritime cooperation agreements, to which the U.S. Navy and PLAN are members, currently exist among the navies of the Asia-Pacific region. However, these agreements are not ISAs, as they do not create incident at sea avoidance mechanisms. As such, the multilateral agreements seem to have failed to effectively curb incidents at sea between the U.S. Navy and the PLAN, as evidenced by incidents like the 2001 EP-3 event that have occurred since the implementation of these agreements. For a discussion of these multilateral agreements, see *Id.*

<sup>114</sup> 22 C.F.R. § 181.2(a)(1)-(a)(5) (2008).

<sup>115</sup> 22 C.F.R. § 181.2(a)(1)-(a)(3) (2008).

<sup>116</sup> See generally Charles Lipson, *Why Are Some International Agreements Informal?*, 45 INT’L ORG. 495, 508 (1991).

<sup>117</sup> *Id.*

<sup>118</sup> *Id.* at 509.

<sup>119</sup> A sole executive agreement is an international agreement of the U.S. government that is negotiated, agreed to and enters into force without the advice and consent of the U.S. Senate. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 303, cmt. a.

<sup>120</sup> *Id.* at § 303(4); See also *United States v. Belmont*, 301 U.S. 324 (1937), *Dames & Moore v. Regan*, 453 U.S. 654 (1981), *Am. In. Ass’n v Garamendi*, 539 U.S. 396 (2003). The U.S.

U.S. national security policy vis-à-vis China; Senators' public statements evidence unease with China's dramatic and rapid rise, and an interest in the U.S. response.<sup>121</sup> Given this predisposition, it is not hard to imagine that a Sino-American ISA could be labeled as conciliatory and "doveish," facing some bumps on the road to ratification. At the very least, the agreement's negotiators would likely have to factor Senators' political agendas into their negotiation objectives. Thus, keeping a Sino-American ISA out of the Senate is imperative. By keeping the agreement out of the Senate, negotiators will not have to worry about rules and regulations that are politically palatable to Senators. Rather, they can focus solely on the objectives that will keep naval personnel, vessels and equipment safe.<sup>122</sup> Negotiators will thus be free to secure the objectives most necessary for the U.S. Navy, not those most necessary to appease a Senator's political agenda.

### C. Content of the Agreement

The maritime vessels and activities that may fall within the jurisdiction of a Sino-American ISA can be as vast or as narrow as the parties wish. INCSEA is again instructive and should serve as a paradigm in constructing these sections of a Sino-American ISA. However, though instructive, a Sino-American ISA should not be a verbatim reproduction of INCSEA. Limits to the analogy between the Sino-American relationship and the U.S.-Soviet relationship require that a Sino-American ISA be updated from its INCSEA paradigm to account for its own idiosyncrasies. Keeping these limits in mind, this section explores both the vessels that a Sino-American ISA must regulate as well as the maritime activities that should fall within its jurisdiction.

#### 1. Ships, Planes and Unmanned Vehicles

Two important military vessels to be covered by a Sino-American ISA are ships and aircraft. With likely heavy use of surface and air forces by the U.S. Navy and the PLAN, "buzzing," "shouldering," and "stalking" incidents are likely to occur between the two forces as the PLAN pushes out from the

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Department of State must transmit to Congress all international agreements within 60 days of their conclusion. 1 U.S.C. § 112(a)-(b) (2008). However, this transmission is for compilation and indexing purposes and does not imply that informal agreements require the advice and consent of the Senate to take effect. *See generally* LOUIS HENKIN, FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION 219-225 (2 ed. 1996) and 22 C.F.R. § 181.1 (a)-(b) (2008).

<sup>121</sup> *See generally* *Nomination of Navy ADM. Timothy Keating For Reappointment to the Grade of Admiral and to be Commander of the U.S. Pacific Command: Hearing Before the Senate Armed Services Comm.* 109th Cong. (2007) and *The Emergence of China Throughout Asia: Security and Economic Consequences for the United States: Hearing Before the Subcomm. On East Asian and Pacific Affairs of the Comm. on Foreign Relations* 109th Cong. (2006).

<sup>122</sup> *See generally* Lipson, *supra* note 116, at 514-518.

littoral. Thus, any Sino-American ISA must cover surface vessels and naval aircraft to have substantial success.

For the definition of these vessels, INCSEA serves as an instructive paradigm. As defined by INCSEA, ships are warships “belonging to the naval forces of the Parties...under the command of an officer duly commissioned... and manned by a crew who are under regular naval discipline...” as well as naval auxiliary vessels.<sup>123</sup> INCSEA defines aircraft as “all military manned heavier-than-air and lighter-than-air craft, excluding space craft.”<sup>124</sup> These definitions are instructive for the vessels they define. However, they must be updated to reflect the advances in naval warfare technology that have been developed and deployed since INCSEA was signed thirty-five years ago.

The past two decades have seen a dramatic increase of interest in unmanned war fighting systems among the world’s major militaries. The U.S. and Chinese militaries are among those doing the most research and development on such systems.<sup>125</sup> For the U.S. Navy, this has meant development of unmanned aerial vehicles (UAVs), unmanned surface vehicles (USVs) and unmanned underwater vehicles (UUVs).<sup>126</sup> All vehicles will have surveillance capabilities, and possibly be equipped to carry military payloads.<sup>127</sup>

For their part, the PLAN has likely been doing all it can in the development of unmanned vehicle technology. China gives few public glimpses of its unmanned vehicle technology, and thus little is known of its capability in this field.<sup>128</sup> However, the glimpses it has afforded the West have shown an industry that is making strong, innovative strides in its field.<sup>129</sup> Given China’s focus on and development of unmanned technology, it is likely that China will continue to invest heavily in unmanned technology and will one day have unmanned capabilities on par with that of the U.S. Navy. Like the U.S. vehicles, the capabilities of these vessels mean they will likely become major players in incidents that will fall under the jurisdiction of a Sino-American ISA.

These developments mean a Sino-American ISA must be updated from its INCSEA paradigm to include unmanned vessels. Like manned vessels

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<sup>123</sup> INCSEA, *supra* note 27, at art. I, § 1, cls. (a), (b).

<sup>124</sup> *Id.* at art. 1, § 2.

<sup>125</sup> See generally Alon B. David et al., *Frontline Fliers*, JANE’S DEFENCE WKLY., May 10, 2006.

<sup>126</sup> For a description of the U.S. Navy’s development of unmanned technology see RONALD O’ROURKE, CONG. RESEARCH SERV., UNMANNED VEHICLES FOR U.S. NAVAL FORCES: BACKGROUND AND ISSUES FOR CONGRESS, Rep. No. RS21249 (2006), *available at* <http://www.fas.org/sgp/crs/weapons/RS21294.pdf>.

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

<sup>128</sup> David, *supra* note 125, at 26.

<sup>129</sup> *Id.* at 26-27.

before them, any of the vehicles mentioned above can collide with, obstruct the path of, or intentionally harass a vessel of an opposing navy. Thus, any Sino-American ISA must modernize INCSEA definitions of ship and aircraft to reflect these advancements in unmanned war fighting technology.

## 2. Submarine Naval Forces

Even with this update to account for developments in military unmanned technology, there remains a glaring exception to the vessels that fall within the jurisdiction of a proposed Sino-American ISA: submarine naval forces. Modern naval forces, including the U.S. Navy and the PLAN, operate above the sea, on the sea *and* under the sea. INCSEA, however, provides no instruction on the regulation of submarine forces, as these vessels do not fall within the jurisdiction of the agreement.<sup>130</sup> Nevertheless, the idiosyncrasies of the U.S. Navy – PLAN relationship require that jurisdiction over submarine forces be discussed.

For at least the past decade, the PLAN has been developing its tactics and doctrine with a focus on the asymmetric nature of its rivalry with the U.S. Navy.<sup>131</sup> Consequently, the PLAN is attempting to develop capabilities and tactics that would allow it to match the stronger U.S. Navy by counteracting the focal points of U.S. naval power.<sup>132</sup> The PLAN views submarines as one of the primary means of carrying out this “asymmetric warfare” in the open oceans.<sup>133</sup> It believes submarines are well-suited to deter and defeat their main threat in the Pacific – U.S. Navy aircraft carriers and their accompanying battle groups.<sup>134</sup> In pursuit of this strategy, the PLAN is modernizing their conventional submarine capabilities.<sup>135</sup> Given this development, there is a high likelihood that submarines will play an important role in open ocean interactions between the U.S. Navy and the PLAN.

Institutions that regulate the activities of submarine forces are not new and some could, theoretically, be implemented through a Sino-American ISA.<sup>136</sup>

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<sup>130</sup> As of 1985, INCSEA applies to U.S. submarine forces operating on the surface. Allen, *supra* note 28, at 44. Such a clause should be explicitly stated in a Sino-American ISA.

<sup>131</sup> Lyle Goldstein & William Murray, *Undersea Dragons: China's Maturing Submarine Force*, INT'L SEC., Spring 2004, at 187.

<sup>132</sup> See generally Thomas J. Christensen, *Posing Problems Without Catching Up: China's Rise and Challenges for U.S. Security Policy*, INT'L SEC., Spring 2001, at 9.

<sup>133</sup> Goldstein & Murray, *supra* note 131, at 162.

<sup>134</sup> See generally *id.*

<sup>135</sup> For an overview of the PLAN's current conventional submarine force see Goldstein & Murray, *supra* note 16.

<sup>136</sup> One such example is a Submarine Movement Advisory Authority (SMAA). An SMAA monitors the movements of submarines and ships operating in a designated area, and advises all maritime

However, the implementation of any such regulatory institution would require the two navies to surrender the location of its submarines or its freedom to sail certain areas of the seas, or both. For good reason, neither navy would be willing to put such restrictions on the operability of their submarine forces.

First, neither navy would allow the locations of its submarines, especially its ballistic missile submarines (SSBNs), to be so easily known to a foreign navy, nor should they. The lynchpin of a submarine's effectiveness is its stealth. Its ability to sail undetected is what makes it such a powerful and successful weapon. By exposing the location of a submarine, its stealth is neutralized, thereby weakening the capabilities and import of the submarine. INCSEA reflects this truth, as the U.S. Navy adamantly opposed the Soviet Navy's repeated attempts to include clauses regulating submarine forces in the agreement.<sup>137</sup>

Second, neither navy would allow its freedom of navigation to be impeded. For its part, the U.S. Navy regularly conducts freedom of navigation exercises in which its ships traverse disputed areas of the sea to ensure that the international community has not adopted any unlawful or excessive claims by states over specific areas of the ocean.<sup>138</sup> It is hard to imagine that a navy that so vigorously protects the principle of freedom of navigation would voluntarily surrender its right to sail even small parts of the ocean without complete freedom. Furthermore, the PLAN would also likely reject such encroachments upon its freedom of navigation. As an emerging naval power, the PLAN will likely realize it is in its best interest to protect its freedom to sail all areas of the ocean it has a legal right to sail.<sup>139</sup>

Though neither navy will likely agree to a clause that regulates submarine operations, the establishment of the Sino-American ISA alone may be enough to at least address submarine issues. The import of a Sino-American ISA is that it creates channels of communication between the U.S. Navy and the PLAN. With channels created and annual meetings established, the signatories will have the opportunity to discuss potentially dangerous submarine incidents and operations with one another, if only informally or off the record. Indeed, U.S. delegations to annual INCSEA meetings would regularly listen to Soviet concerns about dangerous submarine incidents. Though these conversations took place off the record, the naval officers involved took the concerns

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vessels in that area of possibilities of mutual interference. See JOINT CHIEFS OF STAFF, DEPARTMENT OF DEFENSE DICTIONARY OF MILITARY TERMS 352 (1988).

<sup>137</sup> David F. Winkler, *An Incidents Under the Sea Agreement?*, NAV. REV., Apr. 1995, at 110.

<sup>138</sup> For a detailed overview of the U.S. Navy's Freedom of Navigation Program, see William J. Aceves, *The Freedom of Navigation Program: A Study of the Relationship Between Law and Politics*, 19 HASTINGS INT'L & COMP L. REV. 259 (1996).

<sup>139</sup> See generally 1 D.P. O'CONNELL, THE INTERNATIONAL LAW OF THE SEA 2 (1982).

seriously.<sup>140</sup> Similarly, by opening lines of communications between the PLAN and the U.S. Navy, a Sino-American ISA will foster an environment in which issues involving submarine operations, though not explicitly covered by the agreement, can be discussed and addressed.

### 3. Activities to Be Covered

INCSEA, through its own provisions, and by incorporating COLREGS,<sup>141</sup> attempts to regulate dangerous incidents at sea by promulgating general preventive measures that instill a heightened level of safety and caution in interactions in international waters.<sup>142</sup> A number of recent incidents between the PLAN and the U.S. Navy reveal that the possibility for collisions between vessels is prevalent, and that these regulations from INCSEA and COLREGS are therefore necessary. On the sea, in 2002 a PLAN frigate harassed the *USNS Bowditch* (T-AGS 62), a naval auxiliary ship that conducts oceanographic surveys. The PLAN frigate shouldered the vessel in an attempt to drive the ship off course.<sup>143</sup> Above the sea, the 2001 EP-3 plane collision discussed above shows that such regulations are imperative.

Incorporating language from INCSEA – which contains general preventive measures and incorporates COLREGS – into a Sino-American ISA would do much to curtail these incidents in the future. An event similar to the *Bowditch* harassment incident could have been avoided. Since the *Bowditch* is a U.S. Navy auxiliary vessel,<sup>144</sup> it would be covered by INCSEA language.<sup>145</sup> As such, an INCSEA-like Sino-American agreement would have mandated the PLAN frigate to “take appropriate measures not to hinder the maneuver[ing]”<sup>146</sup> of the *Bowditch* as well as “remain well clear” of the vessel.<sup>147</sup> And, by incorporating COLREGS, additional provisions would have regulated the ships’ approach toward and interaction with one another, keeping them a safe distance from each other in the first place. For instance, Rule 6 of COLREGS would have mandated that the PLAN frigate “proceed at a safe speed so that she can take proper and effective action to avoid collision and be stopped.”<sup>148</sup> Rule 8 would have required the PLAN ship to take measures to avoid collision that

<sup>140</sup> Winkler, *supra* note 137.

<sup>141</sup> INCSEA, *supra* note 27, at art. II.

<sup>142</sup> See generally *id.* at arts. II-VI and COLREGS, *supra* note 44, at Rs. 5,6,7,8, among many others.

<sup>143</sup> SHIRLEY A. KAN, CONG. RESEARCH SERV., U.S.-CHINA MILITARY CONTACTS: ISSUES FOR CONGRESS 51, Rep. no. RL 32496 (2007), available at <http://www.fas.org/sgp/crs/natsec/RL32496.pdf>.

<sup>144</sup> In 2002, USNS *Bowditch* was assigned to U.S. Navy Military Sealift Command (MSC) as a naval auxiliary ship. JANE’S FIGHTING SHIPS 2002-2003, at 850 (Stephen Saunders ed. 2002).

<sup>145</sup> INCSEA, *supra* note 27, art. I, § 1, cl. (b).

<sup>146</sup> *Id.* at art. III, § 2.

<sup>147</sup> *Id.* at § 1.

<sup>148</sup> COLREGS, *supra* note 44, R. 6.

were “positive, made in ample time and with due regard to the observance of good seamanship.”<sup>149</sup>

An incident similar to the EP-3 incident would have been regulated by INCSEA language. Article IV would have mandated that the two pilots use “the greatest caution and prudence” when approaching one another.<sup>150</sup> This mandate may have brought enough pause and caution to the situation to have averted the deadly incident. However, a Sino-American ISA should also contain more specific regulations for air-to-air encounters. Though INCSEA incorporates COLREGS, the only aircraft COLREGS regulates is “seaplanes.”<sup>151</sup> It does not cover military aircraft, such as the EP-3 and PLAN fighter. Nevertheless, the U.S. Navy can draw upon COLREGS language and rules regarding the safe speed,<sup>152</sup> risk of collision<sup>153</sup> and avoidance of collision<sup>154</sup> of seaplanes to create more specific rules to regulate incidents occurring above the sea.

In addition to these general preventive measures, INCSEA also uses specific prohibitions of harassment to curtail dangerous incidents at sea.<sup>155</sup> At the time the parties signed INCSEA, specific forms of harassment were prevalent, and thus specific proscriptions were incorporated. However, between the U.S. Navy and the PLAN, there are currently no public reports of specific and frequent forms of harassment, making it impossible to prescribe specific prohibitions. A Sino-American ISA should rather contain a broad prohibition of harassment and, if harassment between the two forces takes specific forms in the future, the two navies can then discuss specific issues at an annual meeting and decide the best legal course of action to take to prohibit this harassment.

Finally, INCSEA is a flexible document. By establishing annual meetings, INCSEA allows the agreement to be updated to account for any developments in naval surface tactics or capabilities that may take place. Such a clause must also be incorporated in a Sino-American agreement. Naval tactics, sailing and signaling capabilities, and the U.S. Navy-PLAN relationship may all change over the course of time, requiring an updating of the agreement to reflect these developments. Such issues could be addressed and incorporated into the agreement at annual meetings. Additionally, by incorporating COLREGS, the agreement gains further flexibility to adapt to changes in advancements in ship

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<sup>149</sup> *Id.* at R. 8(a).

<sup>150</sup> INCSEA, *supra* note 27, at art. IV.

<sup>151</sup> COLREGS, *supra* note 44 at R. 3 (a), (e).

<sup>152</sup> *Id.* at R. 6.

<sup>153</sup> *Id.* at R. 7

<sup>154</sup> *Id.* at R. 8

<sup>155</sup> INCSEA, *supra* note 44, at art. III, § 6 and art. IV.

technology and capability. COLREGS can be updated to reflect changes that may occur in sailing capabilities or the maritime environment.<sup>156</sup>

4. A Sino-American Incident at Sea Agreement Must Be Clear, Concise

Whatever form a Sino-American ISA may eventually take, it is important to remember that the language of the agreement must be clear and concise. A Sino-American ISA will be put to work during moments of tension when there will be little time to decipher the obligations laid out in the agreement. An agreement that is uncomplicated and unambiguous will best serve this purpose. The simplicity of INCSEA is often credited as a reason for its success. One rear admiral who participated in annual INCSEA meetings noted that, “[INCSEA] was carefully crafted to address specific remedies to specific problems, i.e. measures to avoid incidents at sea. It is a short, simple and flexible instrument that is easily understood by the relatively junior officers at sea who must make it work.”<sup>157</sup> Negotiators must make sure a Sino-American ISA has the same clarity of language and purpose.

**V. CONCLUSION**

As the PLAN’s power projection capability grows in the coming years, its area of operation will increasingly overlap with that of the U.S. Navy, increasing contact between the two forces in international waters. With more contact, there will inevitably be a growing number of dangerous incidents at sea. The 2001 collision over the South China Sea and more recent encounters between U.S. and Chinese naval forces show that such dangerous incidents are already occurring, and that their inherent potential for disaster is great. To truly ensure fair winds and following seas for their sailors, the two navies must negotiate an incident at sea agreement. Failure to do any less is an invitation for disaster.

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<sup>156</sup> COLREGS, *supra* note 44, at art.VI.

<sup>157</sup> Hilton, *supra* note 23, at 37.

## BOOK REVIEW

### FIASCO: THE AMERICAN MILITARY ADVENTURE IN IRAQ<sup>1</sup>

Major Jennifer B. Bottoms, JA, USA<sup>2</sup>

*If you know the enemy and know yourself, you need not fear the result of a hundred battles. If you know yourself but not the enemy, for every victory gained you will also suffer a defeat. If you know neither the enemy nor yourself, you will succumb in every battle.*<sup>3</sup>

#### I. INTRODUCTION

Now in its fifth year in Iraq with no ultimate exit strategy in sight, the United States military sits squarely in the public spotlight. Its civilian and military leaders have come under increased scrutiny from Congress and the American public.<sup>4</sup> Scholars and experts have provided bookshelves of critiques.<sup>5</sup> Some readers may believe that the subject of the mission in Iraq has been spent. Enter *Fiasco*. This book by Thomas Ricks offers an alluringly fresh perspective.

*Fiasco*'s uniqueness and utility lies in Ricks's focus not only on the war's lead-up, but also on its execution through 2006. He looks to us, the

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<sup>1</sup> THOMAS E. RICKS, *FIASCO: THE AMERICAN MILITARY ADVENTURE IN IRAQ* (2006).

<sup>2</sup> U.S. Army. Written while assigned as a Student, 56th Judge Advocate Officer Graduate Course, The Judge Advocate General's Legal Center and School (TJAGLCS), U.S. Army, Charlottesville, Virginia. The views expressed in this book review are solely those of the author of this review, and are not to be construed as representing the views of the United States government or any entity thereunder.

<sup>3</sup> SUN TZU, *THE ART OF WAR* 15 (Lionel Giles trans., Filiquarian Publishing, LLC 2006) (1910).

<sup>4</sup> See, e.g., Editorial, *No Exit, No Strategy*, N.Y. TIMES, Sept. 14, 2007, available at <http://www.nytimes.com/2007/09/14/opinion/14fri1.html>.

<sup>5</sup> See, e.g., BOB WOODWARD, *STATE OF DENIAL* (2006); BOB WOODWARD, *PLAN OF ATTACK* (2004); RICHARD CLARKE, *AGAINST ALL ENEMIES: INSIDE AMERICA'S WAR ON TERROR* (2004); MICHAEL R. GORDON & GENERAL BERNARD E. TRAINOR, *COBRA II: THE INSIDE STORY OF THE INVASION AND OCCUPATION OF IRAQ* (2006).

military, and assesses our performance—and he finds it lacking. Military leaders have contributed significantly to the “fiasco.” Ricks explains: While the Bush administration . . . bear[s] much of the responsibility for the mishandling of the occupation, . . . blame also must rest with the leadership of the U.S. military, who didn’t prepare the U.S. Army for the challenge it faced, and then wasted a year by using counterproductive tactics that were employed in unprofessional ignorance of the basic tenants of counterinsurgency warfare.<sup>6</sup>

Ricks takes the reader on a journey into the perfect storm of individual and institutionalized failure. He argues that the crisis in Iraq was not inevitable, but instead was the result of poor decisions from ill-prepared senior leaders.<sup>7</sup> He presents a dire picture of Iraq’s future where even greater chaos awaits, no matter what exit strategy the United States ultimately chooses.<sup>8</sup>

All of these subjects provide an incredible read. However, this article will focus its review upon Ricks’s unique examination of the military. First, it will examine Ricks’s background, his use of sources, and his organization. Then, it will analyze Ricks’s indictment of U.S. military leadership, and propose why his conclusions are relevant to uniformed leaders of all ranks.

## II. AUTHOR, ORGANIZATION, AND USE OF SOURCES

Pulitzer-prize winning Thomas Ricks is no stranger to the military.<sup>9</sup> Known as the “dean” of America’s military correspondence, his credentials are unrivaled.<sup>10</sup> He has interviewed scores of officers and enlisted Soldiers.<sup>11</sup> He has sorted through 37,000 pages of official documents.<sup>12</sup> In so doing, he presents a balanced and credible take on what has happened on the ground in Iraq.

Ricks skillfully harnesses his sources to support his propositions. He rarely makes a ground-breaking assessment without relying on an expert source.<sup>13</sup> Ricks’s genius lies not in his own conclusions per se, but in his ability

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<sup>6</sup> RICKS, *supra* note 1, at 4.

<sup>7</sup> *E.g.*, *id.* at 3-4.

<sup>8</sup> *Id.* at 430-39.

<sup>9</sup> WASH. POST, TOM RICKS, at <http://projects.washingtonpost.com/staff/articles/thomas+e.+ricks/> (last visited Sept. 15, 2007) (discussing Ricks’s experience in journalism).

<sup>10</sup> Random House, *Thomas E. Ricks: From The Author.*, <http://www.randomhouse.com/author/results.pperl?authorid=25519&view=fromauthor> (last visited Sept. 14, 2007) (discussing Ricks’s reputation among other journalists).

<sup>11</sup> RICKS, *supra* note 1, at 441.

<sup>12</sup> *Id.* at 442.

<sup>13</sup> *See, e.g.*, *id.* at 99, 142, 174, 344, 392, 420.

to capture the observations of others, legitimize them with additional evidence, and carefully weave them into an integrated whole.

His book's organization makes for an easy read. Beginning with the aftermath of the 1991 Gulf War, Ricks marches the reader through the years leading up to the 2003 invasion of Iraq.<sup>14</sup> He discusses U.S. containment policy and its effects and examines U.S. policy shifts after 9/11.<sup>15</sup> He then slows down to examine Operation Iraqi Freedom chronologically, providing a crisp, organized approach to a study of this subject.<sup>16</sup>

Despite this clarity, Ricks exceeds his scope when he recounts the years leading up to the 2003 invasion. The reader may become bogged down during this portion. Ricks is at his best when introducing new ideas versus the same facts that so many other authors already have chronicled. While a reader new to the subject may find this portion helpful, a reader familiar with the war's lead-up may do well to skip this part and go directly to the meat of the book.<sup>17</sup>

### III. INDICTMENT OF UNITED STATES MILITARY LEADERSHIP

Ricks, as authors before him have done, lays at the feet of our civilian leaders much of the blame for Iraq.<sup>18</sup> But he does not stop there. Instead, he asserts that U.S. military leaders share that blame, committing several unthinkable errors that helped to fuel the insurgency. First, they failed to create a viable plan for postwar operations.<sup>19</sup> Second, they failed to grasp the nature of the conflict and the need to train for and engage in counterinsurgency operations.<sup>20</sup> Finally, they failed both to challenge their superiors and to foster innovation and healthy dissent among their subordinates.<sup>21</sup>

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<sup>14</sup> *Id.* at 3-111.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.* at 115-429.

<sup>17</sup> *But see* Abe J. Riesman, *Winging the Invasion Iraq?*, HARVARD CRIMSON, Sept. 27, 2006 (reviewing THOMAS E. RICKS, *FIASCO: THE AMERICAN MILITARY ADVENTURE IN IRAQ* (2006)), available at <http://www.thecrimson.com/article.aspx?ref=514524>. Riesman finds Ricks's writing of the background information to be vital, potentially making this book "the definitive historical record" of the war.

<sup>18</sup> *See, e.g.*, RICKS, *supra* note 1, at 4, 49, 101-11, 158-66.

<sup>19</sup> *Id.* at 109-11.

<sup>20</sup> *E.g., id.* at 264-67.

<sup>21</sup> *E.g., id.* at 33, 89-90, 122, 175-76, 289, 373.

### A. Lack of Postwar Campaign Plan

United States military commanders did not plan for postwar Iraq.<sup>22</sup> Instead, “An intellectually shoddy atmosphere . . . characterized war planning under [General] Franks.”<sup>23</sup> One V Corps planner explained that U.S. Army Central Command never produced any type of postwar blueprint.<sup>24</sup> Lieutenant General Joseph Kellogg, who oversaw both the planning and the execution of the war, simply stated regarding postwar operations, “There was no real plan.”<sup>25</sup>

Military leaders did not plan because they did not expect to be in Iraq for a significant length of time.<sup>26</sup> Like their civilian bosses, they believed that Iraqis would welcome U.S. troops with open arms and quickly would establish their own democracy.<sup>27</sup> “When assumptions are wrong, everything built on them is undermined. Because the Pentagon assumed the U.S. troops would be greeted as liberators and that an Iraqi government would be stood up quickly, it didn’t plan seriously for less rosy scenarios.”<sup>28</sup> Explaining this blasé view, one Army colonel stated, “Politically we’d made a decision that we’d turn it over to the Iraqis in June [2003]. So why have a Phase IV [postwar] plan?”<sup>29</sup>

This lack of planning not only impacted U.S. forces, but also significantly affected Iraqi citizens who initially had welcomed these Soldiers with hope.<sup>30</sup> Explained a foreign service officer, “Over time Iraqis became disappointed. . . . [B]ecause of our incompetence, more and more Iraqis have made the decision that their interests don’t lie with us.”<sup>31</sup>

Ricks’s discussion of our leaders’ failure to plan is disheartening. We rightly expect from commanders if not talent at least competence. Ricks reminds us as judge advocates that even senior commanders can make astronomical mistakes and fail to consider critical factors. No judge advocate should assume that because the commander holds the rank of Colonel or of General Officer he intuitively will make the wise decision each time. Instead,

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<sup>22</sup> *Id.* at 109. See also Tomislav Z. Ruby, *Campaign Planning: The Ground Truth*, in *HOPE IS NOT A PLAN: THE WAR IN IRAQ FROM INSIDE THE GREEN ZONE* 32-56 (Thomas Mowle ed., 2007).

<sup>23</sup> RICKS, *supra* note 1, at 34.

<sup>24</sup> *Id.* at 80.

<sup>25</sup> *Id.* at 109 (quoting Lieutenant General Joseph Kellogg).

<sup>26</sup> *Id.* at 110-11.

<sup>27</sup> *Id.* at 111.

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

<sup>29</sup> *Id.* at 110 (quoting Colonel Gregory Gardner, assigned to the Coalition Provisional Authority in 2003).

<sup>30</sup> *Id.* at 325.

<sup>31</sup> *Id.* at 325-26 (quoting David Dunford, retired foreign service officer).

legal advisors must pay close heed to give their commanders not just frank, but full advice.

### B. Conventional Warfare vs. Counterinsurgency Operations

Compounding the problem of having no postwar plan, military leaders failed to understand the nature of the enemy and of the battle.<sup>32</sup> For two years, they refused to employ counterinsurgency operations.<sup>33</sup> Lieutenant Colonel Paul Yingling recently has published a scathing indictment of the General Officer corps, bemoaning its training the Army to fight “the last war,” Desert Storm, versus the next war.<sup>34</sup> Ricks similarly explains that the military fought “the battle it wanted to fight, mistakenly believing it would be the only battle it faced.”<sup>35</sup> In doing so, the United States lost valuable time to the enemy and burned critical bridges with Iraqis.<sup>36</sup>

Simply put, our leaders had failed to learn the lessons of Vietnam.<sup>37</sup> “After it came home from Vietnam, the Army threw away virtually everything it had learned there, slowly and painfully, about how to wage a counterinsurgency campaign.”<sup>38</sup> The Army “hadn’t taught its commanders in such a way that they would arrive at . . . answers to the tactical problems they faced.”<sup>39</sup> According to one expert, the military had no “viable counterinsurgency doctrine, understood by all soldiers, or taught at service schools.”<sup>40</sup> The result, says Ricks, is that we went into battle knowing well our strengths-- but not our weaknesses.<sup>41</sup>

Ricks skillfully illustrates that counterinsurgency operations, while formulated at the highest levels of the military, are executed at the lowest levels.<sup>42</sup> To succeed in such operations, where *the people are the prize*, Soldiers must befriend the local population, honor them as individuals, and respect their culture. Only then can we hope to win them to our side.<sup>43</sup>

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<sup>32</sup> See, e.g., *id.* at 264-67.

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

<sup>34</sup> Paul Yingling, *A Failure in Generalship*, ARMED FORCES JOURNAL, May 2007, available at <http://www.armedforcesjournal.com/2007/05/2635198>.

<sup>35</sup> RICKS, *supra* note 1, at 115.

<sup>36</sup> See, e.g., *id.* at 139-40, 142, 150-52, 232-37, 279-90.

<sup>37</sup> *Id.* at 130-33.

<sup>38</sup> *Id.* at 133.

<sup>39</sup> *Id.* at 226.

<sup>40</sup> *Id.* (quoting Major Gregory Peterson, School of Advanced Military Studies, Fort Leavenworth, Kansas).

<sup>41</sup> *Id.* at 133.

<sup>42</sup> See, e.g., *id.* at 250-52.

<sup>43</sup> See, e.g., *id.*

*Fiasco* is replete with examples of commanding generals, company commanders, sergeants, and specialists who failed to recognize the ultimate goal of winning hearts and minds. Instead, consistent with their training, they viewed the war in conventional terms. Commanders sought to demonstrate massive firepower, overwhelming strength, and the ability to defeat the enemy at will.<sup>44</sup> Often such goals translated into Soldiers conducting mass cordon-and-sweeps, kicking in doors, carelessly brandishing pistols and rifles, humiliating Iraqi men in front of their families, and thereby driving many Iraqis to support the insurgency.<sup>45</sup> Indeed, the reader can almost pinpoint specific moments where, with a different course of action, a different decision at the micro-level, a little more education in Iraqi culture, the U.S. military might have snuffed the budding insurgency.<sup>46</sup>

Now five years into the war, military leaders can read *Fiasco*, and not only gain a grasp of *what* operational changes the military is making in Iraq, but also *why* we are making them. The exhausted young Soldier conducting cordon-and-searches, the haggled judge advocate settling a claim with a local farmer--the conduct of these Soldiers can win-- or lose-- the war.

### C. Leadership Styles

#### 1. Failure of Senior Military Leaders to Speak Up.

Perhaps most disturbing for the military reader is Ricks's assessment of our senior leaders. Yingling asserts that our generals lack "moral courage," evidenced by their failure to "make their objections public" when the United States went to war with too few troops.<sup>47</sup> Ricks provides snapshots of the highest-ranking military leaders capitulating to the administration's whims and parroting its rosy predictions.<sup>48</sup> He suggests that the service chiefs lacked either the foresight or the courage to challenge the administration's assumptions going

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<sup>44</sup> See, e.g., *id.* at 195, 214-15, 250, 260, 418.

<sup>45</sup> See, e.g., *id.* at 192 (asserting that presence patrols humiliated Iraqis and caused them to view the U.S. military as occupiers); 200 (lamenting the impact of forward operating bases on the Iraqi psyche); 259 (examining en masse cordon and sweeps); 264 (discussing the impact on Iraqis of the U.S. military publicly humiliating Saddam Hussein after his capture).

<sup>46</sup> See, e.g., *id.* at 139-40, 150-51, 164, 232-33, 274-78, 281-83, 286-87. But see, e.g., *id.* at 152-54, 229-31 (providing numerous examples of well-behaved, forward-thinking soldiers and leaders who sought to build bridges with Iraqis). See generally RICK ATKINSON, IN THE COMPANY OF SOLDIERS: A CHRONICLE OF COMBAT (2004) (providing a primarily positive recount of 101st Airborne Division's conduct during Operation Iraqi Freedom I).

<sup>47</sup> Yingling, *supra* note 34.

<sup>48</sup> E.g., RICKS, *supra* note 1, at 74, 89-90, 100, 120, 122, 171-72, 344-46.

into Iraq, particularly regarding the lack of postwar planning.<sup>49</sup> Ricks presents them as more concerned with keeping the peace with their civilian bosses than properly representing the Soldier, Sailor, Airman, and Marine.<sup>50</sup> According to one colonel, “They are organization men. . . . They are extremely careful.”<sup>51</sup> Such conduct from senior military leaders is unfathomable. It lends credence to Yingling’s proposal that general officers receive 360-degree evaluations, with superiors, subordinates, and peers all rating their performance.<sup>52</sup>

## 2. Fostering a Climate of Fear and Conformity vs. Innovation

“Mistrust and arrogance are antithetical to inspired and inspiring leadership,” asserted General Eric Shinseki at his retirement ceremony.<sup>53</sup> Yet Ricks introduces us to commanders who exhibited just these qualities, often publicly belittling their junior commanders, bullying their staff, and killing any messenger who delivered bad news.<sup>54</sup> The result was a staff with low morale, lack of motivation, and fear of discussing worst-case scenarios with their bosses.<sup>55</sup>

What if these senior leaders had fostered dissent instead of publicly denigrating, and thereby silencing, their subordinates? Might other ideas have surfaced? Perhaps early innovative thinking would have led more quickly to a shift in tactics and standard operating procedures. Perhaps morale would have been higher, frustration lower, and Soldiers more personally invested in taking the high road when presented with the opportunity for revenge. We cannot know. But if Ricks’s assessment is valid, these leaders did not foster a climate conducive to success. Army leaders reading this book would do well to reflect upon their own leadership style and upon whether they develop initiative in their junior commanders.

## IV. CRITIQUES

Criticizing Ricks’s phenomenal book is difficult. No one better has cast a critical eye upon the military’s role in Iraq or better explained the once-dormant doctrine of counterinsurgency; however, a few additions would have enhanced the book.

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<sup>49</sup> See, e.g., *id.* at 89-90, 129.

<sup>50</sup> See *id.* at 373.

<sup>51</sup> *Id.* (quoting an unnamed Army colonel).

<sup>52</sup> See Yingling, *supra* note 34.

<sup>53</sup> RICKS, *supra* note 1, at 156 (quoting General Eric Shinseki, Army Chief of Staff).

<sup>54</sup> *Id.* at 33, 175-76, 289.

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

First, while Ricks includes some endnotes, they are incomplete. When a writer has interviewed the number and caliber of his sources, and has sifted through thousands of pages of official documents, sharing this information more explicitly with the reader would have been beneficial.<sup>56</sup>

Second, more mention of our allies, particularly a discussion of their tactics and experiences with the Iraqis would have been enlightening. Perhaps the U.S. military can learn from its coalition partners' practices that have worked for them. Without Ricks briefly comparing and contrasting their approaches with our own, we are left without a foil.

Third, Ricks offers valid criticism of one problem with rotating troops in and out of Iraq. Namely, as soon as a military unit and local Iraqi leaders establish a solid relationship, it is time to transfer authority to the incoming unit and start the process again.<sup>57</sup> Yet Ricks offers no solution, which leaves the reader frustrated. Perhaps no solution exists other than the unviable option of leaving the same troops in place for years.

## V. CONCLUSION

Thomas Ricks's *Fiasco* is phenomenal. The military should require that everyone read it, from the most junior service member to the most senior general/flag officer. Commanders should dissect it in Officer Professional Development sessions, and encourage all their subordinates to review it again prior to deployment.

For if Ricks's assessment of our military is legitimate, we urgently need a *true* military "transformation," such as what we find budding at the Army's Counterinsurgency Academy (COIN Academy) and see manifested in our tactical shifts in Iraq.<sup>58</sup> Such transformation requires leaders at all levels who know the enemy and understand the nature of the conflict. It demands senior commanders who encourage innovation in their young counterparts. It calls for junior leaders who know their jobs and who, at the handshake-and-tea level, know how to capture the prize that Ricks so aptly describes. This type of transformation is desperately needed, or we may wither into the very military

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<sup>56</sup> See *id.* at 441-42.

<sup>57</sup> *Id.* at 322-24.

<sup>58</sup> See, e.g., John Koopman, 911: *Five Years Later; Military Transformed— Better Gear, New Goals*, S. F. CHRON., Sept. 7, 2006, available at <http://sfgate.com/cgi-bin/article.cgi?file=/c/a/2006/09/07/MNGQRL0TDR1.DTL>.

that our enemy desires. We would do well to heed Thomas Ricks and his *Fiasco*.



## RED ROGUE: THE PERSISTENT CHALLENGE OF NORTH KOREA<sup>1</sup>

Major Stephen F. Keane, USMC<sup>2</sup>

### I. INTRODUCTION

There are presently more than 25,000 American troops stationed in the Republic of Korea (ROK).<sup>3</sup> Thousands more come to the Korean peninsula each year to participate in military exercises.<sup>4</sup> Though the mission in Korea exists far from the headline-grabbing operations in Iraq and Afghanistan, the mission continues to play a vital role in the national security strategy of the United States (US) and its allies. While the book's title may indicate a narrow focus on the North Korean Regime alone, Dr. Bruce Bechtol's concise yet thorough *Red Rogue* presents the essentials necessary to understanding the complex relationships involving Kim Chong-II's North Korea (DPRK) and the ROK; the DPRK and the US; the ROK and the US; and, finally, the importance of the relationships these countries have with the other major East Asian nations: China, Russia, and Japan. Unique in its currency and expert insight, *Red Rogue* is essential reading for all military officers, planners and policy makers serving in the Korean Theater. For those not currently assigned to positions that address East Asia, the book serves as a pointed reminder of the region's global strategic importance.

The book opens with a brief history of how the current situation, consisting of a totalitarian communist north opposite a democratic south, on the

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<sup>1</sup> BRUCE E. BECHTOL, JR., *RED ROGUE: THE PERSISTENT CHALLENGE OF NORTH KOREA* (2007). Dr. Bechtol is a retired Marine and a former intelligence officer with the Defense Intelligence Agency. He is an associate professor of international relations at the U.S. Marine Corps Command and Staff College and an adjunct professor of diplomacy at Norwich University. The positions and opinions in this article are those of the author and do not necessarily represent the views of the United States Government, the Department of Defense, or the United States Navy.

<sup>2</sup> U.S. Marine Corps. Deputy Chief of Operational Law, U.S. Forces Korea, United Nations Command, Combined Forces Command. Staff Judge Advocate, U.S. Marine Corps Forces Korea. This review represents the opinions of the author alone and not necessarily the official positions of U.S. Forces Korea or the U.S. Department of Defense.

<sup>3</sup> Global Security.Org, US Forces Korea – Exercises, <http://www.globalsecurity.org/military/ops/ex-usfk.htm> (last visited Jan. 2, 2008). See also, Anthony Faiola and Bradley Graham, *U.S. Plans Major Cut Of Forces In Korea*, WASHINGTON POST, June 8, 2004 at A01.

<sup>4</sup> Global Security.Org, US Forces Korea – Exercises, <http://www.globalsecurity.org/military/ops/ex-usfk.htm> (last visited Jan. 2, 2008).

Korean peninsula was shaped.<sup>5</sup> Bechtol illustrates how American strategists have, since World War II, repeatedly tried to reduce the significance of Korea in the context of the overall national security plan.<sup>6</sup> Nevertheless, as the author points out, security on the Korean peninsula has repeatedly proven to be an issue of critical consequence.<sup>7</sup>

Bechtol posits that conventional wisdom assumes, because of the isolationist nature of the DPRK, that the US and its allies have a distinct advantage in leveraging the Instruments of National Power (IOP's): Diplomatic, Informational, Military and Economic (DIME).<sup>8</sup> However, Bechtol points out that the DPRK has routinely and effectively managed to use controversy and brinkmanship to obtain their objectives and perpetuate regime survival.<sup>9</sup> Bechtol's observations become important, in judging the actions of the international community generally, and the ROK-US alliance specifically, as keys to successfully addressing the challenges posed by the Kim Chong-Il regime.

## II. POST 9/11 NORTH KOREA

Bechtol illustrates the DPRK's use of its developing nuclear weapon programs as a mechanism of foreign policy.<sup>10</sup> The DPRK, playing on post 9/11 fears of global nuclear proliferation, has consistently tied freezing and/or dismantling its nuclear weapons programs to economic and foreign aid incentives.<sup>11</sup> Importantly, *Red Rogue* raises the issue that the DPRK has not one but two separate nuclear programs.<sup>12</sup> The first program uses plutonium, and was highlighted by the DPRK's controversial nuclear test in October 2006.<sup>13</sup> The DPRK's other nuclear program uses highly enriched uranium (HEU), is more covert, and potentially poses a greater risk to the international community.<sup>14</sup> Bechtol concludes that despite the best efforts of the six-party talks<sup>15</sup>,

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<sup>5</sup> BECHTOL, *supra* note 1 at 3.

<sup>6</sup> *Id.* at 2-3.

<sup>7</sup> *Id.* at 2-4.

<sup>8</sup> *Id.* at 2.

<sup>9</sup> *Id.* at 2-3.

<sup>10</sup> *Id.* at 13.

<sup>11</sup> *Id.* at 30-31.

<sup>12</sup> *Id.* at 13-19.

<sup>13</sup> *Id.* at 29-30.

<sup>14</sup> While a plutonium program is relatively easy to detect, an HEU program is easier for the developer to keep covert. While a bomb is the most probable delivery vehicle for a plutonium device, HEU warheads can be delivered via missile thus making them more of a threat. BECHTOL, *supra* note 1 at 5, 13-20.

<sup>15</sup> "The Six-Party Talks concerning the DPRK's nuclear program involve the United States, North Korea, China, Japan, Russia and, South Korea. However, the primary players are the US and North Korea. The US has requested the involvement of the other four nations to deny North Korea of its desire to participate in bilateral negotiations with the US. The US is unwilling to participate in

persuading the DPRK to verifiably end both of its nuclear programs will be near impossible as long as the programs' usefulness as a foreign policy tool continues.<sup>16</sup> Contrary to popular news reports depicting Kim Chong-II as a stark raving lunatic, Bechtol suggests that there is in fact a method to his madness.

In addition to the development of nuclear programs, the author provides a detailed description of the other major troubling activities of the DPRK regime and, perhaps more importantly, the DPRK rationale for engaging in them. For example, the DPRK's ballistic missile production is of global concern, particularly when one considers the DPRK's Middle East trading partners.<sup>17</sup> Bechtol posits that the missile programs are a policy tool designed to deter, constrain and harm the US, not only in East Asia, but also in other regions such as the Middle East.<sup>18</sup> The strength of Bechtol's writing lies not only in his description of the DPRK's actions, but, more importantly, he explores the DPRK's motivation and desired reward for repeatedly engaging in these provocative types of activities.

*Red Rogue* next provides a concise description of the DPRK's military transformation from armored and mechanized warfare to one that focuses on asymmetric warfare.<sup>19</sup> Bechtol analyzes that the DPRK's asymmetric capability is maintained by a triad of forces; missiles, long range artillery and special operations forces.<sup>20</sup> According to the author, the DPRK uses its military to conduct scripted provocations carefully designed to garner maximum world attention to the DPRK's threat without risking a full-scale war that the DPRK would find impossible to sustain.<sup>21</sup> In discussing the DPRK's military, the book conveys an appreciation of the DPRK's strategy that anyone considering the North Korean problem from a military or diplomatic viewpoint would find useful.

Bechtol also explains how the DPRK uses illicit activities, such as drug trafficking and counterfeiting, to further regime survival.<sup>22</sup> The DPRK's lack of

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bilateral negotiations, citing North Korea's breach of the 1994 Framework Agreement." Global Security.Org, Six-Party Talks, <http://www.globalsecurity.org/wmd/world/dprk/6-party.htm> (last visited Jan. 2, 2008). See also, U.S. Department of State.gov, North Korea and the Current Status of Six-Party Agreement, Christopher R. Hill, Assistant Secretary for East Asian and Pacific Affairs, Statement Before the House Foreign Affairs Committee Washington, DC, February 28, 2007, <http://www.state.gov/p/eap/rls/rm/2007/81204.htm> (last visited Jan 2, 2008).

<sup>16</sup> BECHTOL, *supra* note 1 at 36.

<sup>17</sup> "Since 9/11, Pyongyang has had deals for weapons programs with Pakistan, Libya, Egypt, Iran, Syria, Vietnam and Yemen." *Id.* at 46.

<sup>18</sup> *Id.* at 53.

<sup>19</sup> *Id.* at 62.

<sup>20</sup> *Id.* at 62-63.

<sup>21</sup> *Id.* at 69.

<sup>22</sup> *Id.* at 24-25, 90-94.

natural resources and industry is further accentuated by the isolationist nature of the regime. The illicit activities go a long way toward allowing the regime to “support its military and operate as a state that maintains isolationist policies and belligerent international behavior.”<sup>23</sup> Along with his description of the DPRK’s illicit activities, Bechtol dedicates a section to evaluating the recent successes in defeating these illicit activities.<sup>24</sup> Importantly, Bechtol finds that because DPRK relies so heavily on the revenue that its criminal enterprises produce, combating these illicit activities is an effective means to exert economic pressure on the DPRK.<sup>25</sup> It is also an area where the US can build consensus amongst the region’s other major players who also have an interest in curbing the DPRK’s illicit activities, China, Russia, and Japan.<sup>26</sup> Striking at Kim Chong-Il’s illicit income appears to be one of the best ways to influence his actions in other areas such as the six-party talks.<sup>27</sup>

### III. THE ROK-US ALLIANCE

Bechtol perceives the evolving nature of the ROK-US alliance as greatly complicating security matters on the Korean peninsula.<sup>28</sup> When the President Roh Moo-hyun administration took power in early 2003, it marked a change in US-ROK relations. Importantly, Roh was elected by largely espousing an anti-American platform combined with one of reconciliation and engagement with the DPRK.<sup>29</sup> Bechtol pulls no punches in deriding Roh’s left-leaning policies as having a detrimental effect not only on the ROK-US alliance, but also on the security and stability of the region.<sup>30</sup>

Currently, the ROK and US national authorities maintain combined responsibility for wartime operational control of Combined Forces Command (CFC)<sup>31</sup> forces,<sup>32</sup> and a US Army four-star General is the CFC commander.<sup>33</sup> Prompted at least in part by President Roh’s call for a change in command relationships, CFC will be disestablished in the next few years and the ROK will assume operational control of its wartime forces under a ROK Joint Warfighting

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<sup>23</sup> *Id.* at 7.

<sup>24</sup> *Id.* at 103-106.

<sup>25</sup> *Id.* at 105.

<sup>26</sup> *Id.* at 7-8, 88.

<sup>27</sup> *Id.* at 105-106.

<sup>28</sup> *Id.* at 145.

<sup>29</sup> *Id.* at 147. See also, Damien McElroy, Telegraph.co.uk, Threat to US ties as South Korea elects ‘sunshine’ leader, <http://www.telegraph.co.uk/news/main.jhtml?xml=/news/2002/12/20/wkor20.xml> (last visited Jan. 2, 2008).

<sup>30</sup> *Id.* at 146-147.

<sup>31</sup> Combined Forces Command: The ROK-US Combined Force.

<sup>32</sup> BECHTOL, *supra* note 1 at 166.

<sup>33</sup> *Id.* at 46.

Command (JFC).<sup>34</sup> The US will form a separate command to support the ROK JFC.<sup>35</sup> While much debate continues in ROK politics regarding the prudence of such a move, it appears the disestablishment of CFC has been set in motion with little chance of turning back. Plans call for this transformation effort to be completed in 2012.<sup>36</sup>

Bechtol is openly skeptical of the ROK commitment to transformation. He fears that the ROK will not invest the necessary resources and manpower required for this massive undertaking.<sup>37</sup> Time will tell if the ROK will commit to upgrading technology to sufficiently equip its C4I<sup>38</sup> infrastructure. Seemingly this transformation will require an increase in ROK troop strength, yet current ROK plans call for reducing its active force by 180,000 troops.<sup>39</sup> Additional major concerns include modernizing the ROK Air Force and Navy, properly equipping the ROK Marine Corps and improving ROK organic missile defense capabilities.<sup>40</sup> While the transformation plan moves forward with critical commitments from the ROK left unanswered, Bechtol persuasively sounds the alarm that a half-hearted commitment to transformation of wartime operational control will leave the ROK vulnerable to potential belligerent activities of the DPRK.

#### IV. FUTURE SECURITY ON THE KOREAN PENINSULA

Bechtol rounds out his book with a chapter discussing the dynamic and controversial nature of ROK civil-military affairs. Since the Roh administration has taken power, Bechtol notes that there has been a concerted effort, *vis a vis* the structuring of President Roh's cabinet and particularly the National Security Counsel, to diminish the influence of the military.<sup>41</sup> Part and parcel to this effort to marginalize the military is a simultaneous undercurrent of anti-Americanism. Roh and his cabinet are the product of having come of age in a Korea that was essentially a military dictatorship.<sup>42</sup> During the 1970's and 1980's, the ROK military was involved in several incidents of using heavy-handed methods to quell dissent culminating with the Kwangju Uprising incident.<sup>43</sup> Groups

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<sup>34</sup> *Id.* at 166-175.

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

<sup>36</sup> *Id.* at 175.

<sup>37</sup> *Id.* at 162-166.

<sup>38</sup> Command Control, Communications, Computers and Intelligence.

<sup>39</sup> BECHTOL, *supra* note 1 at 162.

<sup>40</sup> *Id.* at 162-166.

<sup>41</sup> *Id.* at 181-87.

<sup>42</sup> *Id.* at 177-78.

<sup>43</sup> "The icon event of the pre-democratic governments in Seoul is now considered to be the 'Kwangju Uprising,' an event where ROK Special Forces killed several hundred civilians in Kwangju in putting down a riot, and in the process created a controversy that rages to this day." *Id.* at 178.

denouncing the military for Kwangju and other incidents typically associate the American military presence with these atrocities, despite the fact that American military involvement has never been established.<sup>44</sup> Interestingly, the majority of South Koreans do not approve of the way the Roh administration has handled military affairs or the alliance with the US.<sup>45</sup> This popular dissatisfaction likely contributed to the recent election of the conservative candidate, Lee Myung-bak.<sup>46</sup>

With a new conservative administration taking power in the ROK, it will be interesting to see how the issues of military transformation and civil military affairs will be affected. While some may argue that, contrary to Bechtol's analysis, Roh's policy of engaging North Korea is a sound strategy, the DPRK missile<sup>47</sup> and nuclear weapon tests<sup>48</sup> of 2006 seem to strongly indicate Roh's strategy has failed. Interestingly, it appears that one of President elect-Lee's first moves will be to disband the ROK Ministry of Unification, the government entity currently responsible for DPRK engagement.<sup>49</sup>

It also currently appears as though the new administration will be eager to restore the history of a close alliance with the US.<sup>50</sup> In order to maintain the relevancy of his book, at least as it relates to the ROK-US alliance, *Red Rogue* will need recurring periodic updates and addendums. The fast moving pace of the military transformation coupled with the changing ROK political landscape calls for the conduct of continuing examinations to identify areas where accepted paradigms have shifted.

## V. CONCLUSION

In sum, *Red Rogue* is concise, and its content is presented in a logical and easy-to-follow format. The book's style is clearly geared toward the military or policy professional reader. Bechtol does not delve into anecdotal information that is normally found in books written more for entertainment

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<sup>44</sup> *Id.* at 178-179.

<sup>45</sup> *Id.* at 192-93.

<sup>46</sup> Burt Herman, Lee Claims Win in South Korea Election, ASSOCIATED PRESS NEWSWIRE, December 19, 2007,

<http://ap.google.com/article/ALeqM5gjO9waTTMWVzOU5hGMtz4ZQOwTRAD8TKI4E00>.

<sup>47</sup> BECHTOL, *supra* note 1 at 29-30.

<sup>48</sup> *Id.* at 38-39.

<sup>49</sup> Jon Herskovitz, South Korea's Lee aims to close ministry for North, REUTERS UK, January 16, 2008, <http://uk.reuters.com/article/worldNews/idUKSEO36763520080116>.

<sup>50</sup> *Id.* See also, Yonhap News Agency, U.S. (arguing that South Korea's election gives U.S. chance to rein in North Korea) Dec. 26, 2007, <http://english.yonhapnews.co.kr/national/2007/12/27/88/0301000000AEN20071226007600315F.HTML>, (last visited Jan. 2, 2008)

purposes. Since the book is written with this professional audience in mind, more casual readers may find parts of Bechtol's analysis rather dry.

Nevertheless, *Red Rogue* insightfully captures the motivations of the DPRK regime and juxtaposes them against the complex military and political relations in the ROK. Since Bechtol's analysis is based on solid research and a deep knowledge of Korean affairs, readers with an interest in military and political dynamics on the Korean peninsula will greatly benefit from his expertise.<sup>51</sup> Assuming reasonable efforts to maintain *Red Rogue's* currency, the book should become required reading for those assigned to work Korean issues.

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<sup>51</sup> In addition to being responsible for teaching the Korea block of instruction at the U.S. Marine Corps Command and Staff College, Dr. Bechtol speaks Korean and has lived for several years on the Korean peninsula. *Red Rogue's* extensive bibliography is a testament to the level of research Bechtol applied to the book.

