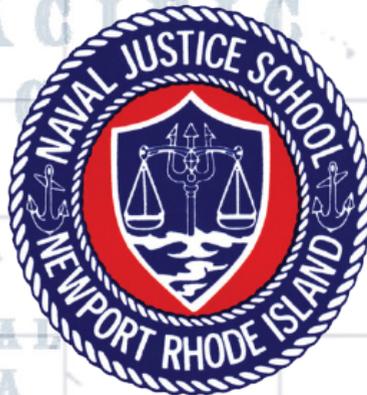


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NUCLEAR NON-PROLIFERATION ON THE HIGH SEAS: A PROBLEM OF ENFORCEMENT

Lieutenant Commander Michael J. Melocowsky, JAGC, USN*

I. Introduction: The Problem Illustrated by the *So San* and the *Kang Nam*

International law does not provide enough safeguards against the proliferation of nuclear materials and technology. Nations and vessels trying to limit the spread of these inherently dangerous materials often realize that they have very limited jurisdiction to stop and search vessels suspected of engaging in the illegal trade of nuclear materials, even when on the high seas. Most of the legal authorization to stop ships originates with the very nation whose flag a vessel is registered to and whose flag it flies. Without the permission of the flag state, other nations are left with limited options. Two illustrative examples, the *So San* and *Kang Nam I* incidents, exemplify this ineffectiveness of states who wish to address the potentially dangerous transfer of weapons and material. The lack of legal authorization in this area of international law is a threat to the security of the United States and its allies, as rogue States and non-State actors seek out nuclear materials to further their own interests. Over the years, many laws and treaties have been enacted which seek to promote the peaceful and safe use of the oceans. However, none of these laws addresses the dangerous gap that exists concerning nuclear cargos on the world's oceans.

A. The Case of the *So San*

On 10 December 2002, the Spanish Navy, acting on a tip from U.S. intelligence agencies, stopped a North Korean ship, *So San*, located in international waters 600 miles south of Yemen in the Arabian Sea.¹ The

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¹ Thom Shanker, *Scud Missiles Found on North Korean Ship*, New York Times (Dec. 11, 2002), <http://www.nytimes.com/2002/12/11/international/asia/11MISS.html>. For a discussion of Nuclear Non-Proliferation, the *So San* and the Proliferation Security Initiative Tony Karon, *SCUD Seizure Raises Tricky Questions*, World, TIME (Dec. 11, 2002), <http://www.time.com/time/world/article/0,8599,398592,00.html>, see also DAVID G HODGES, 19

Spanish Navy cited several reasons for boarding and searching the *So San*. First, the ship lacked identifying marks, which would indicate which country regulated it.² Second, the vessel's documentation was incomplete and she carried a false manifest.³ Based on these grounds, the Spanish authorities searched the ship and uncovered fifteen SCUD missiles hidden beneath thousands of bags of cement.⁴ These fifteen SCUD missiles were not listed on the ship's manifest. The SCUD missiles were destined for Yemen.⁵

The Yemeni government insisted that the sale of SCUD missiles by North Korea to Yemen was legal.⁶ After several days of Yemeni protests, the ship was released.⁷ Although the parties involved found that Spain had the legal authority to board and search the *So San*, neither Spain nor the United States had the legal authority to seize the missiles that were discovered onboard.⁸ Highlighting this particular issue at a White House press conference, White House Press Secretary Ari Fleisher stated:

There is no provision under international law prohibiting Yemen from accepting delivery of missiles from North Korea. . . . While there is authority to stop and search, in this instance there is no clear authority to seize the shipment of Scud missiles from North Korea to Yemen. Therefore, the merchant vessel is being released.⁹

Commenting further on the release of the North Korean vessel, John Norton Moore, University of Virginia law professor and director of the University of Virginia's Center of Oceans Law and Policy, explained that under international law a nation is justified in boarding and searching a ship if the vessel appears to have no nationality, but international laws do not authorize seizing the cargo

OCEAN & COASTAL L.J. 189, HIGH SEAS AND HIGH RISKS: PROLIFERATION IN A POST-9/11 WORLD, 2014 available at <http://oclj.maine.gov/vol-19-no-2/proliferation-post-911-world/>.

² Craig H. Allen, *Maritime Counterproliferation Operations and the Rule of Law*, Greenwood, 2007, 151-153.

³ *Id.* and Shanker, *supra* note 1.

⁴ Craig H. Allen, *Limits of Intelligence in Maritime Counterproliferation Operations*, Naval War College Review, Winter 2007, Vol.60, No.1 at 42.

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ Al Goodman et al., *U.S. Lets SCUD Ship Sail to Yemen*, *World*, CNN.COM (Dec. 12, 2002, 10:45 AM EST), <http://archives.cnn.com/2002/WORLD/asiapcf/east/12/11/us.missile.ship/index.html>.

under such conditions.¹⁰ As a result, the *So San* and her cargo of SCUD missiles were ultimately released.¹¹

B. The Case of *Kang Nam I*

The *So San* is not the only incident in which the international community was left without options in trying to prevent the questionable and alarming transfer of dangerous materials. In June 2009, USS *John S. McCain* (DDG 56), a U.S. Navy warship, tracked a North Korean vessel, the *Kang Nam I*, in international waters in the Pacific Ocean.¹² The *Kang Nam* left a North Korean port on June 17 and was suspected of carrying weaponry, missile parts, and possible nuclear materials to Myanmar.¹³ The *Kang Nam* had been involved in the trafficking of nuclear weapons previously. In October 2006, the *Kang Nam* was detained in Hong Kong after being suspected of nuclear proliferation.¹⁴ Now this same vessel was suspected of carrying illegal weapons and weapons parts and possible nuclear material in violation of United Nations (U.N.) Security Council Resolution (UNSCR) 1874.¹⁵ UNSCR 1874, read in conjunction with previous U.N. Security Council Resolutions on the subject, bans North Korea from exporting weapons, including missile parts and nuclear materials.¹⁶ It also allows the international community to ask for permission from the flag State to board and search any suspect ship on the high seas.¹⁷ If that request is denied, authorities can ask for an inspection of the suspect vessel in “an appropriate and convenient port...[to be conducted] by local authorities.”¹⁸

Wanting the world to know it would refuse permission for a boarding, North Korea declared that any interdiction of the *Kang Nam* would be considered an act of war.¹⁹ Lacking the requisite permission from North Korea to board, *McCain* could only track the *Kang Nam* as she slowly proceeded through the Pacific. After 12 days on the high seas and for reasons which were

¹⁰ Kevin Drew, *Law Allows Search, But Does Not Address Seizure of Cargo*, Law Center, CNN.COM, (Dec. 11, 2002, 2:48 PM EST), <http://archives.cnn.com/2002/LAW/12/11/missiles.legal/>.

¹¹ *Id.*

¹² Pauline Jelenik, *North Korean Ship Kang Nam Turns Around, World*, HUFFINGTON POST (June 30, 2009, 10:11 PM ET), http://www.huffingtonpost.com/2009/06/30/north-korean-ship-kang-na_n_223262.html.

¹³ *Id.*

¹⁴ Jennifer Griffin & Justin Fishel, *U.S. Military Tracking North Korean Ship Suspected of Proliferating Missiles, Nukes*, FOXNEWS.COM (June 18, 2009), <http://www.foxnews.com/politics/2009/06/18/military-tracking-north-korean-ship-suspected-proliferating-missiles-nukes/>.

¹⁵ See S.C. Res. 1874, U.N. Doc. S/Res/1874 (June 12, 2009).

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ Jelenick, *supra* note 13.

not disclosed, the *Kang Nam* unexpectedly returned to its North Korean port.²⁰ The vessel did not pull into any other port or enter any other nation's territorial waters, thereby preventing a legal search of the vessel.²¹

C. Growing Nuclear Threat

The incidents involving the *So San* and *Kang Nam* are significant because they illustrate the inability for states to uphold their obligations under international law to combat the sale and transfer of weapons of mass destruction, particularly between military dictatorships. This is particularly troublesome when applied to the threat of nuclear weapons. As Sharon Squassoni, Senior Associate in the Nonproliferation Program at the Carnegie Endowment for International Peace in Washington, stated while commenting on the *Kang Nam*, "It's frightening to contemplate nuclear cooperation between two military dictatorships, especially when the intentions and capabilities of the recipient [Myanmar] . . . in this case are so murky."²² The *Kang Nam* incident shows how ineffective the world community actually is in preventing the transfer of nuclear weapons between dictatorships, even when these transfers occur through the delivery of weapons on ships which pass through international waters.

However, the transfer of nuclear weapons between military dictatorships is just one problem. The potential transfer of these weapons to violent non-state actors is a concern that is just as critical. Graham Allison, director of Harvard University's Belfer Center for Science and International Affairs, put the illegal transfer of nuclear technology and materials into perspective for the security of the United States, stating "[a] nuclear 9/11 in Washington or New York would change American history in ways that [the original] 9/11 didn't. It would be as big a leap beyond 9/11 as 9/11 itself was beyond the pre-attack illusion that we were invulnerable."²³ This threat is beyond attacks on facilities and structures on land.

²⁰ *Id.*

²¹ *Id.*

²² Simon Roughneen, *Myanmar's N. Korea Ties Escape Scrutiny*, *World, News*, WASH. TIMES (Aug. 9, 2009), <http://www.washingtontimes.com/news/2009/aug/09/myanmars-ties-to-n-korea-escape-scrutiny/#>.

²³ Mary H. Cooper, *Nuclear Proliferation and Terrorism*, 14 CQ RESEARCHER ONLINE 297, 299 (Apr. 2, 2004), available at <http://library.cqpress.com/cqresearcher> (subscription required); see also Ellen Nakashima & Alan Sipress, *Insider Tells of Nuclear Deals and Cash*, WASH. POST, Feb. 21, 2004, at A1, available at http://www.washingtonpost.com/wp-dyn/articles/A59015-2004Feb20_2.html.

Post 9/11, Al-Qaeda is thought to have an interest in targeting the oceans, primarily trade ships and U.S. Navy vessels in East Asia.²⁴ From an economic standpoint, this exposes a great global vulnerability because ninety percent of the world's trade is transported by sea.²⁵ This vulnerability is even greater for the United States since it is one of the highest volume sea-trading nations on earth, making the peaceful use of the ocean a priority not just for U.S. national security, but for the U.S. economy as well.²⁶

The current trend shows that nuclear materials and technology are relatively easier to obtain. In 2003, A.Q. Kahn, the esteemed father of Pakistan's nuclear program, admitted to operating a black-market trade in nuclear technology.²⁷ Kahn's network involved manufacturers in countries like Malaysia and the United Arab Emirates and the governments of Libya, North Korea and Iran.²⁸ His confession showed the extent to which nuclear technology was infiltrating the black market, surprising most experts on "the level of commerce" involved in nuclear proliferation.²⁹ Since Kahn's admissions, fear of nuclear terrorism has dominated the international response and has created an internationally shared urgency to restrict the spread of nuclear technology and materials.³⁰

Although Malaysia and the United Emirates may be the leading manufacturers of nuclear technology now, security issues related to the source of nuclear technology became a concern during the breakup of the former Soviet Union at the end of 1991. After 1991, Russia no longer maintained centralized control over Soviet-era nuclear weapons because they were deployed in the territories of several former Soviet republics.³¹ Due to the deteriorating economic and security conditions of the 1990s, the former Soviet republics lacked the ability to account for and guard these nuclear weapons.³² This

²⁴ Caitlin Harrington, *Heightened Security: The Need to Incorporate Articles 3BIS (1)(A) and 8BIS (5)(E) of the 2005 Draft SUA Protocol Into Part VII of the United Nations Convention on the Law of the Sea*, 16 PAC. RIM L. & POL'Y J. 107, 136 (2007).

²⁵ U.N., OCEANS: THE SOURCE OF LIFE 13 (2002), available at http://www.un.org/Depts/los/convention_agreements/convention_20years/oceanssourceoflife.pdf.

²⁶ See *Table View, Liner Shipping Connectivity Index, Annual, 2004–2012*, U.N. CONF. ON TRADE & DEV. (1 Oct. 2012, 14:06:14), <http://unctadstat.unctad.org/TableView/tableView.aspx?ReportId=92>.

²⁷ Cooper, *supra* note 23, at 299.

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.* at 299-300.

³¹ AMY WOLF, CONG. RESEARCH SERV., RL 91144, NUCLEAR WEAPONS IN THE FORMER SOVIET UNION: LOCATION, COMMAND, AND CONTROL (1996), available at <http://www.fas.org/spp/starwars/crs/91-144.htm>.

³² Rensselaer Lee, *E-Notes: Nuclear Smuggling From the Former Soviet Union: Threats and Responses*, FOREIGN POL'Y RES. INST. (Apr. 27, 2001), <http://www.fpri.org/enotes/russia.20010427.lee.nuclearsmuggling.html>.

situation has led to theft and smuggling of Soviet nuclear materials.³³ These materials continue to support the market of criminal nuclear proliferation today.³⁴ Stanford nuclear physicist and arms control expert Wolfgang Panofsky stated that these nuclear materials pose a “clear and present danger to our national and international security.”³⁵ This statement was true when he made it in 1999 and it is true today as rogue nations and terrorist organizations continue to market in Soviet technology.³⁶

If the United States and the International Community are to limit the “spread” of nuclear technology, the Community must focus on how these materials are going to be transferred from one location to another. One preferred method, as illustrated by the *So San* and *Kang Nam I*, is via ship. Ship transport is an attractive choice because the ocean is large and difficult to monitor, considering that the ocean comprises seventy-one percent of the Earth’s surface,³⁷ or 139.5 million square miles.³⁸ Although the United States currently has the largest Navy in the world by tonnage and by scope of reach,³⁹ there are only 272 ships⁴⁰ to cover the world’s oceans. Even with the support of myriad international partners, it becomes increasingly clear that policing the world’s oceans is a difficult task.

Not only are there physical limitations to patrolling the world’s oceans, there are legal limitations as well. As will be discussed in detail below, ships have very limited authority to stop ships on the high seas, let alone seize their cargo.⁴¹ This gap in international law provided the basis for the *So San* and *Kang Nam* incidents. Despite the fact that over the years many laws and treaties have been written and agreed upon which seek to promote the peaceful and safe uses of the oceans, the *So San* and *Kang Nam* incidents demonstrate these laws do not provide security from the increasing threat of the proliferation of nuclear materials and technology. The deficiency that exists under current international law prevents law-abiding vessels from stopping or seizing the cargo of vessels

³³ *Id.*

³⁴ *Id.*

³⁵ Press Release, Stanford News Service, Leftover Nuclear Material Threatens International Security (Aug. 9, 1999), <http://news.stanford.edu/pr/94/940809Arc4166.html>.

³⁶ Lee, *supra* note 32.

³⁷ *Ocean*, NAT’L OCEANIC & ATMOSPHERIC ADMIN, <http://www.noaa.gov/ocean.html> (last visited Apr. 12, 2013).

³⁸ Michael Pidwirny, *Ocean*, ENCYCLOPEDIA OF THE EARTH (Feb. 28, 2013, 6:45 PM), <http://www.eoearth.org/article/Ocean>.

³⁹ Secretary Robert M. Gates, U.S. Dept. of Def., Address at the Naval War College (Apr. 17, 2009), <http://www.defense.gov/speeches/speech.aspx?speechid=1346>.

⁴⁰ *Status of the Navy*, U.S. NAVY (May. 12, 2016), http://www.navy.mil/navydata/nav_legacy.asp?id=146.

⁴¹ See United Nations Convention on the Law of the Sea art. 30, Dec. 10, 1982, 1833 U.N.T.S. 396 [hereinafter UNCLOS].

engaged in the illegal transfer of nuclear materials. Addressing this shortcoming will be essential to the security of the world as it looks to protect itself from the illegal transfer of nuclear materials to and from rogue nations and terrorist organizations operating throughout the world.

II. Existing Law

An understanding of current international law and how and why it developed *vis-à-vis* interdiction of ships on the high seas is essential to understanding how the problem illustrated by the *So San* and *Kang Nam* developed. It also helps in understanding why certain recommendations to change this deficiency may work and why others may not.

A. Customary International Law

Customary international law is defined in part as the “general practice” of States accepted as law.⁴² Three requirements must be met before a new international law becomes customary.⁴³ One, practice must be “general,” though not necessarily universal.⁴⁴ This means that not all states must accept the “general practice”⁴⁵ in order to meet this prong. Second, to be accepted as law, a nation must accept the “general practice” as legally binding upon itself domestically and internationally.⁴⁶ Lastly, these laws must exist and be practiced over a period of time.⁴⁷ When these elements are met, the “general practice” is considered binding upon all states.⁴⁸ This is distinct from treaty law which only binds those nations which are party to the treaty.⁴⁹

Considering the near universality that is required before a new legal concept can emerge, customary international law is often slow to change, especially given the third prong that the general practice of states must occur over a period of time. Additionally, since these practices are not written in a

⁴² Statute of the International Court of Justice art. 38, June 26, 1945, 59 Stat. 1031, 3 Bevans 1153 [hereinafter ICJ Statute].

⁴³ Michelle Kundmueller, *The Application of Customary International Law in U.S. Courts: Custom, Convention, or Pseudolegislation*, 28 J. LEGIS. 359, 362 (2002).

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*; see also SHABTAI ROSENNE, PRACTICE AND METHODS OF INTERNATIONAL LAW 55 (1984). The author defines customary international law as “rules of law derived from the consistent conduct of States acting out of the belief that the law required them to act that way.” *Id.* It follows that customary international law can be discerned by a “widespread repetition by States of similar international acts over time (state practice); Acts must occur out of sense of obligation (*opinio juris*); Acts must be taken by a significant number of States and not be rejected by a significant number of States.” *Id.*

single document, it is nearly impossible to prove and can be easily refuted by other sources to the contrary, leaving it unreliable as a source of clear legal precedent or application. Currently, there is no customary international law established that addresses the issue of nuclear proliferation. Although the United States is working to change customary international law with efforts such as the Proliferation Security Initiative,⁵⁰ those efforts may not be enough. Even if those efforts are enough to begin the process, actual change in customary international law will be slow.

B. Convention on the High Seas and United Nations Convention on Law of the Sea

The Convention on the High Seas, which was signed on 29 April 1958 and entered into force on 30 September 1962, began the process to memorialize and promote orderly and peaceful use of the world's oceans.⁵¹ That treaty led to further negotiations, which eventually led to the United Nations Convention on the Law of the Sea (UNCLOS), which opened for signature on 10 December 1982 and entered into force on 16 November 1994.⁵² The preamble to UNCLOS demonstrates the desire of the negotiating powers "to codify the rules of international law relating to the high seas."⁵³ Prior to these treaties, the world relied upon customary international law to dictate the law of the seas. Now, those laws are codified as part of international law.

The United States has never ratified UNCLOS; however, it follows most of its provisions. In 1983, the Reagan Administration expressed reservations about some aspects of the Convention,⁵⁴ which are unrelated to the topic of this paper. In particular, the Reagan administration opposed some provisions related to deep seabed mining.⁵⁵ Nonetheless, President Reagan indicated the United States would follow all other provisions of UNCLOS, including those relating to international navigation and the rights and duties of coastal states, as these provisions were customary international law and thus binding on all states.⁵⁶

As stated above, UNCLOS codified many aspects of customary international law. One of these aspects is in defining areas of the oceans and the

⁵⁰ See *infra* Part IV.B.

⁵¹ U.N. Convention on the High Seas pmbl., Apr. 29, 1958, 13 U.S.T. 2312, 450 U.N.T.S. 82.

⁵² UNCLOS, *supra* note 41.

⁵³ *Id.* pmbl.

⁵⁴ Statement on Oceans Policy, 19 WEEKLY COMP. PRES. DOC. 383 (Mar. 10, 1983), available at <http://www.oceanlaw.org/downloads/references/reagan/ReaganOceanPolicy-1983.pdf>.

⁵⁵ *Id.*

⁵⁶ Proclamation No. 5030, 48 Fed. Reg. 10,605 (Mar. 14, 1983), available at <http://www.archives.gov/federal-register/codification/proclamations/05030.html>.

jurisdiction and rights of nations within these areas or zones.⁵⁷ There are four zones defined in UNCLOS.⁵⁸ First, the Convention defines the territorial sea as encompassing those areas within twelve nautical miles from a coastal state's baselines.⁵⁹ This means the sovereignty of the coastal state extends into the territorial sea and the coastal nation has the right to set laws within those waters, as long as those laws do not conflict with other articles of the Convention.⁶⁰ It is also important to note that the ports of the coastal nation are, by definition, internal waters of the nation,⁶¹ giving coastal nations the right to regulate those ports.⁶² Most states recognize that if a foreign-flagged vessel voluntarily enters the port or internal waters of a coastal state, the vessel is fully subject to the administrative, civil, and criminal jurisdiction of the coastal state, absent agreement to the contrary.⁶³ In order to administer its laws, port states are allowed to inspect foreign vessels while in port.⁶⁴ If violations are discovered, the port state may undertake certain enforcement proceedings, including detention of the violating vessel.⁶⁵ Warships and government ships operated for non-commercial purposes enjoy the right of sovereign immunity and are not subject to search; nothing in the Convention affects these rights.⁶⁶ A warship or government vessel can be asked to leave a port if it does not comply with port laws or regulations; however, it is not required to submit to search.⁶⁷

The fact that a port state can inspect a foreign vessel is significant to the *Kang Nam* incident because it is the most likely reason the ship did not visit any ports after it left North Korea. Had the *Kang Nam* visited any port, the port nation could have searched the ship as a condition of port entry. However, under UNCLOS, all States enjoy the right of innocent passage.⁶⁸ This means that a ship may, subject to certain limitations, traverse the territorial sea without entering the internal waters or ports of the coastal State.⁶⁹ Since the ship was too small to make it all the way to Myanmar without stopping to refuel, this was most likely the ship's only option.

⁵⁷ UNCLOS, *supra* note 41, arts. 2–11, 55–58, 76–78.

⁵⁸ *Id.*

⁵⁹ *Id.* arts. 2–4.

⁶⁰ *Id.* arts. 2–3.

⁶¹ *Id.* art. 8 (defining internal waters as the waters on the landward side of the baseline of the territorial sea); *id.* art. 11 (defining ports as permanent harbor works that form an integral part of the harbor system and because of this nature are regarded as forming part of the coast).

⁶² *Id.* arts. 2–3.

⁶³ *Wildenhus' Case*, 120 U.S. 1, 11 (1887).

⁶⁴ UNCLOS, *supra* note 41, art. 11.

⁶⁵ *Id.* arts. 218, 220.

⁶⁶ *Id.* art. 32.

⁶⁷ *Id.* art. 30.

⁶⁸ *Id.* art. 17.

⁶⁹ *Id.* arts. 18–19.

The second type of area (or zone) is the contiguous zone, defined as twelve to twenty-four nautical miles beyond the territorial sea of the coastal nation.⁷⁰ In this zone, a coastal nation is limited to making and enforcing laws related to pollution, taxation, customs, and immigration.⁷¹ The third type is an exclusive economic zone, which is defined as the zone 200 nautical miles from the baseline, where the coastal nation has the exclusive right to manage the natural resources within this territory.⁷² Foreign nations have the freedom of navigation and over-flight in this zone, subject to limited regulations of the coastal states.⁷³

Finally, any part of the sea that is not considered part of the exclusive economic zone, contiguous zone, or territorial sea of a State is considered the High Seas.⁷⁴ UNCLOS states that all nations have the right to sail the high seas, thereby preserving the freedom of navigation for all states.⁷⁵ All ships must fly the flag of one nation and be subject to the exclusive jurisdiction of that state and nations have the right to grant its nationality to ships in order to limit stateless ships.⁷⁶ Flag states have the right to set the requirements for how ships become registered with that state.⁷⁷ UNCLOS only requires that the ship have some connection to the flag state but does not set any parameters or dictate what the minimum connections or ties should be.⁷⁸ If a ship fails to fly the flag of a state, UNCLOS provides that the flagless ship may be boarded and searched.⁷⁹ This was the legal justification that the Spanish authorities used to stop the *So San*. As noted previously, the Spanish authorities were unable to identify its flag and the documentation verifying its nationality was not in order.⁸⁰

Generally speaking, UNCLOS limits any state from extending its sovereignty into the high seas and prevents states from exerting control over other state vessels on the high seas in an effort to preserve the freedom of the oceans.⁸¹ There are, however, exceptions. Under UNCLOS, nations can search and seize any vessel engaged in acts of piracy or slave trade, regardless of flag.⁸²

⁷⁰ *Id.* art. 31.

⁷¹ *Id.* art. 33.

⁷² *Id.* arts. 55–57.

⁷³ *Id.* arts. 55–58.

⁷⁴ *Id.* art. 86.

⁷⁵ *Id.* arts. 87, 90.

⁷⁶ *Id.* arts. 91, 92.

⁷⁷ *Id.* art. 91.

⁷⁸ *Id.*

⁷⁹ *Id.* art. 110.

⁸⁰ Tony Karon, *SCUD Seizure Raises Tricky Questions, World*, TIME (Dec. 11, 2002), <http://www.time.com/time/world/article/0,8599,398592,00.html>.

⁸¹ *Id.* art. 89.

⁸² *Id.* arts. 99, 100, 105.

C. International Maritime Organization

The International Maritime Organization (IMO) was established in 1948 as a specialized agency of the United Nations⁸³ and is currently composed of 170 member states.⁸⁴ Its stated goal is to develop and maintain a comprehensive regulatory framework for shipping on the world's oceans.⁸⁵ The umbrella of the IMO has broadened to include matters involving safety, environmental concerns, maritime security, and efficient shipping.⁸⁶

The IMO has sponsored various conventions which have produced guidelines to meet its stated goals. Two of the most important of these conventions overall are the Safety of Life at Sea Convention (SOLAS) of 1974⁸⁷ and the International Convention for the Prevention of Pollution From Ships of 1973, as modified by the Protocol of 1978 (MARPOL 73/78).⁸⁸ More specifically, the transport of dangerous goods by sea, including nuclear materials, is governed by chapter VII of SOLAS and the International Maritime Dangerous Goods (IMDG) Code.⁸⁹

SOLAS has been amended several times to enhance the safety of maritime trade.⁹⁰ In 1982, the Paris Memorandum of Understanding (Paris MoU) amended SOLAS to extend regulations and guidelines established by SOLAS.⁹¹ The Paris MoU established Port State Control which allows port states to search foreign flagged vessels in order to ensure that the vessel is complying with guidelines established under various international conventions, including SOLAS and MARPOL.⁹² In 2007 alone, Port State Control officials

⁸³ *About IMO*, IMO, <http://www.imo.org/About/Pages/Default.aspx> (last visited Apr. 18, 2014).

⁸⁴ *Membership*, IMO, <http://www.imo.org/About/Membership/Pages/Default.aspx> (last visited Apr. 18, 2014).

⁸⁵ *About IMO*, IMO, *supra* note 83.

⁸⁶ *Id.* For additional background information on the IMO, see MYRON H. NORDQUIST & JOHN NORTON MOORE, CTR. FOR OCEANS LAW AND POL'Y, CURRENT MARITIME ISSUES AND THE INTERNATIONAL MARITIME ORGANIZATION (1999).

⁸⁷ International Convention for the Safety of Life at Sea, Nov. 1, 1974, 1184 U.N.T.S. 3.

⁸⁸ International Convention for the Prevention of Marine Pollution from Ships, 1973, as modified by the Protocol of 1978, Feb. 17, 1978, 17 I.L.M. 546.

⁸⁹ Hartmut Hesse, Mar. Safety Div., Int'l Mar. Org. [IMO], *IMO Requirements Related To The Maritime Transport of Nuclear Materials, In Particular Developments Related To Radioactive Waste, Status and Future Activities*, Sci. Forum during the 44th Int'l Atomic Energy Agency Gen. Conference (Sep. 20, 2000), available at <http://www.iaea.org/About/Policy/GC/GC44/SciProg/hesse.pdf>.

⁹⁰ See *infra* note 98.

⁹¹ Paris Memorandum of Understanding on Port State Control, Jan. 16, 1982, 21 I.L.M. 1 [hereinafter Paris MoU].

⁹² *Id.*; NORDQUIST & MOORE, *supra* note 86, at 98–99.

uncovered nearly 75,000 deficiencies and detained over 1,200 vessels.⁹³ These provisions are clearly important beyond the transfer of nuclear materials.

SOLAS was strengthened even further in 2002 when the International Ship and Port Facility Security (ISPS) Code was adopted as an amendment to SOLAS.⁹⁴ ISPS was specifically developed “in response to the perceived threats to ships and port facilities in the wake of the 9/11 attacks in the United States.”⁹⁵ ISPS requires most ships and port facilities engaged in international trade to establish and maintain strict security procedures.⁹⁶ However, one of the key deficiencies of the Paris MoU and ISPS is that the right to search a vessel is conditioned upon the vessel’s entry into the port of the coastal state conducting the search.⁹⁷ A ship seeking to avoid search could simply choose to bypass the port of a country seeking to search it, just as the *Kang Nam* did.

Another deficiency with SOLAS is that regulations are written to protect safety of life at sea. As such, regulations focus on how to carry the materials rather than who may carry them. In November of 1993, IMO adopted the Code for the Safe Carriage of Irradiated Nuclear Fuel, Plutonium and High Level Radioactive Waste in Flasks on Board Ships (INF Code) as a recommended supplement to SOLAS.⁹⁸ Its purpose is “[t]o supplement the

⁹³ Paris Memorandum of Understanding on Port State Control, *Annual Report*, 22–23 (2007), available at <https://www.parismou.org/Content/PublishedMedia/cab1f247-2507-4fab-a4db-6c5ac1cf8957/Annual%20report%202007.pdf>.

⁹⁴ International Maritime Organization Conference of Contracting Government to the International Convention for the Safety of Life at Sea, 1974, *Consideration and Adoption of the International Ship and Port Facility Security (ISPS) Code*, Annex 1, IMO Doc. SOLAS/CONF.5/34 (Dec. 12, 2002) [hereinafter *ISPS Code*].

⁹⁵ *FAQ on ISPS Code and Maritime Security*, IMO, http://www.imo.org/Newsroom/mainframe.asp?topic_id=897#what (last visited Apr. 12, 2013).

⁹⁶ See *ISPS Code*, *supra* note 94.

⁹⁷ *Id.*; Paris MoU, *supra* note 91.

⁹⁸ IMO, *Code for the Safe Carriage of Irradiated Nuclear Fuel, Plutonium, and High-Level Radioactive Waste in Flasks on Board Ships*, IMO Assemb. Res. A.748(18) (Nov. 4, 1993), available at [http://www.imo.org/blast/blastDataHelper.asp?data_id=22597&filename=A748\(18\).pdf](http://www.imo.org/blast/blastDataHelper.asp?data_id=22597&filename=A748(18).pdf). The Code has been adopted as mandatory under SOLAS. IMO, *Adoption of the International Code for the Safe Carriage of Packaged Irradiated Nuclear Fuel, Plutonium and High-Level Radioactive Wastes on Board Ships (INF Code)*, Mar. Safety Comm. Res. MSC.88(71) (27 May 1999), available at [http://www.imo.org/blast/blastDataHelper.asp?data_id=15456&filename=88\(71\).pdf](http://www.imo.org/blast/blastDataHelper.asp?data_id=15456&filename=88(71).pdf); IMO, *Adoption of Amendments to the International Convention for the Safety of Life at Sea, 1974, as Amended*, Mar. Safety Comm. Res. MSC.87(71) (27 May 1999), available at [http://www.imo.org/blast/blastDataHelper.asp?data_id=22597&filename=A748\(18\).pdf](http://www.imo.org/blast/blastDataHelper.asp?data_id=22597&filename=A748(18).pdf). It has also been amended several times. IMO, *Adoption of Amendments to the International Code for the Safe Carriage of Packaged Irradiated Nuclear Fuel, Plutonium and High-Level Radioactive Wastes on Board Ships (INF)*, Mar. Safety Comm. Res. MSC.241(83) (12 Oct. 2007), available at [http://www.imo.org/blast/blastDataHelper.asp?data_id=20458&filename=241\(83\).pdf](http://www.imo.org/blast/blastDataHelper.asp?data_id=20458&filename=241(83).pdf); IMO, *Adoption of Amendments to the International Code for the Safe Carriage of Packaged Irradiated Nuclear Fuel, Plutonium and High-Level Radioactive Wastes on Board Ships (INF)*, Mar. Safety Comm. Res. MSC.135(76) (12 Dec. 2002), available at

efforts in assuring the safe transport of nuclear materials and, in particular radioactive waste, . . . [and it] is considered a major contribution towards the environmentally safe transport of these materials by sea.”⁹⁹ Until IMO expands regulations to limit who is qualified to transport nuclear materials, SOLAS will be ineffective in prohibiting the illegal transfer of nuclear material and technology on the high seas.

D. U. S. Domestic Criminal Law

Title VIII of the Uniting Strengthening America by Fulfilling Rights and Ensuring Effective Discipline Over Monitoring Act of 2015 or the USA FREEDOM Act amended Title 18 of the United States Code by creating a new crime entitled “Violence against maritime navigation and maritime transport involving weapons of mass destruction.”¹⁰⁰ On its face, this new section, 18 U.S. Code §2280a, would appear to address the concern raised by this paper. National level prosecutions of crimes, however, are not without limitations and the jurisdictional statement of §2280a is no different. §2280a(b) includes the jurisdictional requirements for the crime of Maritime Transport involving Weapons of Mass Destruction.¹⁰¹ Congress has limited jurisdiction to those where there is a direct connection to United States vessels,¹⁰² nationals,¹⁰³ territory including territorial seas,¹⁰⁴ and national security interests.¹⁰⁵ This jurisdictional limitation of this new crime would not address the issue raised in this paper.

III. Shortcomings in the Law

A. Flag State Issues

Although seemingly comprehensive in nature, the treaties, laws, regulations, and guidelines just described still have many deficiencies in meeting the threat of the illicit transfer of nuclear weapons. As previously

[http://www.imo.org/blast/blastDataHelper.asp?data_id=15505&filename=135\(76\).pdf](http://www.imo.org/blast/blastDataHelper.asp?data_id=15505&filename=135(76).pdf); IMO, *Adoption of Amendments to the International Code for the Safe Carriage of Packaged Irradiated Nuclear Fuel, Plutonium and High-Level Radioactive Wastes on Board Ships (INF)*, Mar. Safety Comm. Res. MSC.118(74) (6 June 2001), available at [http://www.imo.org/blast/blastDataHelper.asp?data_id=15487&filename=118\(74\).pdf](http://www.imo.org/blast/blastDataHelper.asp?data_id=15487&filename=118(74).pdf). However, it remains inadequate on this issue.

⁹⁹ Hesse, *supra* note 89, at 3.

¹⁰⁰ Title VIII, USA FREEDOM Act, H.R. 2048, Section 801 et. seq. June 2015.

¹⁰¹ Title VIII, USA FREEDOM Act, H.R. 2048, Section 802

¹⁰² *Id.* at 18 U.S.C. §2280a(b)(1)(A)(i).

¹⁰³ *Id.* at 18 U.S.C. §2280a(b)(1)(A)(iii) and (b)(1)(B).

¹⁰⁴ *Id.* at 18 U.S.C. §2280a(b)(1)(A)(ii), (b)(1)(C) and (b)(2).

¹⁰⁵ *Id.* at 18 U.S.C. §2280a(b)(3).

stated, UNCLOS provides that a ship may be boarded and searched if it is flagless; however, UNCLOS is silent as to permissible actions the vessel, who is conducting the search, may do if and when contraband is found onboard the flagless vessel.¹⁰⁶ This omission was highlighted during the *So San* incident. Under international law, Spain properly stopped the *So San* for not having the proper identifying marks indicating nationality.¹⁰⁷ Likewise, the search was proper for the same reasons.¹⁰⁸ Problems developed when Spain discovered fifteen SCUD missiles in various containers.¹⁰⁹ Considering that there was no documentation for the SCUD missiles and that the missiles were found concealed under thousands of bags of concrete, the actions of *So San* were suspicious at best and illegal at worst.¹¹⁰ Despite this evidence, the ship was released in the end because there was no legal authority to seize the missiles.¹¹¹

Another issue with UNCLOS relates to the rights of nations to sail ships flying their flag.¹¹² However, UNCLOS is unclear as to how much of a link the ship has to have to the flag State for the country to grant the ship the right to fly its flag under its registry.¹¹³ Myron H. Nordquist, author of *The United Nations Convention on the Law of the Sea: A Commentary*, describes “nationality” as signifying only a “legal connection” between the ship and its state of registry and rejects any analogy to the nationality of individuals.¹¹⁴ Because the standard is so low for establishing “nationality” for a ship, a concern exists that many countries would allow ships to join their registries strictly to collect the fees without knowing exactly what cargos the vessels may be carrying or what the intentions of the crews may be. This practice is known as operating under a flag of convenience.¹¹⁵ In 1997, it was estimated that half of the entire world's merchant fleet operated under flags of convenience.¹¹⁶

Under current international law, only the flag states have the right to stop and search a vessel engaged in freedom of navigation on the high seas.¹¹⁷ Non-flag state vessels have limited rights to stop a ship, for example in instances

¹⁰⁶ See *supra* Part II.B.

¹⁰⁷ Drew, *supra* note 10.

¹⁰⁸ *Id.*

¹⁰⁹ Karon, *supra* note 1.

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² UNCLOS, *supra* note 41, art. 90.

¹¹³ *Id.* art. 91.

¹¹⁴ MYRON H. NORDQUIST ET AL., CTR. FOR OCEANS LAW AND POL'Y, UNITED NATIONS CONVENTION ON THE LAW OF THE SEA 1982: A COMMENTARY 106 (1995).

¹¹⁵ *Shipping: Flags of Peace?* ECONOMIST, Sept. 13, 2003, at 57, available at http://www.economist.com/node/2054796?story_id=E1_NDVQJG.

¹¹⁶ *Id.*

¹¹⁷ See *id.* art. 92 (stating that ships shall be subject to the exclusive jurisdiction of their flag state when on the high sea).

of slave trade and piracy.¹¹⁸ There are no provisions under UNCLOS for stopping and searching a vessel on the high seas when a ship is suspected of engaging in maritime terrorism or nuclear proliferation without flag State consent.¹¹⁹ This creates a huge maritime safety concern by giving illegal traffickers a shield to protect their operations while flying flags of convenience.¹²⁰

B. Freedom of Navigation

Under UNCLOS, all nations have the right to sail the high seas.¹²¹ It preserves these basic freedoms by limiting nations from extending their sovereignty into high seas and prevents nations from exerting control over other nations' vessels engaged in the freedom of navigation, especially on the high seas.¹²² In fact, an analysis of the laws related to the territorial sea shows that the only real authority a coastal State has over a foreign vessel is when that vessel enters one of its ports. This legal structure creates two issues. First, it prevents a coastal nation from protecting its exclusive economic zone and territorial sea from the proliferation of illegal nuclear weapons because the legal structure created by UNCLOS does not include the authority for coastal nations to board vessels that do not fly the coastal nation's flag in either of these zones. Second, this legal structure allows a suspect vessel to enter the coastal nation's port before a coastal nation can search the vessel, giving that vessel the ability to unload its cargo within the country. If the suspect vessel is carrying nuclear cargo, the people on board have the opportunity to use the nuclear materials within a close proximity to the shore. This legal structure does not sufficiently restrict the ability of bad actors to gain unfettered access to the ports of coastal nations.

Although freedom of navigation on the high seas is generally sacrosanct, it does have some limitations, albeit small ones. In 1982, when the treaty opened for signature, UNCLOS was forward thinking enough to provide search exemptions for some universally recognized crimes, such as piracy and slave trade.¹²³ Weapons of mass destruction (WMDs), by contrast, were not the same kind of concern at the time UNCLOS was opened for signature and, more specifically, concern about the portability of WMDs was not at the level of awareness that it has become post 11 September 2001.¹²⁴ The Convention fails

¹¹⁸ UNCLOS, *supra* note 41, art. 110.

¹¹⁹ *See id.*

¹²⁰ Harrington, *supra* note 24, at 136.

¹²¹ *See* UNCLOS, *supra* note 41.

¹²² *Id.* art. 89.

¹²³ *Id.* art. 110.

¹²⁴ *See, generally*, Woolf, Amy F. "Nonstrategic Nuclear Weapons" Congressional Research Service, February 23, 2015, available at: fas.org/sgp/crs/nuke/RL32572.pdf.

to provide any board and search exemptions for the illegal transfer of nuclear weapons or materials. Although trafficking in nuclear technology is not a current exemption under UNCLOS, the fact that there exemptions exist for certain universally recognized crimes sets a precedent that could be used to address the concern raised in this paper. The issue, which will be described below, is the ability to amass a coalition large and willing enough to change the current law.

C. Treaty Law and International Agreements

One way to change the law is to change or enact new treaties; however, treaties are very limited in effect, because they only bind the parties which have agreed to be bound. The Treaty on the Non-Proliferation of Nuclear Weapons (NPT) was opened for signature on 1 July 1968,¹²⁵ and 190 states are now parties to it.¹²⁶ The treaty seeks to prevent the proliferation of nuclear weapons and promotes nuclear disarmament and the peaceful uses of nuclear energy.¹²⁷ It also provides mechanisms for preventing the peaceful uses of nuclear materials from being converted into military or offensive weapons.¹²⁸

Under the NPT, States possessing nuclear weapons are prevented from “transferring nuclear weapons or other nuclear explosive devices.”¹²⁹ Additionally, nations may not “assist, encourage, or induce a state without nuclear weapons to acquire nuclear weapons.”¹³⁰ Nations without nuclear weapons may not receive, manufacture, or acquire nuclear weapons or receive assistance from any nation to do so.¹³¹ Additionally, parties agree to allow for the monitoring of their nuclear technology to ensure that peaceful uses are not converted into non-peaceful uses.¹³²

While the treaty is incredibly useful, it does have several problems. First, all nations are not a party to the NPT. In particular, North Korea withdrew from the treaty in 2003 and is no longer a party.¹³³ This is significant since

¹²⁵ Treaty on the Non-Proliferation of Nuclear Weapons, July 1, 1968, 21 U.S.T. 483, 729 U.N.T.S. 161 [hereinafter NPT].

¹²⁶ *Treaty on the Non-Proliferation of Nuclear Weapons, Disarmament Treaties Database*, UNITED NATIONS OFFICE OF DISARMAMENT AFFAIRS, <http://disarmament.un.org/treaties/t/npt> (last visited 23 Apr. 2013).

¹²⁷ NPT, *supra* note 125, pmbl.

¹²⁸ *Id.*

¹²⁹ *Id.* art. I.

¹³⁰ *Id.*

¹³¹ *Id.* art. II.

¹³² *Id.* art. III.

¹³³ *Democratic People’s Republic of Korea, Accession to the Treaty on the Non-Proliferation of Nuclear Weapons*, UNITED NATIONS OFFICE OF DISARMAMENT AFFAIRS, <http://disarmament.un.org/treaties/t/npt> (last visited 23 Apr. 2013).

North Korea is one of the largest traffickers in nuclear weapons and technology.¹³⁴ Second, the enforcement mechanisms for reducing proliferation of nuclear weapons are ineffective and need reform. The International Atomic Energy Agency (IAEA) is responsible for monitoring the use of nuclear materials under the NPT; however, the organization has been unsuccessful in such high profile matters such as Iran's development of nuclear technology.¹³⁵ The IAEA has attempted to monitor Iran's enrichment of uranium and development of nuclear technology but has been continually rebuked as Iran continues its pursuit of nuclear technology.¹³⁶

On July 14, 2015, the P5+1, the European Union, and Iran entered into a multilateral agreement called "a Joint Comprehensive Plan of Action" or JCPOA.¹³⁷ The purpose of this agreement was "to ensure that Iran's nuclear program will be exclusively peaceful."¹³⁸ The plan became effective and participants began to implement their JCPOA commitments on October 18, 2015.¹³⁹ There were also related concerns about Iran's development of ballistic missiles as the means of delivery for nuclear warheads¹⁴⁰ as early as 2010, when the U.N. Security Council passed Resolution 1929 prohibiting Iran from undertaking "any activity related to ballistic missiles capable of delivering nuclear weapons..."¹⁴¹ It remains to be seen whether the JCPOA will be an effective mechanism for enforcement.

In addition to ineffective enforcement agencies, the NPT fails to address the role of non-state actors in nuclear proliferation.¹⁴² The NPT has been in effect for forty years yet nuclear proliferation is becoming an increasing concern. This is due in part to the treaty focusing mainly on state rather than non-state actors. It was designed to prevent the illegal transfer of nuclear technology and weapons between States only. Today, there is a concern about

¹³⁴ See Andrew Coe, *North Korea's New Cash Crop*, WASH. Q., Summer 2005, at 73 (2005).

¹³⁵ Mark Heinrich, *IAEA Votes to Censure Iran Over Nuclear Cover Up*, REUTERS (Nov. 27, 2009, 5:53 PM EST), <http://www.reuters.com/article/worldNews/idUSTRE5AQ1BZ20091127>.

¹³⁶ *Id.*

¹³⁷ "Joint Comprehensive Plan of Action." Office of the Under Secretary for Economic Growth, Energy, and the Environment, Department of State. Accessed at: <http://www.state.gov/e/eb/tfs/spi/iran/jcpoa/>

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ Bedell, Zoe "What has Iran Done Now? A Primer on Recent Iranian Missile Tests and Sanctions." LawFare, Brookings Institution, January 4, 2016. Accessed at: <https://www.lawfareblog.com/what-has-iran-done-now-primer-recent-iranian-missile-tests-and-sanctions#>

¹⁴¹ Paragraph 9, Resolution 1929, United Nations Security Council, Adopted June 9, 2010.

¹⁴² See NPT, *supra* note 125.

the transfer of nuclear technology and weapons between States and non-State actors, such as terrorist organizations, and the NPT is silent on this issue.

The biggest problem with the NPT is there is no explicit authority to stop ships on the high seas engaged in the illegal trade of nuclear materials and technology. States are encouraged not to facilitate or allow the spread of nuclear technology for non-peaceful uses.¹⁴³ There are no enforcement provisions to guide signatories on how to stop signatories that do not comply. Not to mention, the NPT is completely powerless against non-signatories such as North Korea and non-state actors. Encouraging member nations to adopt domestic laws to prosecute this crime would be a good start but this would lead to inconsistent application amongst States. Therefore, the only way to fix this issue is to incorporate initiatives to interdict ships at sea into current international legal regimes.

D. Sovereign Immunity

Sovereign immunity is another limiting principle under international law. Under this principle, government vessels, including warships, are exempt from the legal jurisdiction of any state.¹⁴⁴ The exemption from jurisdiction is codified under article 32 of UNCLOS, which grants immunity to “warships and other government ships operated for non-commercial purposes.”¹⁴⁵ Jurisdiction is also discussed under articles 95 and 96 of the Convention. Article 95 states that “warships on the high seas have complete immunity from the jurisdiction of any state other than the flag states.”¹⁴⁶ To alleviate any doubt as to what a warship is and whether the immunity applies to all government ships,¹⁴⁷ Article 96 states that “ships owned and operated by a state and used only on government noncommercial service shall, on the high seas, have complete immunity from the jurisdiction of any state other than the flag state.”¹⁴⁸

The sovereign immunity of government vessels limits the extent to which vessels on the high seas can be searched. Consider the scenario in which a rogue nation seeks to engage in the illegal trade or transfer of nuclear materials. The plain reading of UNCLOS would prevent the rogue nation’s “government vessel” from being searched. This is especially true when read in the context of the Vienna Convention on the Law of Treaties.¹⁴⁹ The Vienna

¹⁴³ NPT, *supra* note 126, art. I.

¹⁴⁴ Ingrid Delupis, *Foreign Warships and Immunity for Espionage*, 78 AM. J. INT’L L. 53, 54 (1984).

¹⁴⁵ UNCLOS, *supra* note 41, art. 32.

¹⁴⁶ *Id.* art. 95.

¹⁴⁷ Article 29 defines what a warship is and distinguishes it from a vessel owned and operated by the State using it for non-commercial purposes. *Id.* art. 29.

¹⁴⁸ *Id.* art. 96.

¹⁴⁹ Vienna Convention on the Law of Treaties art. 31(1), May 23, 1969, 1155 U.N.T.S. 331.

Convention puts forth the principle that international instruments are to be interpreted in “accordance with the ordinary meaning given to the terms of the treaty in their context and in light of its object and scope.”¹⁵⁰ This interpretation was supported by the International Court of Justice in *The Competence of the General Assembly for the Admission of a State to the United Nations* case.¹⁵¹ In that case, the ICJ noted “the first duty of a tribunal which is called upon to interpret and apply the provisions of a treaty is to endeavor to give effect to them in their natural and ordinary meaning in the context in which they occur.”¹⁵²

IV. Efforts to Address Legal Shortcomings

A. Suppression of Unlawful Acts Against the Safety of Maritime Navigation

The international community has made a few attempts to address the issues discussed above. One of them was the 2005 Protocol¹⁵³ amending the 1988 Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (SUA Convention).¹⁵⁴ The SUA Convention was originally written in response to a “[c]oncern about unlawful acts which threaten[ed] the safety of ships and the security of their passengers and crews grew during the 1980s.”¹⁵⁵ During this time crews were kidnapped; ships hijacked, deliberately run aground, or blown up by explosives; and passengers were threatened and sometimes killed. At the time, the threat of nuclear proliferation, as outlined above, was not the focus of the world community and therefore, it was not addressed in the drafting of the SUA Convention.

The 2005 Protocol sought to address the issue of terrorism. It spelled out specific goals:

The new nonproliferation offenses strengthen the international legal basis to impede and prosecute the trafficking of WMD, their delivery systems and related materials on the high seas in commercial ships by requiring state parties to criminalize such transport. These transport

¹⁵⁰ *Id.*

¹⁵¹ Advisory Opinion, 1950 I.C.J. 4 (3 Mar.).

¹⁵² *Id.* at 8.

¹⁵³ Protocol of 2005 to the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, Oct. 14, 2005, S. TREATY DOC. NO. 110-8, IMO Leg/Conf.15/21 [hereinafter Protocol to the SUA Convention].

¹⁵⁴ Convention on the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, Mar. 10, 1988, S. TREATY DOC. NO. 101-1, 1678 U.N.T.S. 221.

¹⁵⁵ *Id.* art 3.

offenses are subject to specific knowledge and intent requirements that ensure the protection of legitimate trade and innocent seafarers. . . .

The new counterterrorism offenses criminalize the use of a ship or a fixed platform to intimidate a population or compel a Government or international organization, including when: (1) explosive, radioactive material or a biological, chemical or nuclear weapon is used against, on or discharged from a ship or fixed platform; (2) certain hazardous or noxious substances are discharged from a ship or fixed platform; or (3) any other use is made of a ship in a manner that may lead to or causes death, serious injury or damage. The SUA Protocol also criminalizes transport of fugitives who have committed an offense under the 12 UN terrorism conventions and protocols.

The ship boarding provisions establish a comprehensive set of procedures and protections designed to facilitate the boarding of a vessel that is suspected of being involved in a SUA offense. Consistent with existing international law and practice, SUA boardings can only be conducted with the express consent of the flag state. In addition to eliminating the need to create time-consuming ad hoc boarding arrangements when facing the immediacy of ongoing criminal activity, the ship boarding provisions provide robust safeguards that ensure the protection of innocent seafarers.¹⁵⁶

Article 3*bis* of the 2005 Protocol prohibits using a ship as a weapon, targeting a ship, or using a ship as a means of transporting terrorist material.¹⁵⁷ Further, article 8*bis* of the 2005 Protocol outlines a set of procedures for non-flag state ships to enforce article 3*bis*.¹⁵⁸ Under this legal scheme, flag state consent is unnecessary in order to board a vessel. A flag state can give consent for another signatory to the Protocol to search a suspect vessel under several circumstances.¹⁵⁹ However, it is important to remember that this legal scheme applies only to signatories of the Protocol and there are only 106 signatories to the 2005 Protocol. While SUA and the 2005 Protocol provide a useful tool in

¹⁵⁶ Bureau of Int'l Sec. and Nonproliferation, *Fact Sheet, Protocols to the United Nations Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (SUA)*, U.S. DEP'T ST. (Oct. 21, 2005), <http://2001-2009.state.gov/t/isn/rls/fs/58322.htm>.

¹⁵⁷ Protocol to the SUA Convention, *supra* note 153, art. 3*bis*.

¹⁵⁸ *Id.* art. 8*bis*.

¹⁵⁹ *Id.* art. 3*bis*.

combating terrorism, non-signatories can sail their vessels without fear of having their cargo seized, such was the case with the *Kang Nam*. Had North Korea been a signatory to the Convention, USS *John S. McCain* could have stopped the vessel. Without the consent of North Korea, USS *John S. McCain* was left powerless and could only monitor the *Kang Nam*'s movement.

B. Proliferation Security Initiative

To address these shortcomings, President George W. Bush announced the Proliferation Security Initiative (PSI) in May 2003 in Poland.¹⁶⁰¹⁶¹ Participants in PSI are asked to support the Statement of Interdiction Principles.¹⁶² The guiding principle of the PSI is to impede and stop the flow of nuclear proliferation to and from states and non-state actors "consistent with national legal authorities and relevant international law and frameworks, including the U.N. Security Council."¹⁶³

The Statement calls on participating states to pursue PSI's overall objective by committing to:

Undertake effective measures, either alone or in concert with other states, for interdicting the transfer or transport of WMD . . . and related materials

Adopting streamlined procedures for rapid exchange of relevant information concerning suspected proliferation activity

Review and work to strengthen their relevant national legal authorities where necessary to accomplish these objectives

Take specific actions in support of interdiction efforts regarding cargoes of WMD . . . or related materials¹⁶⁴

¹⁶⁰ See DAVID G HODGES, 19 OCEAN & COASTAL L.J. 189, HIGH SEAS AND HIGH RISKS: PROLIFERATION IN A POST-9/11 WORLD, 2014 available at

<http://oclj.maine.gov/vol-19-no-2/proliferation-post-911-world/>

¹⁶¹ President George W. Bush, Remarks by the President to the People of Poland (31 May 2003), <http://georgewbush-whitehouse.archives.gov/news/releases/2003/05/20030531-3.html>.

¹⁶² Fact Sheet, Office of the Press Sec'y, White House, Proliferation Security Initiative: Statement of Interdiction Principles (Sept. 4, 2003), available at <http://www.state.gov/t/isn/c27726.htm>.

¹⁶³ *Id.*

¹⁶⁴ *Id.* (internal paragraph numbering omitted).

Essentially, PSI takes advantage of a state's ability to prescribe laws within its territorial sea, which extends twelve miles from its shore.¹⁶⁵ Under UNCLOS, coastal states are allowed to prescribe laws which relate to illegal cargo and boarding within their territorial seas so long as those laws do not interfere with another state's right to innocent passage.¹⁶⁶ Under article 17 of UNCLOS, every State "enjoy[s] the right of innocent passage through the territorial sea[s]" of other nations.¹⁶⁷ Passage is considered "innocent" so long as it does not interfere with the peace or security of the coastal state.¹⁶⁸

PSI has had some success. Perhaps the most well-known was the interdiction of the *BBC China* and the seizure of nuclear weapons parts. In October 2003, U.S and British intelligence discovered that the *BBC China*, a German owned ship sailing under an Antigua and Barbuda flag of convenience, was carrying a cargo of centrifuge parts used to transform uranium hexafluoride into enriched uranium for nuclear weapons.¹⁶⁹ It was further discovered that this cargo was headed for Libya.¹⁷⁰ After *BBC China* left Dubai and headed towards the Suez Canal, the German government was notified and German officials contacted the ship's German owner, who agreed to divert the ship to the Italian port, Taranto, where it was searched by Italian and German authorities.¹⁷¹ The centrifuge parts were found in multiple containers labeled "used machine parts" on the ship's manifest.¹⁷² Those parts were confiscated and the situation was hailed as a success for PSI.¹⁷³

Despite its success, PSI is controversial for several reasons. First, similar to other international agreements mentioned previously, the initiative is limited in application to the territorial seas of the participating nations.¹⁷⁴ The issue of seizure on the high seas is not addressed and/or answered.¹⁷⁵ Additionally, as mentioned above, if a vessel is flagless, states have the right to search the vessel under UNCLOS and PSI adds nothing.¹⁷⁶ Second, only 102 nations currently participate in PSI.¹⁷⁷ There is still the outstanding question of

¹⁶⁵ See UNCLOS, *supra* note 41, arts. 2–11.

¹⁶⁶ *Id.* art. 21.

¹⁶⁷ *Id.* art. 17.

¹⁶⁸ *Id.* art. 19.

¹⁶⁹ MARY BETH NIKITIN, CONG. RESEARCH SERV., RL 34327, PROLIFERATION SECURITY INITIATIVE 5 (2012), available at <http://www.fas.org/sgp/crs/nuke/RL34327.pdf>.

¹⁷⁰ William R. Hawkins, *Interdict WMD Smugglers at Sea*, PROCEEDINGS, Dec. 2004, at 49, available at http://www.military.com/NewContent/1,13190,NI_1204_Sea-P1,00.html.

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ *Id.*

¹⁷⁴ Fact Sheet, *supra* note 162.

¹⁷⁵ *Id.*

¹⁷⁶ UNCLOS, *supra* note 41, arts. 92, 110.

¹⁷⁷ Bureau of International Security and Nonproliferation, *Proliferation Security Initiative Participants*, U.S. DEP'T OF ST. (Nov. 20, 2012), <http://www.state.gov/t/isn/c27732.htm>.

what to do with a vessel that is flying a flag of one of the approximately 100 non-participating countries that exist in the world community. If those countries refuse to allow their vessels to be boarded, coastal states continue to lack the authority to seize the cargo of that ship.¹⁷⁸

Third, the lack of strategic partners hinders PSI. China, a permanent U.N. Security Council State, is not a PSI participant.¹⁷⁹ Additionally, no states from the Middle East are core participants in the initiative,¹⁸⁰ a region where the non-proliferation of nuclear weapons and technology is of grave concern as noted previously in the discussion of Iran's nuclear program.

Fourth, PSI only applies to commercial vessels. Article 32 of UNCLOS states: "Nothing in this Convention affects the immunities of warships and other government ships operated for non-commercial purposes."¹⁸¹ This means it is illegal under international law to stop and search any government ship that is not engaged in commercial activity. This even applies to the territorial sea where coastal nations have greater authority to enact laws and regulations. Under article 30 of UNCLOS, if a warship does not comply with the laws of a coastal nation, the coastal state's only remedy is to require the suspect vessel to leave its territorial sea immediately.¹⁸²

The protection of government vessels is a significant hindrance in addressing the problem of the illicit transfer of nuclear weapons. In July 2002, a Pakistani C-130 cargo plane picked up ballistic missile parts in North Korea.¹⁸³ In return, Pakistan provided North Korea with many of the designs for gas centrifuges and much of the machinery it needed to make highly enriched uranium.¹⁸⁴ This occurred in full view of American spy satellites.¹⁸⁵ However because of the immunity of government ships, these shipments could not have been stopped under PSI. Although this incident involved an aircraft, it is worth noting because UNCLOS affords the same sovereign rights to government ships as it does aircraft.¹⁸⁶

Fifth, PSI exists in a grey area of international law. In objection to PSI, countries such as China and North Korea often point to article 23 of UNCLOS

¹⁷⁸ See *supra* Part II.B.

¹⁷⁹ Bureau of International Security and Nonproliferation, *supra* note 177.

¹⁸⁰ NIKITIN, *supra* 169, at 2 & n.9.

¹⁸¹ UNCLOS, *supra* note 41, art. 32.

¹⁸² *Id.* art. 30.

¹⁸³ David E. Sanger, *Threats and Responses: Alliances; In North Korea and Pakistan, Deep Roots of Nuclear Barter*, N.Y. TIMES, Nov. 24, 2002, at 1, available at <http://www.nytimes.com/2002/11/24/international/asia/24KORE.html>.

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

¹⁸⁶ UNCLOS, *supra* note 41, arts. 42(5), 107, 110(4)–(5), 224, 236.

which only requires foreign nuclear powered ships and ships carrying nuclear or other inherently dangerous or noxious substances to “carry documents and observe special precautionary measures established for such ships by international agreements” when exercising the right of innocent passage through the territorial sea.¹⁸⁷ UNCLOS does not give coastal states the authority to stop and search those vessels.¹⁸⁸ In fact, article 24 further states:

The coastal State shall not hamper the innocent passage of foreign ships through the territorial sea except in accordance with this Convention. . . . [T]he coastal State shall not:

(a) impose requirements on foreign ships which have the practical effect of denying or impairing the right of innocent passage; or

(b) discriminate in form or in fact against . . . ships carrying cargoes to, from or on behalf of any State.¹⁸⁹

Reading articles 23 and 24 together, states such as North Korea argue that ships, even those carrying nuclear weapons, cannot have their rights infringed upon. North Korea uses this argument to claim that the United States and its PSI partners engage in acts of piracy when they stop ships under this initiative.¹⁹⁰ This is why North Korea claimed that the stopping of the *Kang Nam* would have amounted to an act of war.

Another argument for the legality of PSI is anticipatory self-defense. Many supporters, including John R. Bolton, former Under Secretary for Arms Control and International Security and former United States Ambassador to the United Nations, cite article 51 of the U.N. Charter as legal support for this claim. Supporters of anticipatory self-defense argue that since the United States was attacked by a terrorist organization that seeks illicit nuclear materials, ships trafficking in the illicit transfer of these materials, pose an imminent threat to the United States. However, an examination of the language of article 51 reveals a shortcoming with this argument. Article 51 states: “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.”¹⁹¹ The language of the Charter is quite clear. The language, on its face, seems to

¹⁸⁷ *Id.* art. 23.

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

¹⁹⁰ *US Practicing Acts of Piracy*, ANTI-IMPERIALIST NEWS SERVICE (Sep. 16, 2003), http://www.anti-imperialist.org/korea-piracy_9-16-03.html.

¹⁹¹ U.N. Charter art. 51 (emphasis added).

purposefully prohibit self-defense unless adverse action is actually taken. This would not include the mere transfer of these weapons.

Furthermore, any argument that relies upon 9/11 as the “attack” contemplated under article 51 to justify boarding of vessels suspected of engaging in nuclear proliferation is specious. First, 9/11 occurred nearly ten years ago. The immediacy contemplated by article 51 is no longer present. Additionally, article 51 is meant to be a stop gap until the international community can take action.¹⁹² It is not meant to be blank check for aggression.

C. U.N. Security Council Resolution

The United Nations Security Council is the U.N. organ that is responsible for the maintenance of international peace and security.¹⁹³ It is comprised of fifteen members.¹⁹⁴ Five are permanent members of the council—China, France, the Russian Federation, the United Kingdom, and the United States—and the other ten members serve on a rotating basis from the general assembly.¹⁹⁵ For a resolution to pass, it must be approved by nine of the fifteen members and cannot be vetoed by a permanent member of the council.¹⁹⁶

The U.N. Security Council has made clear attempts to solve the problem of nuclear proliferation on the high seas by passing various resolutions. The first attempt was UNSCR 1540 which was adopted unanimously on 28 April 2004.¹⁹⁷ The resolution recognized the issue of non-state actors in the proliferation of weapons of mass destruction and required all nations to adopt measures to limit the proliferation of WMDs. Before UNSCR 1540 was adopted, there was one holdout: China. In order to get China to agree to the criminalization of the proliferation of WMDs, the United States dropped from an initial draft a proposal that would have allowed the interdiction at sea of any vessel suspected of engaging in the illegal trafficking of WMDs.¹⁹⁸ Being a permanent member of the Security Council, China’s vote was essential to avoid a veto so the proposal was dropped and the loophole remained.¹⁹⁹

The very same issue would appear again in another UNSCR involving the *Kang Nam*. UNSCR 1874 bans North Korea from exporting weapons,

¹⁹² *Id.*

¹⁹³ *Id.* art. 24.

¹⁹⁴ *Id.* art. 23.

¹⁹⁵ *Id.*

¹⁹⁶ *Id.* art. 27.

¹⁹⁷ S.C. Res. 1540, ¶ 3, U.N. Doc. S/RES/1540 (Apr. 28, 2004).

¹⁹⁸ Colum Lynch, *U.S. Urges Curb on Arms Traffic*, WASH. POST, Mar. 25, 2004, at A20.

¹⁹⁹ U.N. Charter arts. 23, 27.

including missile parts and nuclear materials.²⁰⁰ However, the major shortfall in UNSCR 1874 is that it requires flag state consent in order to interdict vessels suspected of engaging in nuclear proliferation on the high seas.²⁰¹ There are no enforcement mechanisms and only encourages “all States to cooperate with those inspections.”²⁰²

In order to get China to agree to support UNSCR 1874, the same language found in draft proposal of UNSCR 1540 regarding interdiction at sea had to be removed.²⁰³ As a result, the world was left to wonder how and when the North Korean vessel could be stopped. In the *Kang Nam* incident, it never was and the ship eventually returned to port. Had the world community been given the authority to stop vessels on the high seas suspected of carrying WMDs in clear and distinct language, the outcome would have been very different.

V. Possible Ways Ahead

A. Customary International Law

One possible way forward could be to simply change customary international law to allow states to stop vessels suspected of engaging in the illicit transfer of nuclear weapons and technology. The problem with this is that customary international law is slow to change. By definition it is based on the “general practice” of states *over time*. It is the “over time” part that creates the problem since it would be a slow process. Since the proliferation of nuclear weapons is a matter of immediate importance, it seems that a faster solution is required.

B. Expansion of Port State Authority

As discussed, coastal states enjoy the right to regulate their ports.²⁰⁴ As a result, when a vessel enters the port of a coastal nation, that vessel is subject to the national laws of that state.²⁰⁵ With this in mind, it would seem that a cooperation of port states could help hinder the spread of nuclear materials and technology by strengthening their domestic laws in the same way that the treaties already discussed encourage nations to strengthen domestic laws to prosecute crimes involving nuclear proliferation.

²⁰⁰ See S.C. Res. 1874, ¶ 8, U.N. Doc. S/Res/1874 (June 12, 2009).

²⁰¹ *Id.*

²⁰² *Id.*

²⁰³ See John R. Crook, *North Korea Rejects Past Nuclear Commitments, Tests Another Nuclear Weapon, and Provokes Additional UN Sanctions*, 103 AM. J. INT’L L. 597, 598 (2009).

²⁰⁴ See UNCLOS, *supra* note 41.

²⁰⁵ See UNCLOS, *supra* note 41, arts. 25, 211(3)

A good example of how port state cooperation can be successful is the Paris MoU.²⁰⁶

The organization consists of 27 participating maritime Administrations and covers the waters of the European coastal States and the North Atlantic basin from North America to Europe.

[Its] mission is to eliminate the operation of sub-standard ships through a harmonized system of port State control.

Annually more than 19,000 inspections take place on board foreign ships in the Paris MoU ports, ensuring that these ships meet international safety, security and environmental standards²⁰⁷

As discussed, the only weakness in the Paris MoU is the limitation of its jurisdiction.²⁰⁸ Expanding that jurisdiction beyond the ports and into the exclusive economic zone of the coastal nation, where nations already have enumerated rights under UNCLOS, would go further to meet the goals of the IMO. Those goals are the very reason that the Paris MoU was created.

Another way to strengthen port state authority is to amend UNCLOS or enact an UNSCR to expand a coastal nation's authority in the territorial sea and exclusive economic zone. The *Kang Nam* most likely returned to North Korea because it knew that if pulled into any port, the ship would have been searched. Expanding the authority of coastal nations to regulate the waters surrounding their territory would further close the noose on those who seek to bypass areas of regulation. The obvious obstacle is that it would infringe upon the freedom of navigation. This idea has already proved to be unpopular among powerful nations such as China in the case of UNSCR 1540.²⁰⁹

C. U.N. Peacekeepers

Another possible way to close the gap would be to use U.N. peacekeepers in ways that they have not been used in the past. The U.N.

²⁰⁶ Paris MoU, *supra* note 91.

²⁰⁷ *Organization*, PARIS MOU, <http://www.parismou.org/Organization/> (last visited 23 Apr. 2013). For additional background information on the Paris MoU, see PARIS MOU, <http://www.parismou.org/> (last visited 23 Apr. 2013).

²⁰⁸ See *supra* note 97 and accompanying text.

²⁰⁹ See *supra* note 198–199 and accompanying text.

Security Council is responsible for maintaining international peace, and the Security Council authorizes peacekeeping missions to meet this end.²¹⁰ To authorize a mission, nine of the fifteen Security Council members must vote to authorize the mission and a permanent member of the Security Council cannot oppose the measure by veto.²¹¹

The U.N. Security Council normally establishes peacekeeping operations based on the following basic principles:

[A]greement and continuing support by the Security Council; agreement by the parties to the conflict and consent of the host government(s); unrestricted access and freedom of movement by the operation within the countries of operation and within the parameters of its mandate; . . . and noninterference by the operation and its participants in the internal affairs of the host government.²¹²

In keeping with these principles, the Security Council could authorize a peacekeeping force to keep the peace on the high seas. After all, there is no restriction of access on the high seas nor is there a host government or parties to a conflict. The U.N. would simply be maintaining the peace. UNCLOS already declares that the high seas “shall be reserved for peaceful purposes.”²¹³ It can and should be argued that the proliferation of nuclear weapons and technology is a threat to international security. Using the high seas to further this threat would thus be a violation of the “peaceful uses” clause of UNCLOS.²¹⁴ Therefore, preventing the proliferation of nuclear material would constitute peacekeeping.

One way the U.N. could keep the peace on the high seas would be by creating a small naval force and expanding its operations. This could be justified under articles 41 and 42 of the U.N. Charter, which provide for Security Council authorization of military action by the member states, including blockades and other operations at sea. This idea of expanding peacekeeping operations of the U.N. is not new. In 1993, President Bill Clinton supported the “creation of a genuine U.N. peacekeeping headquarters with a planning staff, with access to timely intelligence, with a logistics unit that can be deployed on a

²¹⁰ U.N. Charter art. 27.

²¹¹ U.N. Charter art. 28.

²¹² MARJORIE ANN BROWNE, CONG. RESEARCH SERV., RL 33700, UNITED NATIONS PEACEKEEPERS: ISSUES FOR CONGRESS 16 (2011).

²¹³ UNCLOS, *supra* note 41, art. 88.

²¹⁴ *Id.* pmb., art. 301.

moment's notice and a modern operations center with global communications."²¹⁵

Provided a U.N. peacekeeping naval force could be created, it would need something to enforce. UNSCR 1540, which calls for states to prohibit the proliferation of nuclear weapons, could provide the legal justification for these peacekeeping missions. In the alternative, the U.N. Security Council could pass a new resolution outlawing the illegal transfer of nuclear weapons and technology on the high seas.

Additionally, cases arising on the high seas could be prosecuted by the International Criminal Court (ICC). The ICC came into being as a result of Rome Statute of the International Criminal Court which entered into force on 1 July 2002.²¹⁶ Currently, only 122 states are members of the Court, with the United States as a notable exception.²¹⁷ The ICC has jurisdiction to prosecute cases where the accused is a national of a State party to the treaty but it can also prosecute cases referred to it by the U.N. Security Council.²¹⁸ It would be the Security Council in this case that would refer cases originating on the high seas to the ICC. Alternatively, the Rome Statute could be amended to give the prosecutors more flexibility to file criminal charges against defendants who are not citizens of a signatory to the statute.²¹⁹ However, this would be difficult to enforce because it would require non-signatories to accede to the jurisdiction of the Court.²²⁰

Several problems exist with this proposal. First, it would take time and money to build a U.N. naval force capable of monitoring the world's oceans. The U.S. Navy already has more ships than any other nation on earth but even with our vast resources we cannot be everywhere at all times.²²¹ Second, China

²¹⁵ *THE U.N. ASSEMBLY; In Clinton's Words: U.N. Become Engaged in Every World Conflict*, N.Y. TIMES, Sep. 27, 1993, at A16, available at <http://www.nytimes.com/1993/09/28/world/the-un-assembly-in-clinton-s-words-un-become-engaged-in-every-world-conflict.html?src=pm>.

²¹⁶ Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 3 [hereinafter Rome Statute].

²¹⁷ *Rome Statute of the International Criminal Court, Status of Treaties*, UNITED NATIONS TREATY COLLECTION (23 Apr. 2013, 17:38), http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-10&chapter=18&lang=en. For a discussion of the U.S. concerns regarding the Rome Statute, see Joseph A. Rutigliano Jr., *Fundamental Concerns*, 62 NAVAL L. REV. 92 (2013).

²¹⁸ Rome Statute, *supra* note 216, arts. 12–13.

²¹⁹ In fact, there has been an amendment to the Rome Statute adopted by state parties for the purpose of broadening the scope of the court's jurisdiction with regard to the crime of aggression. U.N. Secretary General, *Amendments to the Rome Statute of the International Criminal Court on the Crime of Aggression*, U.N. Doc. C.N.651.2010.TREATIES-8 (depository notification) (2010), available at <http://treaties.un.org/doc/publication/CN/2010/CN.651.2010-Eng.pdf>.

²²⁰ See Rutigliano, *supra* note 217.

²²¹ Gates, *supra* note 39; *Status of the Navy*, *supra* note 40.

has already shown reluctance to support an amendment to UNCLOS or UNSCR that gives one nation the authority to stop another nation's vessel engaged in the freedom of navigation on the high seas.²²² As previously discussed, China has veto authority on the Security Council and would likely strike down any peacekeeping mission or resolution which would authorize any such measure.²²³

Assuming arguendo that a U.N. naval force was a possibility, whether it was developed by the U.N. from the ground up or was composed of a multi-nation coalition of ships acting under the auspices of the U.N., another problem with this proposal is the issue of prosecution. Many nations, including the United States, are not parties to the Rome Statute and the ICC.²²⁴ Getting universal support for the treaty could prove to be difficult since many nations seem reluctant to give the ICC that kind of universal jurisdiction. Without the ICC, states would have to prosecute the crimes of their own nationals and it appears unlikely that a nation, which supports or engages in the proliferation of nuclear weapons, would prosecute their own citizens for engaging in such an activity.

This leaves U.N. Security Council Resolutions as the only alternative and China as the biggest obstacle. However, as UNSCR 1540 demonstrates, China did not explicitly prohibit the stopping of ships on the high seas; it simply chose not to expressly authorize it.²²⁵ This may allow other states to argue that they have the authority to stop the proliferation of nuclear weapons wherever it may occur. Nevertheless, any nation willing to meet this challenge must understand the possible consequences. As in the case with the *Kang Nam*, North Korea indicated that such an interdiction of one of its ships on the high seas would amount to an act of war.²²⁶

D. Expansion of Treaties

Another option involves the expansion of current treaties. Ideally, if every nation were a party to PSI, then every nation would have the authority to stop vessels suspected of engaging in the illegal transfer of nuclear materials on the high seas.²²⁷ However, only 102 nations are a party to the Initiative.²²⁸ The more realistic option would then be to work with treaties that are nearly universal. The Treaty for the Non-Proliferation of Nuclear Weapons has 190

²²² See *supra* note 175 and accompanying text and Part IV.C.

²²³ See *supra* Part IV.C.

²²⁴ See *supra* notes 216–220 and accompanying text.

²²⁵ See S.C. Res. 1874, ¶ 8, U.N. Doc. S/Res/1874 (June 12, 2009).

²²⁶ Jelenick, *supra* note 13.

²²⁷ See *supra* Part IV.B.

²²⁸ Bureau of International Security and Nonproliferation, *supra* note 177.

members.²²⁹ NPT already calls for the non-proliferation of nuclear weapons.²³⁰ Amending that treaty to allow for the interdiction of ships suspected of engaging in the proliferation of nuclear weapons seems to be a much more viable and realistic option.

VI. Conclusion

The freedom of navigation on the high seas is a cornerstone of international law. However, many of the treaties which codified customary international law were written during a time when the world was divided between two great powers during a long and protracted Cold War. Access to the oceans was essential, and it needed to be safeguarded. However, the world is changing and new threats are emerging which require a universal policing of the oceans to ensure that nuclear materials and technology do not fall into the wrong hands. As it currently stands, flag states have the authority to stop vessels carrying their flag on the high seas. Other States can only do so in limited circumstances, such as in the case of ports. States need the authority to exercise greater authority within their waters and cooperate with other coastal state nations to deny vessels engaged in the illegal traffic of nuclear materials any safe haven. New U.N. Security Council resolutions and expansion of current treaties which seek to address the problem of nuclear proliferation also need to address this issue and allow any state to interdict a vessel suspected of engaging in the illegal transfer of nuclear materials or technology. The case of A.Q. Kahn demonstrated that the black market for nuclear weapons and technology is growing increasingly strong and has even surprised intelligence communities around the world.²³¹ Stopping this threat in the new age of technology will be the test of our national and international security forces and governments.

²²⁹ *Treaty on the Non-Proliferation of Nuclear Weapons*, *supra* 126.

²³⁰ NPT, *supra* note 125, pmb1.

²³¹ *See supra* notes 27–30 and accompanying text.

EXPANDING OBJECT AND PURPOSE – VIENNA CONVENTION ON THE LAW OF TREATIES, ARTICLE 18, AND THE DOMESTIC COURTS' STRUGGLE TO DEAL WITH IT

Johannes Munter*

I. Introduction

On Monday, February 1, 1993, a rainy and relatively cloudy day in the Bahamas¹, the *Nordic Empress* was passing through Bahamian territorial waters.² The ship, owned by Royal Caribbean Cruises ("RCC"), was on its way to Miami, when the United States Coast Guard observed it dumping oil discharge into the water.³ After the ship reached its destination, the Coast Guard boarded the ship and insisted on inspecting its Oil Record Book. The Record Book did not have any entry indicating the oil discharge,⁴ and US authorities promptly charged the company for violating 18 USC. § 1001, which criminalized making false statements to proper authorities.⁵

Almost one and a half years later, in October of 1994, RCC was in trouble yet again. This time, the Coast Guard observed the *Sovereign of the Seas* discharging pollutants in US territorial waters off the coast of Puerto Rico.⁶ The *Sovereign*, the largest cruise ship built since the *Queen Elizabeth* at the time of her construction in 1988,⁷ was inspected by the Coast Guard upon her arrival in San Juan, and similar to the situation with the *Nordic Empress*, no log entry was

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¹ Weather in the Center of Bahamas on Monday, February 1, 1993, WOLFRAMALPHA, <http://www.wolframalpha.com/input/?i=weather+in+bahamas+on+1+february%2C+1993> (last visited Nov. 22, 2015).

² United States v. Royal Caribbean Cruises, Ltd., 11 F.Supp. 2d 1358, 1361 (S.D. Fla. 1998).

³ *Id.*

⁴ *Id.*

⁵ United States v. Royal Caribbean Cruises, Ltd., 24 F.Supp. 2d 155, 158 (D.P.R. 1997).

⁶ *Id.* at 159.

⁷ Jason Anderson, *Sovereign of the Seas*, CRUISE SHIPS AND BOATS, http://www.pbase.com/jason_daniel_anderson/sovereignoftheseas (last visited February 7, 2016).

found in the ship's oil record book for the discharge.⁸ A grand jury indicted the company on ten counts, including misrepresentation of documents to the US authorities.⁹

In both cases, RCC argued that the United Nations Convention on the Law of the Sea ("UNCLOS"), an international treaty delineating conventional and prevailing international standards related to the territorial and high seas, limited both the US government's ability to bring a suit against the company and monetary penalties.¹⁰ The problem for RCC was that while the US had signed the Convention, and the President had submitted it to the Senate for ratification in 1994, the Senate had never given its advice and consent to the treaty as required by Article II of the United States Constitution.¹¹ Specifically, the Constitution requires that the Senate give its advice and consent before the Executive Branch can ratify a treaty and make the United States an official party to one.¹² In order to try to get around this impasse, the RCC relied on a relatively obscure provision in the Vienna Convention on the Law of Treaties ("VCLT" or "the Convention"), Article 18, which requires states to adhere to the object and purpose of any treaties they have signed but not yet ratified.¹³ To complicate things further, the Vienna Convention has also been signed but not been ratified by the United States.¹⁴

RCC's argument was successful the first time. The US District Court for the District of Puerto Rico issued its decision first and found that although the US was not a party to UNCLOS, it was nevertheless bound by its provisions due to Article 18 of the Vienna Convention, and therefore the United States, pursuant to Section 7 of Part XII of UNCLOS, was only allowed to impose monetary penalties.¹⁵ Meanwhile, the US District Court for the Southern District of Florida held that UNCLOS was inapplicable to the facts in that case. In its decision, the Court found that not only was the US not bound by UNCLOS, but that even if it was, RCC could not use it as a defence, and denied RCC's motion

⁸ *Royal Caribbean Cruises*, 24 F.Supp.2d at 158.

⁹ *Id.* at 157.

¹⁰ *Id.* at 159; *United States v. Royal Caribbean Cruises, Ltd.*, 11 F. Supp. 2d 1358, 1369 (S.D. Fla. 1998).

¹¹ *Treaties Pending in the Senate*, U.S. DEP'T OF STATE, Apr. 27, 2015, <http://www.state.gov/s/l/treaty/pending/>.

¹² U.S. CONST. art. II, § 2, cl. 2.

¹³ Vienna Convention on the Law of Treaties art. 18, *opened for signature* May 23, 1969, 1155 U.N.T.S. 331 [hereinafter Vienna Convention].

¹⁴ *Treaties Pending in the Senate*, U.S. DEP'T OF STATE, Apr. 27, 2015, <http://www.state.gov/s/l/treaty/pending/>.

¹⁵ *United States v. Royal Caribbean Cruises, Ltd.*, 24 F.Supp. 2d 155, 159-160 (S.D. Fla. 1998).

to dismiss the charges because the allegations occurred in port and within the United States' jurisdiction.¹⁶

The contrary decisions are baffling, and raise the question of how much weight US courts give to signed – but unratified – international treaties. The answer not only has important implications to our understanding of Article 18 of the Vienna Convention on the Law of Treaties' scope and acceptance but also to the separation of powers between the executive and legislative branches of the federal government. Analyzing these cases gives us a better understanding of the status and role of Article 18 of the VCLT, and whether it has developed into international customary law or whether it has significance only when a state has ratified it or considers it to be otherwise binding.

This note will examine the role of the Convention on the US judicial system. Specifically, the focus will be on whether US courts refer to Article 18 of the Convention or, alternatively, use similar judicial standards when deciding cases concerning treaties that the US has signed but not ratified. When examining the role of the Convention, this article will keep in mind that Article 18 of the VCLT requires members to a treaty who have signed but not ratified it to nevertheless adhere to its object and purpose.¹⁷

The focus will be on three treaties that represent a cross-section of the types of treaties the United States has traditionally signed. The United Nations Convention on the Law of the Sea (“UNCLOS”) represents a relatively technical treaty that has been widely adopted and is arguably indicative of customary international law regarding the law of the sea.¹⁸ The American Convention on Human Rights and the International Covenant on Economics, Social and Cultural Rights are both wide-ranging human rights treaties.¹⁹ While the International Covenant has been adopted by the majority of the countries in the world, the American Convention is a regional treaty, which has not even been adopted by some of the most politically influential countries in the Americas.²⁰

¹⁶ United States v. Royal Caribbean Cruises, Ltd., 11 F.Supp. 2d 1358, 1373-74 (S.D. Fla. 1998).

¹⁷ Vienna Convention, *supra* note 13, at art. 18.

¹⁸ Hugo Caminos & Michael R. Molitor, *Perspectives on the New Law of the Sea: Progressive Development of International Law and the Package Deal*, 79 AM. J. INT'L L. 871, 871-73 (1985); George K. Walker, *Professionals' Definitions and States' Interpretative Declarations (Understandings, Statements, or Declarations) for the 1982 Law of the Sea Convention*, 21 EMORY INT'L L. REV. 461, 480 (2007).

¹⁹ 139 CONG REC. S14653, 12-17 (1993); see Paul R. Dubinsky, *Human Rights Law Meets Private Law Harmonization: The Coming Conflict*, 30 YALE J. INT'L L. 211, 251 (2005).

²⁰ Office of the High Commissioner for Human Rights, *Ratification of 17 International Human Rights Treaties*, <http://indicators.ohchr.org> (last visited Feb. 7, 2016); Inter-American Commission on Human Rights, *Ratification and Signatories, B-32: American Convention on Human Rights "Pact of San Jose, Costa Rica,"* ORGANIZATION OF AMERICAN STATES, <http://www.cidh.org/Basicos/English/Basic4.Amer.Conv.Ratif.htm> (last visited Feb. 7, 2016).

This note concludes that while US courts generally avoid discussing Article 18 of the VCLT directly, they often run the required treaty analysis regardless in order to bolster their holding and to demonstrate adherence to the treaty's object and purpose. The note further argues that since the VCLT has never been ratified by the US, US courts do not have an obligation to refer to and abide by unratified treaties to the extent envisaged by the VCLT as Article 18 can hardly be considered an integral part of the VCLT, especially considering its contested nature and weak historical foundation.²¹

Determining whether federal courts give weight to the object and purpose of unratified treaties is important in order to better understand the role of international law in domestic courts. Such analysis also enables us to better evaluate allegations that Article 18 substantially modifies the balance of power in the US federal system.²² Whether courts routinely use Article 18 to justify giving weight to unratified international treaties, give weight to unratified treaties only as far as they are indicative of customary international law, or whether they completely disregard unratified treaties is an important consideration, regardless of whether the treaty's interpretation proves decisive in the case. In effect, examining how domestic courts use unratified treaties can inform our understanding of the actual role of the Senate when it comes to giving effect to international treaties.

II. Unratified Treatises, Concepts, VCLT, and the Scope of Article 18

Before analyzing some of the relevant treaties, it is important to establish some of the most important concepts, norms, and treaties that create the foundation for treaty analysis. This section will examine some of those concepts before discussing the Vienna Convention on the Law of Treaties and Article 18 of the VCLT in more detail. Finally, this section will examine some of the treaties the United States has signed but not ratified as of 2016.

A. Important Concepts for Treaty Interpretation

In order to understand treaty interpretation, international law in domestic courts, and Article 18 of the VCLT, it is important to have a general understanding of some of the most relevant concepts. First and foremost,

²¹ See generally, Jan Klabbers, *How to Defeat a Treaty's Object and Purpose Pending Entry into Force: Toward Manifest Intent*, 34 VAND. J. TRANSNAT'L L. 283 (2001); Edward Swaine, *Unsigning*, 55 STAN. L. REV. 2061, 2071, 2078-82 (2003); Curtis A. Bradley, *Unratified Treaties, Domestic Politics, and the U.S. Constitution*, 48 HARV. INT'L L.J. 307 (2007).

²² For such allegations, see, e.g., David H. Moore, *The President's Unconstitutional Treaty-making*, 59 UCLA L. REV. 598, 598-600 (2012).

although a "treaty" can refer to both multilateral and bilateral agreements between countries,²³ in this note, the focus will be on multilateral treaties that the US has signed. Multilateral treaties are negotiated between multiple governments and include various state parties.²⁴ The topic and scope of a treaty can vary considerably from relatively specific treaties, such as a treaty describing tax arrangements between two or more states for a certain period of time, to general human rights treaties that cover a wide variety of issues, such as prohibition of torture, right to work, and freedom of speech, which do not have a set duration.²⁵

Before a treaty can enter into force, however, it must be ratified by a sufficient number of signatories.²⁶ The ratification process varies by treaty and country but usually involves the national legislative institutions.²⁷ These institutions often either ratify the treaty by themselves or give advice and consent for the executive branch to ratify a treaty.²⁸ Following such a gesture, the executive submits a document indicating that the country has ratified the treaty in question to an intermediary identified in the treaty.²⁹ Again, VCLT sets out intricate procedures for the ratification process,³⁰ which is beyond this note's scope.

After a treaty enters into force, treaty interpretation becomes the important consideration. In a case involving questions arising under or invoking a subject matter covered by a treaty, the domestic courts are required to interpret the applicable treaties to determine whether the treaties are applicable and, if so, whether they have been breached and the potential consequences of a breach.³¹ Usually, the treaty's plain language is the starting point in the interpretation process, although the VCLT sets out various other interpretation procedures discussed below.³² However, regardless of the specific interpretation process,

²³ Edward Grosek, *How to Research International Treaties and Agreements*, 20 LOY. L.A. INT'L & COMP. L.J. REV. 641, 661 (1998).

²⁴ Multilateral Agreement, CORNELL UNIVERSITY LEGAL INFORMATION INSTITUTE, https://www.law.cornell.edu/wex/multilateral_treaties (last visited Feb. 6, 2016).

²⁵ *Id.*

²⁶ RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, § 312 cmt. b (Am. Law Inst. 1987).

²⁷ Alexandra R. Harrington, *Signed, Sealed, Delivered, and Then: An Evaluation of the Correlation Between Policy Areas, Signing, and Legal Ratification of Organization of American States' Treaties by Member States*, 6 RICH. J. GLOBAL L. & BUS. 1, 4-12 (2006). *Signature, Ratification and Accession*, UNICEF (May 19, 2012) http://www.unicef.org/crc/index_30207.html.

²⁸ Harrington, *supra* note 27, at 6-7.

²⁹ *Signature, Ratification and Accession*, UNICEF (May 19, 2012) http://www.unicef.org/crc/index_30207.html.

³⁰ Vienna Convention, *supra* note 13, art. 82.

³¹ Alex Glashauser, *What We Must Never Forget When It Is a Treaty We Are Expounding*, 73 U. CIN. L. REV. 1243, 1250-51 (2005).

³² Vienna Convention, *supra* note 13, at art. 31.

the concepts of "object and purpose" and "intent and expectations" play an essential role.³³ Although related, these concepts are clearly distinct. Object and purpose refers to the ultimate goal of the treaty – what it aims to achieve and how it seeks to do so.³⁴ Meanwhile, "intent and expectations" is a more subjective standard in the sense that it lays out the expectations of the parties to the treaty – what the signatories intended the treaty to accomplish, what their expectations were as to how the treaty would achieve that purpose, and what the scope of the treaty was.³⁵ In effect, the intent and expectations of the parties when negotiating a treaty can differ considerably from the final signed product.

Lastly, in order to better understand the potential consequences of considering unratified treaties as binding or largely authoritative in domestic courts, it is vitally important to understand the concepts of "*jus cogens*," "judicial restraint," "customary international law," and the "separation of powers." The term "*Jus cogens*" refers to international norms that are so generally accepted and fundamental that they are considered inviolable regardless of the identity of the violator or the context surrounding the conduct.³⁶ Some examples of *jus cogens* norms include the prohibition on torture and the right to self-defence.³⁷ "Judicial restraint" refers to the role judges are willing to take in deciding contentious issues.³⁸ In effect, judicial restraint is often used to describe a judicial approach that emphasizes refraining from deciding legal issues that are not absolutely necessary for the resolution of the case in question and, instead, deferring to legislative and executive measures.³⁹ This could potentially have major implications for the interpretation of unratified treaties in the absence of clear legislative, executive, or judicial guidance. Meanwhile, "customary international law" is the primary source of international law besides international treaties.⁴⁰ It arises from the combination of state practice and subjective obligation on part of the states that they are

³³ Glashausser, *supra* note 31, at 1279.

³⁴ David S. Jonas & Thomas N. Saunders, *The Object and Purpose of a Treaty: Three Interpretive Methods*, 43 VAND. J. TRANSNAT'L L. 565, 580 (2010).

³⁵ Jason A. Hoida, *Toward a Uniform Interpretation of Article 14 of the Norway-America Double Taxation Treaty: Avoiding the Double Whammy on American Employees' Income in Norway*, 20 HAMLINE L. REV. 691, 706 (1997).

³⁶ Evan J. Criddle & Evan Fox-Decent, *A Fiduciary Theory of Jus Cogens*, 34 YALE J. INT'L L. 331, 331 (2009).

³⁷ See, e.g., 28 U.S.C. § 1350 (1994) (federal statute granting federal district courts original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States).

³⁸ See Kermit Roosevelt, *Judicial Restraint*, available at <http://www.britannica.com/topic/judicial-restraint>.

³⁹ See *id.*; Zachary Baron Shemtob, *Following Thayer: The Conflicting Models of Judicial Restraint*, 21 B.U. PUB. INT. L.J. 61, 62 (2011).

⁴⁰ Phillip R. Trimble, *A Revisionist View of Customary International Law*, 33 UCLA L. REV. 665, 669 (1986).

bound by them, often called *opinio juris*.⁴¹ "Separation of powers" in the US refers to the system of power distribution among the various branches of the federal government.⁴² In practice, this means the correct distribution of power between the legislative, executive, and judicial branches of government.⁴³

Looking at the general treaty interpretation principles in US domestic courts, it becomes clear that courts are often insensitive to the unique characteristics of treaties and frequently employ general contract or statutory principles when interpreting them.⁴⁴ In addition, and possibly more importantly, for the present question of unratified treaties, US courts also seem to approach the interpretation of international treaties either from a nationalist perspective, informed by US interests, or from a more internationalist perspective, which adheres more closely to the principles expressed in the VCLT.⁴⁵

B. Vienna Convention of the Law of Treaties

The Vienna Convention on the Law of Treaties, adopted in 1969 and signed by the US in 1970,⁴⁶ compiled and restated some of the most prevalent international norms and customary laws regarding international treaties and their interpretation by national governments and domestic courts.⁴⁷ Some of the most important provisions in the VCLT concern rules governing interpretation of treaties, when and how treaties can be terminated, and the effect and prerequisites of treaty reservations.⁴⁸ The provisions concerning the interpretation of treaties lay out the weight courts should give to various documents, including the plain language of the treaty, drafting documents, and statements by government officials.⁴⁹ Meanwhile, the treaty reservation provisions set out rules regarding when governments can issue reservations to a

⁴¹ William Thomas Worster, *The Inductive and Deductive Methods In Customary International Law Analysis: Traditional and Modern Approaches*, 45 GEO. J. INT'L L. 445, 470 (2014).

⁴² James A. Turner, Comment, *The Post-Medellin Case for Legislative Standing*, 59 AM. U.L. REV. 731, 775-76 (2010).

⁴³ M. Elizabeth Magill, *The Real Separation In Separation Of Powers Law*, 86 VA. L. REV. 1127, 1128-29 (2000).

⁴⁴ See Glashauser, *supra* note 31, at 1255.

⁴⁵ See Evan Criddle, *The Vienna Convention on the Law of Treaties in U.S. Treaty Interpretation*, 44 VA. J. INT'L L. 431, 464 (2004).

⁴⁶ See Vienna Convention, *supra* note 13, at art 32; *Vienna Convention on the Law of Treaties*, U.S. DEP'T OF STATE, <http://www.state.gov/s/l/treat/faqs/70139.htm> (last visited Sep. 7, 2015).

⁴⁷ Vienna Convention, *supra* note 13, at art 32.

⁴⁸ See Anthony Aust, *Vienna Convention on the Law of Treaties*, OXFORD PUBLIC INTERNATIONAL LAW, available at <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1498> (last visited Nov. 22, 2015); Vienna Convention, *supra* note 13, at arts. 19, 31-33, 42, 43, 54..

⁴⁹ Vienna Convention, *supra* note 13, at art 31-33.

treaty, what their legal effect is, and how the actions of other states affect the reservations.

As of 2015, the Convention has been signed and ratified by 114 countries, and most of the treaty provisions are generally accepted as customary international law.⁵⁰ Although the US is one of the signatories, the US Senate has never consented to and ratified the treaty.⁵¹ Regardless, similar to the other signatories, the State Department and other governmental agencies have officially stated that the US believes that "many of the provisions of the Vienna Convention on the Law of Treaties [constitute] customary international law on the law of treaties."⁵² Additionally, administrations ranging from President Ronald Reagan to President George W. Bush have supported the treaty and indicated that they consider the VCLT provisions to be binding international law.⁵³

Most of the cases discussing the VCLT focus on the VCLT's rules on treaty interpretation, especially the weight given to *travaux préparatoires*, preambles and other supporting documents. The Supreme Court of the United States has referred to the VCLT only four times since the Convention was signed,⁵⁴ and not once has its discussion of the Convention been determinative. For example, in *Sanchez-Llamas v. Oregon*,⁵⁵ a case concerning the Vienna Convention on Consular Relations (VCCR), the majority did not use the VCLT to inform its interpretation of the VCCR at all, and Justice Breyer only referred to it once in his dissent in order to support his argument that an international obligation can trump a domestic procedural rule.⁵⁶ Meanwhile, in *Sale v. Haitian Ctrs. Council*, Justice Blackmun's dissent drew on the VCLT to support his "ordinary meaning" reading of a statute,⁵⁷ and in *Abbott v. Abbott*, Justice

⁵⁰ See Criddle, *supra* note 45, at 433.

⁵¹ Status of Chapter XXIII Law of Treaties, UNITED NATIONS TREATY COLLECTION, https://treaties.un.org/pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXIII-1&chapter=23&Temp=mtdsg3&lang=en (last visited Sep. 7, 2015).

⁵² Vienna Convention on the Law of Treaties, U.S. DEP'T OF STATE, <http://www.state.gov/s/l/treaty/faqs/70139.htm> (last visited Sep. 7, 2015). Customary International Law is formed when a custom is recognized by enough state parties as a legal obligation. William Thomas Worster, *supra* note 41, at 470.

⁵³ Bradley, *supra* note 21 at 307-09.

⁵⁴ See Martin A. Rogoff, *Interpretation of International Agreements by Domestic Courts and the Politics of International Treaty Relations: Reflections on Some Recent Decisions of the United States Supreme Court*, 11 AM. U.J. INT'L L. & POL'Y 559 (1996); *Abbott v. Abbott*, 560 U.S. 1 (2010); *Sanchez-Llamas v. Oregon*, 548 U.S. 331 (2006); *Sale v. Haitian Ctrs. Council*, 509 U.S. 155 (1993); *Weinberger v. Rossi*, 456 U.S. 25 (1982).

⁵⁵ 548 U.S. 331 (2006).

⁵⁶ *Id.* at 390-91 (Breyer, J., dissenting).

⁵⁷ *Sale*, 509 U.S. at 191 (Blackmun, J., dissenting).

Stevens used the VCLT to establish the hierarchy of supporting treaty interpretation documents.⁵⁸

Sale concerned an executive order stating that all aliens intercepted on the high seas should be repatriated, arguably in violation of the UN Convention Relating to the Status of Refugees and the 1952 Immigration and Nationality Act.⁵⁹ The Court's decision was controversial due to the Court's interpretation of the statute and the treaty.⁶⁰ *Abbott*, on the other hand, concerned the Hague Convention on the Civil Aspects of International Child Abduction and involved an American mother's removal of her child from Chile contrary to the father's wishes and a Chilean court's decision.⁶¹ In *Abbott*, the Court overturned the lower court's interpretation of the Hague Convention.⁶² Meanwhile, the lower federal courts have adopted a more consistently positive view of the VCLT, often referring to it when determining how a treaty should be interpreted or whether the treaty in question is applicable to the situation at hand.⁶³

With regards to its choice of instruments for treaty interpretation, the Supreme Court has traditionally adopted strategies closely aligned with those set out in the VCLT, even if it has not explicitly referred to the VCLT in its discussion.⁶⁴ The most noticeable difference seems to be that the VCLT establishes a more hierarchical structure for the interpretation instruments than US courts traditionally do, although both start from the plain language of the text, and US courts generally give more weight to executive branch opinions than the hierarchy established by the VCLT envisaged.⁶⁵ The latter is exemplified by *El Al Isr. Airlines v. Tsui Yuan Tseng*, where the Court found that the Executive Branch's views should be afforded precedence, and that the Government's construction of the Warsaw Convention was the most reasonable one.⁶⁶ While the Supreme Court has only discussed the weight of executive branch opinions in relation to interpretation of treaties that the US has signed and ratified, it is arguably reasonable to expect courts to give the same deference to executive opinions when interpreting or deciding whether to give any effect at all to international treaties that the US has not ratified.

⁵⁸ *Abbott*, 560 U.S. at 40 n. 11 (Stevens, J., dissenting).

⁵⁹ *Sale*, 509 U.S. at 158, 160.

⁶⁰ See Rogoff, *supra* note 54, at 681-83.

⁶¹ *Abbott*, 560 U.S. at 1.

⁶² *Abbott*, 560 U.S. at 5-7, 22.

⁶³ See, e.g., *De Los Santos Mora v. New York*, 524 F.3d 183, 206 (2d Cir. 2008).

⁶⁴ See, e.g., P. Van Alstine, *The Death of Good Faith in Treaty Jurisprudence and a Call for Resurrection*, 93 GEO. L.J. 1885, 1932-33 (2005).

⁶⁵ See *id.* at 1903; *Glashausser*, *supra* note 31, at 1262.

⁶⁶ *El Al Isr. Airlines v. Tsui Yuan Tseng*, 525 U.S. 155, 168-69 (1999).

1. Article 18: A Controversial Principle

Article 18 of the VCLT focuses on the effect that treaties have on state parties who have signed but not ratified a treaty. Specifically, Article 18 provides that states are "obliged to refrain from acts which would defeat the object and purpose of a treaty" when they have either signed the treaty or "exchanged instruments constituting the treaty subject to ratification, acceptance or approval, until it shall have made its intention clear not to become a party to the treaty."⁶⁷ Further, section 18(b) requires states to adhere to the object and purpose of the treaty when they have expressed consent to be bound by the treaty and are waiting for the treaty to enter into force.⁶⁸

Therefore, under the VCLT, states are obligated to refrain from frustrating the object and purpose of the treaty from the moment they sign onto it, regardless of whether they ever move forward with the ratification process.⁶⁹ Some commentators have argued that in effect, in the case of the United States, this would mean that the president's signature or the signature of another executive representative would be sufficient to bind the United States to the object and purpose of a treaty, circumventing the constitutional treaty making process, which requires the advice and consent of the Senate.⁷⁰ Some of these commentators believe that this circumvention of the United States Constitution amounts to an unconstitutional transfer of power to the executive branch, and that courts should not give weight to unratified treaties except as much as they are indicative of customary international law unless Congress has given clear indication that it expects the courts to do so.⁷¹ However, regardless of these objections, subsequent US administrations have continuously argued that Article 18 represents international customary law and, accordingly, courts should give weight to the object and purpose of international treaties signed by the United States.⁷² At the same time, however, it is also important to note that the Supreme Court has never discussed the effect of Article 18 on treaty interpretation, and has rarely discussed treaties that were not ratified by the US.⁷³

⁶⁷ Vienna Convention, *supra* note 13, art 18.

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ See U.S. CONST. ART. II.

⁷¹ For such allegations, see David H. Moore, *The President's Unconstitutional Treaty-making*, 59 UCLA L. REV. 598, 598-600 (Feb. 2012).

⁷² See Neil A. Lewis, *U.S. to Renounce Its Role in Pact for World Tribunal*, NEW YORK TIMES (May 5, 2002), <http://www.nytimes.com/2002/05/05/international/05TRIB.html>; The President's News Conference (Oct. 14, 1999), 35 Weekly Comp. Pres. Doc. 2035,

<http://www.access.gpo.gov/nara/nara003.html>; Bradley, *supra* note 21 at 307-09.

⁷³ Based on search conducted on LexisNexis in November 2015.

Although the executive branch has often stood behind Article 18, it represents possibly the most controversial principle in the VCLT.⁷⁴ For instance, at the time of drafting, International Law Commission rapporteurs, responsible for drafting the VCLT, expressed doubt as to whether Article 18 should be included in the treaty in the first place.⁷⁵ There were hardly any international precedents that supported the normative assertions included in Article 18, leading the Commission to discuss ruling the Article out completely or adding a more limited version of it in the final treaty.⁷⁶ The cases cited by the Commission as precedents, set out a much more limited object and purpose requirement – requiring states only to refrain from acts that would render their compliance with the treaty impossible once the treaty entered into force eventually.⁷⁷ In practice, this meant that a state party, for example, to a treaty on the inviolability of a specific area would not be able to invade the region in question before the treaty entered into force. In the end, however, the Commission decided to adopt the more expansive draft of the provision, arguably contrary to contemporary customary international law.⁷⁸

While international courts have found that the VCLT Article 18 is based on the customary international law norm of "good faith," the European Court of Justice has acknowledged that there is debate about whether Article 18 actually codifies customary international law or rather aimed to develop it.⁷⁹ The International Court of Justice, on the other hand, has noted that "signed but unratified treaties *may* constitute an accurate expression of the understanding of the parties at the time of signature."⁸⁰ Therefore, it seems that while international courts acknowledge that the general principle of Article 18 is based on customary international law, they stop short of saying that modern customary international law imposes as strict and expansive requirement on state parties

⁷⁴ Bradley, *supra* note 21 at 314-15 (discussing the contentious debate surrounding the status of Article 18).

⁷⁵ Edward Swaine, *Unsigning*, 55 STAN. L. REV. 2061, 2071, 2078-82 (2003); Bradley, *supra* note 21, at 328-29.

⁷⁶ Bradley, *supra* note 21, at 327-34.

⁷⁷ *Id.* at 329-30.

⁷⁸ Patricia Hewitson, *Nonproliferation and Reduction of Nuclear Weapons: Risks of Weakening the Multilateral Nuclear Nonproliferation Norm*, 21 BERKELEY J. INT'L L. 405, 462-63 (2003).

⁷⁹ See *MCI Power Group LC and New Turbine, Inc. v. Republic of Ecuador*, ICSID, Case No. ARB/03/6, Award, ¶¶ 98-102, 108, 116-117 (2007) (finding that Article 18 is an application of good faith but does not allow for the early application of the clauses of the treaty); *Case C-344/04, IATA v. ELFAA*, 2006 E.C.R. I-00403; *Case C-508/08, Commission v. Malta*, 2010 E.C.R. I-10589 (finding that Article 18 and the requirement of "good faith" are regularly considered customary international law but noting that "[n]ot all authorities, however, agree on the extent to which Article 18 constitutes simply a codification, rather than a development, of customary international law...").

⁸⁰ *Maritime Delimitation and Territorial Questions (Bahrain v. Qatar)*, 2001 I.C.J. 40 ¶ 89 (Mar. 16).

who have not ratified a treaty.⁸¹ The "good faith" requirement seems to be closer to the more limited version of Article 18 that the International Law Commission envisaged at first before adopting the current version.⁸²

Although Article 18 in its current form may have arguably developed into customary international law, its precedential authority remains uncertain, especially in domestic courts. Consequently, until there is incontrovertible evidence of how state actors treat Article 18 both in relation to other state actors as well as domestically, an argument can be made that, considering the more limited historical understanding of the object and purpose requirement and its contentious inclusion in the VCLT, the current form of Article 18 does not constitute a part of the object and purpose of the VCLT. Therefore, even if VCLT member states abide by a more expansive reading of the object and purpose requirement of Article 18 because they consider it a customary international legal norm, this requirement should not be equally applied to states that have intentionally decided not to ratify the VCLT.

2. VCLT and Article 18 in Literature and in Courts

Although the Supreme Court has paid little attention to Article 18, the VCLT, and unratified treaties in general, the Court's limited jurisprudence regarding the VCLT has received the most academic attention,⁸³ whereas it seems that the lower federal courts' more voluminous discussion of the VCLT has been largely overlooked by academics. Accordingly, there is a dearth of literature on the interpretation of unratified treaties in lower federal courts.⁸⁴ Moreover, while literature on Article 18 itself is abundant, these works largely focus either on its use internationally, its separation of power implications, or the US government's political decisions.⁸⁵ There appears to be a scarcity of

⁸¹ See, e.g., Malgosa Fitzmaurice, *Third Parties and the Law of Treaties*, 6 MAX PLANCK YEARBOOK OF UN L. 37, 42-43 (2002); MCI Power Group LC and New Turbine, Inc. v. Republic of Ecuador, ICSID, Case No. ARB/03/6, Award, ¶¶ 98-102, 108, 116-117 (2007); Case C-344/04, IATA v. ELFAA, 2006 E.C.R. I-00403; Case C-508/08, Commission v. Malta, 2010 E.C.R. I-10589.

⁸² See Oliver Dörr & Kirsten Schmalenbach, VIENNA CONVENTION ON THE LAW OF TREATIES 220 (2011).

⁸³ See, e.g., Bradley, *supra* note 21; Rogoff, *supra* note 54, at 559.

⁸⁴ Finding extant literature even remotely focused on lower federal courts is difficult. For one of the few articles dealing with customary international law, treaty interpretation, and the VCLT, see Bart M.J. Szewczyk, *Customary International Law and Statutory Interpretation: An Empirical Analysis of Federal Court Decisions*, 82 GEO. WASH. L. REV. 1118 (2014); Ronald B. Hurdle, Walter J. Champion, Jr., *The Life and Times of Napoleon Beazley: The Effect (If Any) of the International Covenant on Civil and Political Rights on Texas' 17 & Up Execution Standard*, 28 T. MARSHALL L. REV. 1 (2002).

⁸⁵ See, e.g., Jan Klabbbers, *How to Defeat a Treaty's Object and Purpose Pending Entry into Force: Toward Manifest Intent*, 34 VAND. J. TRANSNAT'L L. 283 (2001); Bradley, *supra* note 21.

literature focusing solely on the role of unratified treaties in domestic court decisions.

Furthermore, based on the extant literature, it seems that the US courts do not have a great reputation for taking into account the object and purpose of even treaties that the US has signed and ratified. For example, observers have criticized the Supreme Court's approach to the object and purpose question in *Sale*, where the Court made practically no attempt at discovering the object and purpose of the article in question.⁸⁶ In addition, the Court only made a general reference to the Convention's "broad remedial goals" and "general humanitarian intent" and did not delve deeper into what the Convention was trying to achieve or to what its purpose was.⁸⁷

Considering that the Supreme Court has only rarely considered cases involving unratified treaties,⁸⁸ it appears probable that the Court rarely grants certiorari regardless of the lower courts' holdings, making it harder for the lower courts to define the appropriate level of deference they should give to unratified treaties. The question is further complicated by the fact that the US has not ratified the VCLT, effectively rendering Article 18's position and weight ambiguous. This is another example of how the VCLT's ambiguous status within the US legal system has led to a lack of "a coherent doctrine for interpreting treaties."⁸⁹ Combined with American judges' general unfamiliarity with international law and its concepts, the end result is essentially "confused, unsystematic, and ad hoc."⁹⁰

C. Unified Treaties in the US and the Scope of the Article

The United States has signed but not ratified 38 international multiparty treaties thus far.⁹¹ These treaties deal primarily with issues relating to human rights, environmental protection, and tax arrangements between the US and

⁸⁶ See *Sale v. Haitian Ctrs. Council*, 509 U.S. 155, 169, 179-84 (1993) (discussing the lower court's reading of the object and purpose of the Convention and later dismissing it); Rogoff, *supra* note 54, at 577.

⁸⁷ See *Sale*, 509 at 183-84; Rogoff, *supra* note 54, at 577.

⁸⁸ Based on search conducted on LexisNexis in January 2016.

⁸⁹ See Glashauser, *supra* note 31, at 1243 (discussing how the Supreme Court lacks a coherent treaty interpretation doctrine).

⁹⁰ See Michael Waibel, *Principles of Treaty Interpretation: Developed for Applied and by National Courts?*, LEGAL STUDIES RESEARCH PAPER SERIES 25-26, Paper No. 16/2015 (2015), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2595681; Martin A. Rogoff, *Symposium: Application of Treaties and the Decisions of International Tribunals in the United States and France: Reflections on Recent Practice*, 58 ME. L. REV. 405, 413 (2006).

⁹¹ Treaties Pending in the Senate, U.S. DEPT OF STATE, <http://www.state.gov/s/l/treaty/pending/> (last visited Nov. 7, 2015)

various partner countries.⁹² While the State Department maintains a list of all the treaties the US has signed, submitted to the Senate for advice and consent, and not ratified, there are various treaties, most notably the Convention on the Rights of the Child⁹³, that the US has signed but not submitted to the Senate for one reason or another⁹⁴. There appears to be no exhaustive list of these treaties, and since they arguably have an even weaker status in US legal system, they will not be considered in this paper.

In total, US courts have referred to or discussed treaties submitted to the Senate but not ratified in over 400 cases, with the VCLT, the American Convention on Human Rights, and the United Nations Convention on the Law of the Sea being referred to the most.⁹⁵ Furthermore, there have been only eight references to treaties that were submitted to the Senate after 1994,⁹⁶ and only twelve of the 38 unratified treaties were submitted to the Senate in or before 1994.⁹⁷

This note will discuss cases involving the United Nations Convention on the Law of the Sea ("UNCLOS"), the American Convention on Human Rights ("ACHR" or the "American Convention"), and the International Covenant on Economic, Social and Cultural Rights ("ICESCR"). Together, these treaties account for approximately 62% of the citations to unratified treaties in US courts⁹⁸ and represent a wide cross-section of the kind of treaties the US has signed but not ratified. UNCLOS has achieved widespread recognition internationally and is considered by many states to be one of the most defining and authoritative international treaties in its provisions that reflect the overwhelming international norms on the seas.⁹⁹ Both the American Convention and the ICESCR are human rights treaties, as are a large number of the treaties

⁹² *Id.*

⁹³ See Luisa Blanchfield, *The United Nations Convention on the Rights of the Child: Background and Policy Issues*, CONGRESSIONAL RESEARCH SERVICE 1, 7-5700, Dec. 6, 2010, <http://fpc.state.gov/documents/organization/153279.pdf>.

⁹⁴ See, e.g., *Why Won't America Ratify the UN Convention on Children's Rights?*, THE ECONOMIST, Oct. 6, 2013, <http://www.economist.com/blogs/economist-explains/2013/10/economist-explains-2> (suggesting one of the reasons is Congressional Republicans' fear for the sovereignty of the United States).

⁹⁵ Based on a LexisNexis database search (November 2015).

⁹⁶ LexisNexis database search (November 2015).

⁹⁷ *Treaties Pending in the Senate*, U.S. DEP'T OF STATE, <http://www.state.gov/s/l/treaty/pending/> (last visited Nov. 7, 2015).

⁹⁸ Approximate percentage based on search conducted on LexisNexis in November 2015..

⁹⁹ See, e.g., Guifang Xue, *China and the Law of the Sea: An Update*, 84 *International Law Studies* 97, 106 (2008); Stewart M. Patrick, (Almost) Everyone Agrees: The U.S. Should Ratify the Law of the Sea Treaty, *The Atlantic*, Jun. 10, 2012, <http://www.theatlantic.com/international/archive/2012/06/-almost-everyone-agrees-the-us-should-ratify-the-law-of-the-sea-treaty/258301/>.

the US has not ratified.¹⁰⁰ Whereas the ICESCR has over 160 parties, and an additional six who have signed but not ratified the treaty, including the United States,¹⁰¹ the American Convention is a relatively minor treaty in that neither Canada nor the United States, both arguably the most important regional powers in the Americas, have decided to ratify it.¹⁰²

These treaties were selected for three main reasons. First, they represent an adequate cross-section of the types of international treaties the US has signed. UNCLOS is largely a technical treaty that codifies international law that has developed over the centuries, whereas ICESCR is a widely accepted and ratified UN-led treaty that sets out an expansive human rights framework, and the American Convention is a more regionally focused human rights instrument that has its own enforcement organizations and is less widely accepted, even regionally, than the ICESCR.

Secondly, while the UNCLOS was signed in 1994, the American Convention and the ICESCR were signed already earlier in 1977. These three treaties therefore allow us to analyze whether the amount of time a treaty has been in existence and waiting for ratification has an effect on its treatment in domestic courts.

Lastly, as already alluded to, the three treaties also provide us with a contrast when it comes to the number of signatories and general international acceptance. The American Convention is arguably the least universally or even regionally accepted of the three, whereas UNCLOS and ICESCR are almost universally endorsed. In sum, focusing on these treaties will facilitate our understanding of the weight US courts give to different types of unratified treaties, and whether their treatment differs based on their unique characteristics.

III. The Object and Purpose Requirement in Practice: How United States Courts Interpret Unratified Treaties

Having now discussed the background and analytical framework behind the question of VCLT and unratified treaties in domestic courts, this

¹⁰⁰ See, e.g., HUMAN RIGHTS WATCH, *United States Ratification of International Human Rights Treaties*, Jul. 24, 2009, available at <https://www.hrw.org/news/2009/07/24/united-states-ratification-international-human-rights-treaties>.

¹⁰¹ See, *Status of the International Covenant on Economic, Social and Cultural Rights*, UNITED NATIONS TREATY COLLECTION, Feb. 7, 2016, https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-3&chapter=4&lang=en.

¹⁰² See, *American Convention on Human Rights "Pact of San José, Costa Rica" (B-32): Signatories and Ratifications*, ORGANIZATION OF AMERICAN STATES, http://www.oas.org/dil/treaties_B-32_American_Convention_on_Human_Rights_sign.htm (last visited Nov. 22, 2015).

section will focus specifically on the three treaties previously mentioned. It will first discuss the UN Convention on the Law of the Sea before moving on to the American Convention on Human Rights and the International Covenant on Economic, Social and Cultural Rights.

A. United Nations Convention on the Law of the Sea

The UN Convention on the Law of the Sea is perhaps the most prominent international treaty or agreement concerning the use of the seas, including territorial, exclusive economic zones, and the high seas.¹⁰³ Replacing the older "freedom of the seas" doctrine, UNCLOS covers much more than just the rights of sovereign states in their territorial waters; it establishes the responsibilities of the state parties with regard to a variety of issues, such as environmental protection, crimes on the high seas, and the exploitation of deep seabeds.¹⁰⁴ The current UNCLOS is the end result of a process spanning decades, that culminated in the negotiation of what was officially known as UNCLOS III in 1983.¹⁰⁵ However, the Convention was not met with immediate approval by some developed countries because it included some stringent provisions concerning the use of deep seabeds.¹⁰⁶ In response to these concerns, UNCLOS negotiations continued in the early-1990s, once the original agreement had failed to receive sufficient acceptance and signatures from industrialized countries.¹⁰⁷ The Agreement relating to the Implementation of Part XI of the Convention, dealing with the seabed mining provisions and finalized in 1994, secured the backing of various industrial states to the Convention and, consequently, UNCLOS entered into force in 1994.¹⁰⁸ While the United States signed the Implementation Agreement, it has yet to officially

¹⁰³ United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 3 [hereinafter UNCLOS].

¹⁰⁴ See UNCLOS, *supra* note 102, at 3.; Gloria L. Gallardo Fernández, *Fishing Management and Property Rights: A Conceptual Framework*, in FROM SEASCAPES OF EXTINCTION TO SEASCAPES OF CONFIDENCE: TERRITORIAL USE RIGHTS IN FISHERIES IN CHILE: EL QUISCO AND PUERTO OSCURO 25, 28 (2008).

¹⁰⁵ Tullio Treves, *1958 Geneva Convention on the Law of the Sea*, UNITED NATIONS AUDIOVISUAL LIBRARY OF INTERNATIONAL LAW, available at <http://legal.un.org/avl/ha/gclos/gclos.html> (last visited Nov. 22, 2015).

¹⁰⁶ Charles E. Biblowit, *Deep Seabed Mining: The United States and the United Nations Convention on the Law of the Sea*, 58 ST. JOHN'S L. REV. 2, 267-70 (1984).

¹⁰⁷ See Patricia C. Bauerlein, *The United Nations Convention on the Law of the Sea and U.S. Ocean Practice: Are We Complying with International Law*, 17 LOY. L.A. INT'L & COMP. L. REV. 899, 905 (1995).

¹⁰⁸ See *id.*

sign the original Convention, and has not yet ratified the Implementation Agreement.¹⁰⁹

Arguably partially due to UNCLOS' position as the pre-eminent sea treaty, some of the most detailed discussions of Article 18 and the VCLT's object and purpose requirement can be found in cases concerning UNCLOS. Particularly noteworthy are a series of cases from the Fifth and Eleventh Circuits in the late 1990s and mid-2000s revolving around the dumping of hazardous materials in US territorial waters, namely *United States v. Royal Caribbean Cruises (Royal Caribbean Cruises I)*,¹¹⁰ *United States v. Royal Caribbean Cruises (Royal Caribbean Cruises II)*,¹¹¹ *United States v. Kun Yun Jho*,¹¹² and *United States v. Jho*.¹¹³

The Royal Caribbean Cruises cases provide us with arguably the best example of the varied approaches courts adopt when interpreting unratified treaties in general and UNCLOS in particular. The District Courts of Puerto Rico and the Southern District of Florida reached noticeably different conclusions, with the District Court of Puerto Rico holding in *Royal Caribbean Cruises I* that UNCLOS was applicable because of the object and purpose requirement set out in Article 18 of the VCLT, and the District Court for the Southern District of Florida finding in *Royal Caribbean Cruises II* that UNCLOS had no authoritative power.¹¹⁴ The question is further complicated by the fact that neither case was appealed to their respective Circuit Courts. These two cases are also distinguishable by their discussion of Article 18 of the VCLT. *Royal Caribbean Cruises I* analyzed the VCLT explicitly, considering whether it should give weight to it, whereas the District Court for the Southern District of Florida did not refer to the VCLT at all, preferring instead to consider in isolation whether UNCLOS has any authoritative weight.¹¹⁵

¹⁰⁹ See Status of the United Nations Convention on the Law of the Sea, UNITED NATIONS TREATY COLLECTION, https://treaties.un.org/pages/ViewDetailsIII.aspx?src=TREATY&mtmsg_no=XXI-6&chapter=21&Temp=mtmsg3&lang=en (last visited Jan. 20, 2016); Status of the Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1983, UNITED NATIONS TREATY COLLECTION, https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtmsg_no=XXI-6-a&chapter=21&lang=en (last visited Jan. 20, 2016).

¹¹⁰ *United States v. Royal Caribbean Cruises Ltd.*, 24 F. Supp. 2d 155 (D.P.R. 1997).

¹¹¹ *United States v. Royal Caribbean Cruises, Ltd.*, 11 F. Supp.2d 1358 (S.D. Fla. 1998).

¹¹² *United States v. Kun Yun Jho*, 465 F. Supp. 2d 618 (E.D. Tex. 2006), rev'd on other grounds, 534 F.3d 398 (5th Cir. 2008).

¹¹³ *United States v. Jho*, 534 F.3d 398 (5th Cir. 2008).

¹¹⁴ *Royal Caribbean Cruises*, 24 F. Supp.2d at 160; *Royal Caribbean Cruises*, 11 F. Supp.2d at 1362, 1370-71.

¹¹⁵ *Royal Caribbean Cruises*, 24 F. Supp.2d at 159-60.

In *Royal Caribbean Cruise I*, the court first found that VCLT Article 18 applied to the issue in question, in that there was a treaty on point; that the treaty provided remedies that were integral to the object and purpose of the treaty; and that although the US has not signed the VCLT, Article 18 still applied and that the courts were bound to uphold the purpose and principles of treaties to which the US had signed onto.¹¹⁶ Following its decision on the applicability of Article 18, the court then found that UNCLOS was applicable in the case, that the Royal Caribbean Cruises ship had been within the US territorial waters.¹¹⁷ However, because the dumping of oil caused no immediate threat and was not a serious act of pollution as required for more than monetary damages by UNCLOS, the US government was prohibited by the treaty from seeking any redress other than monetary penalties.¹¹⁸

It is worth noting that the District Court of Puerto Rico did not discuss why the US was bound to follow Article 18 of the VCLT. Rather, the Court simply assumed it was bound by this article.¹¹⁹ In effect, therefore, the Court adopted separate and distinct interpretative approaches to both the VCLT and the UNCLOS. With regard to the former, its prescriptive power came from the fact that the US had signed it, not from its international customary law origins, whereas with regard to the latter, international norms together with Article 18 of the VCLT were decisive.¹²⁰

In *Royal Caribbean Cruises II*, the US District Court for the Southern District of Florida reached a substantially different conclusion. In its motion to dismiss, the defendant raised similar, previously successful, defenses, effectively arguing that not only was the Government's case barred under three domestic laws but also that both the International Convention for the Prevention of Pollution from Ships (MARPOL) and UNCLOS required the Court to find for the defendant.¹²¹ In contrast, the Government argued that it had jurisdiction to prosecute the case criminally because the alleged crime of falsifying the ship's Oil Record Book occurred while the ship was within an American port, fulfilling the necessary prerequisites under both MARPOL and UNCLOS.¹²² In addition, the Government argued that the defendant could not rely on double jeopardy or other defenses explicitly enumerated in UNCLOS as, even assuming *arguendo*

¹¹⁶ *Id.* at 159.

¹¹⁷ *Id.*

¹¹⁸ *Id.*¹¹⁹ *Id.* at 159-60.

¹¹⁹ *Id.* at 159-60.

¹²⁰ *Id.*

¹²¹ *United States v. Royal Caribbean Cruises. Ltd.*, 11 F. Supp. 2d 1358, 1362 (S.D. Fla. 1998).

¹²² *Id.* at 1363.

that the Convention was considered customary international law, it was not self-executing, and therefore it could not render individual rights to the defendant.¹²³

Agreeing with the Government, the Court held that neither UNCLOS nor MARPOL were applicable as a matter of law – neither treaty extended to the ports of member states, therefore allowing the member states to apply and enforce their own laws and regulations in their sovereign ports.¹²⁴ In addition, the Court entertained but quickly dismissed defenses available to the defendant even if UNCLOS was controlling.¹²⁵ The RCC argued that the Government could not prevent it from employing UNCLOS as a defense because the question of whether UNCLOS is binding on the United States had already been litigated in *Royal Caribbean Cruises I*.¹²⁶ In other words, the RCC was arguing that since it had already once successfully litigated whether the United States was bound by UNCLOS under Article 18 of the VCLT, it did not need to re-litigate the issue and could rely on defenses available to it under UNCLOS. However, according to the Court, the doctrine of collateral estoppel failed as a defense¹²⁷ because the requirement that the issue must be a critical and necessary part of the litigation was not satisfied.¹²⁸ In effect, the Court concluded that the cases were sufficiently and substantially distinguishable to preclude the application of collateral estoppel. Whereas the Puerto Rico case revolved around ten indictments resulting from an illegal discharge and its aftermath in navigable US waters, the current case revolved a sole count of providing false information to federal officials.¹²⁹

The Court also rejected the defendant's alternative defense that UNCLOS nevertheless constituted customary international law, and that the Court should therefore give effect to it and not frustrate the object and purpose of UNCLOS by permitting criminal prosecution when the treaty itself enumerated merely monetary remedies for aggrieved parties.¹³⁰ While the Court found that the Convention was largely reflective of international norms and practices, and did indeed constitute customary international law, it also held that it would only afford RCC a defense if the treaty was self-executing.¹³¹ Refusing

¹²³ *Id.* at 1370.¹²⁴ *Id.* at 1368-71.

¹²⁴ *Id.* at 1368-71.

¹²⁵ *Id.* at 1371.

¹²⁶ *Id.* at 1371-72.

¹²⁷ *Id.* at 1371-72; Collateral estoppel refers to a doctrine that prevents relitigation of substantive legal issues or facts that have already been decided in previous cases that resulted in valid final judgements. See Collateral Estoppel, CORNELL UNIVERSITY LAW SCHOOL LEGAL INFORMATION INSTITUTE, https://www.law.cornell.edu/wex/collateral_estoppel (last visited Feb. 6, 2016).

¹²⁸ 11 F. Supp. 2d at 1372.

¹²⁹ *Id.* at 1372.

¹³⁰ *Id.* at 1372-73.

¹³¹ *Id.*

to rule on this matter, the Court held that even if the Convention constituted customary international law and was self-executing, it would nevertheless still not extend to criminal prosecutions for crimes committed within US ports.¹³²

The *Royal Caribbean Cruises II* decision is remarkable for two reasons: first, the Court held that the prior decision in *Royal Caribbean Cruises I* regarding the status of UNCLOS in US courts was unpersuasive; secondly, the Court nevertheless found its ruling to be reconcilable with UNCLOS' framework by demonstrating that the decision did not go against the object and purpose of the Law of the Sea Convention. While the Court could have easily held that the United States was not bound by UNCLOS and simply dismissed the unratified document, it attempted to abide by UNCLOS' object and purpose without expressly conceding the document held precedential authority. It seems possible, albeit not clear from the Court's decision, that the Court was concerned about the implications and weight that the Puerto Rico court had been willing to give to an unratified document but was not willing to go as far as to say that courts should not pay any attention to the object and purpose of treaties that the United States has signed but not ratified.

United States v. Jho also demonstrated how the American courts attempted to reconcile the object and purpose of UNCLOS and its status as an unratified treaty. In *Jho*, the defendant was indicted for dumping illegal amounts of oily water discharge into US territorial waters, manipulating the ship's oil record book and pollution detection equipment, and making false representations to US authorities charged with investigating the allegations.¹³³ Relying on Article 16 of UNCLOS, which states that non-flag states can only impose civil fines for violations of national laws and regulations in cases involving pollution of the marine environment, except in cases of wilful and serious acts of pollution, the defendant attempted to argue that it was immune from criminal prosecution under the relevant facts.¹³⁴ Initially, at the trial court, a magistrate judge assigned to investigate the facts and issue recommendations acknowledged the importance of UNCLOS and considered the object and purpose requirement established by the VCLT.¹³⁵ In interpreting UNCLOS and the VCLT, the magistrate judge turned to the relatively similar *Royal Caribbean Cruises* cases.¹³⁶ Holding that the *Royal Caribbean Cruises* cases had conflicting results, the magistrate judge concurred with *Royal Caribbean*

¹³² *Id.* at 1373-74.

¹³³ *United States v. Kun Yun Jho*, 465 F. Supp. 2d 618 (E.D. Tex. 2006), rev'd on other grounds, 534 F.3d 398 (5th Cir. 2008).

¹³⁴ *See* *Kung Yun Jho*, 465 F. Supp. 2d at 625; UNCLOS, *supra* note 102, at 3.

¹³⁵ *United States v. Kun Yun Jho*, 465 F. Supp. 2d 618, 631-32 (E.D. Tex. 2006), *adopted by* *United States v. Kun Yun Jho*, 465 F. Supp. 2d 618 (E.D. Tex. 2006).

¹³⁶ *Id.* at 629-32.

Cruises II's more restrictive interpretation, concluding that UNCLOS did not have the force of law and, thus, did not apply.¹³⁷

The District Court Judge, however, was more receptive to the defendant's UNCLOS argument, and while it did adopt the magistrate's findings in most parts, it modified counts 3-10, holding that, while UNCLOS was not ratified by the US, it was appropriate to consider it when analyzing the current case.¹³⁸ Accordingly, the Court granted the defendant's motion to dismiss those counts that were most dependent on UNCLOS' interpretation.¹³⁹ Therefore, the Court adopted a similar judicial approach seen in *Royal Caribbean Cruises I*.¹⁴⁰ The District Court also specifically discussed the general object and purpose requirement of treaty interpretation, citing the Restatement (Third) of Foreign Relations Law's Article 312(3), which effectively establishes the same concept as VCLT Article 18.¹⁴¹

Nevertheless, the Court's approach to treaty interpretation was emphatically overturned on appeal. The US Court of Appeals for the Fifth Circuit held that the District Court erred in deciding not to adopt the magistrate judge's findings in full, and that the District Court gave too much weight to UNCLOS.¹⁴² In a strongly worded rebuke, the Circuit Court noted that the District Court had erroneously relied on UNCLOS' Articles 216 and 230 even though UNCLOS was not ratified by the US, and thus mattered only to the extent that it reflected customary international law.¹⁴³ The Court then declined to decide whether the relevant UNCLOS articles constituted customary international law because, even if they did, the Court believed the treaty would not be on point for the question presented in the case.¹⁴⁴ The court then ran a full treaty analysis regardless to demonstrate that the relevant UNCLOS provisions would not apply in the case, arguably to prove that it did not violate the object and purpose of the Convention.¹⁴⁵ While the Court did make it clear that the treaty did not have the force of law in the US,¹⁴⁶ it at the same time refrained from deciding whether the Convention constituted customary international law or whether the United States should abide by the Convention's object and purpose.

¹³⁷ *Id.* at 631-32.

¹³⁸ *Kun Yun Jho*, 465 F.Supp. 2d at 624.

¹³⁹ *Id.* at 624-26.

¹⁴⁰ *Id.* at 624.

¹⁴¹ *Id.* at 624-25; RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 312(3) (1987).

¹⁴² *United States v. Jho*, 534 F.3d 398, 400, 406-07 (5th Cir. 2008)

¹⁴³ *Id.* at 406-07.

¹⁴⁴ *Id.* (holding that the District Court erred in construing alleged criminal conduct to have occurred "outside U.S. waters" because the crimes actually occurred within U.S. ports).

¹⁴⁵ *Id.* at 407-09.

¹⁴⁶ *See id.* at 406.

Overall, while a selective sample, these cases indicate that not only are higher courts less likely to give weight to UNCLOS, largely due to the fact that the US has not ratified the treaty, the lower courts are split and seem to consider geospatial factors when deciding the value of unratified treaties. These cases suggest that at least with technical treaties such as UNCLOS, the courts are relatively willing to consider the treaty's articles as is, as long as the treaty was originally drafted to compile extant customary international law, even if the courts have no specific evidence that the provisions in question were among those principles harvested from existing practice. Nevertheless, it is clear is that the courts, even when they refuse to hold that the United States is bound by the unratified treaty, will concede that the treaty is likely indicative of customary international law and run a relatively complete analysis of the treaty's object and purpose arguably in order to demonstrate it is not completely disregarding the treaty in violation of Article 18 of the VCLT.

B. American Convention on Human Rights

The American Convention on Human Rights is perhaps the least prominent of the three treaties examined in this paper. Also known as the "Pact of San José,"¹⁴⁷ the American Convention was adopted in 1969 but did not enter into force until nine years later in 1978, when eleven countries had ratified it in accordance with its articles.¹⁴⁸ Currently, 25 countries have ratified the American Convention.¹⁴⁹ However, neither the United States nor Canada has ratified the treaty – with Canada having refused to even sign the treaty¹⁵⁰ – making it effectively a South and Central American Convention. Although the United States signed the Convention in 1977, it has yet to ratify it.¹⁵¹ As its name suggests, the American Convention's aim is to promote human rights, personal liberty, and social justice in the Americas.¹⁵² Although the Convention has been cited by United States courts in 98 cases, unlike UNCLOS or the Covenant of Economic, Social, and Cultural Rights, only a relatively small proportion of these cases discuss substantive parts of the American Convention or are dependent on the court's interpretation of it. Most of the cases simply mention the American Convention in passing while discussing the existence of

¹⁴⁷ *American Convention on Human Rights "Pact of San José, Costa Rica" (B-32): Signatories and Ratifications*, ORGANIZATION OF AMERICAN STATES, http://www.oas.org/dil/treaties_B-32_American_Convention_on_Human_Rights_sign.htm (last visited Nov. 22, 2015).

¹⁴⁸ *See id.*; American Convention of Human Rights: "Pact of San Jose, Costa Rica," art. 74.2, Nov. 21, 1969, 1144 U.N.T.S. 143 [hereinafter *American Convention*].

¹⁴⁹ *American Convention on Human Rights "Pact of San José, Costa Rica" (B-32): Signatories and Ratifications*, ORGANIZATION OF AMERICAN STATES, http://www.oas.org/dil/treaties_B-32_American_Convention_on_Human_Rights_sign.htm (last visited Nov. 22, 2015).

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² American Convention, *supra* note 146.

certain international norms, usually along with other international treaties. This paper focuses on the few cases where the American Convention played at least a somewhat larger role in the arguments.

The Supreme Court has referred to the American Convention only four times.¹⁵³ In each of these instances, the Court has done so in the context of juvenile death penalty cases, and in each case, the American Convention has not been determinative.¹⁵⁴ Indeed, in all of these cases, the American Convention is mentioned only as supporting evidence for the proposition that the death penalty for juveniles is commonly prohibited internationally, with the notion often buried in a footnote. In this sense, the treatment of the American Convention is relatively similar to UNCLOS. Furthermore, with the exception of *Roper v. Simmons*,¹⁵⁵ the references to the American Convention were included in the dissenting opinions, often advocating for the prohibition of juvenile death penalty. Therefore, because the Supreme Courts' discussion of the American Convention is limited, the analysis should focus on lower federal and state courts.

While the lower courts have more often dealt with issues involving substantive parts of the American Convention, their discussion of it has often been relatively limited, suggesting further evidence of the United States' reluctance to give effect to international human rights treaties.¹⁵⁶ Arguably some of the most influential cases concerning the American Convention are *Garza v. Lappin*,¹⁵⁷ *Flores-Nova v. Att'y Gen. of the US*,¹⁵⁸ and *Flores v. Southern Peru Copper Corp.*¹⁵⁹ While lower federal courts seem to base their analysis in similar cases on these three cases,¹⁶⁰ *Garza* is arguably the most influential based on the number of times it has been cited. As demonstrated below, *Garza* has been relied upon by subsequent courts, regardless of Circuit, for the proposition that the United States is not bound by the unratified American Convention.

¹⁵³ Based on search conducted on LexisNexis in December 2015.

¹⁵⁴ See *Roper v. Simmons*, 543 U.S. 551, 576 (2005); *Stanford v. Kentucky*, 492 U.S. 361, 390 n.10 (1989) (Brennan, J., dissenting); *Thompson v. Oklahoma*, 487 U.S. 815, 830 n.34 (1988); *Burger v. Kemp*, 483 U.S. 776, 823 n.5 (1987) (Powell, J., dissenting).

¹⁵⁵ *Simmons*, 543 U.S. at 576.

¹⁵⁶ CONG. RESEARCH SERV., S. PRT. 106-71, TREATIES AND OTHER INTERNATIONAL AGREEMENTS: THE ROLE OF THE UNITED STATES SENATE 285 (2001).

¹⁵⁷ *Garza v. Lappin*, 253 F.3d 918 (7th Cir. 2001).

¹⁵⁸ *Flores-Nova v. Att'y Gen. of the U.S.*, 652 F.3d 488 (3d Cir. 2011).

¹⁵⁹ *Flores v. S. Peru Copper Corp.*, 343 F.3d 140 (2d Cir. 2003).

¹⁶⁰ See, e.g., *Sarei v. Rio Tinto PLC*, 221 F.Supp.2d 1116, 1158 (C.D. Cal. 2002); *Chen v. Ashcroft*, 85 Fed. App'x. 700 (10th Cir. 2004).

In *Garza*, the petitioner, convicted by a federal court for three counts of murder, argued that he was entitled to a resentencing as the Inter-American Commission on Human Rights had decided that his death sentence was in violation of international human rights law.¹⁶¹ The petitioner had been convicted of money laundering and other drug-related crimes, including the killing of three people in furtherance of his criminal activities.¹⁶² Having exhausted all domestic remedies, Garza petitioned the Inter-American Commission to hear his case, arguing that the admission of evidence of five other murders he had allegedly committed in Mexico at his sentencing hearing violated his rights under the American Declaration of the Rights and Duties of a Man, a declaration signed by the United States.¹⁶³ The Commission decided that since the introduction of the evidence of the Mexican murders allowed the US government to effectively impose a death penalty for both the Mexican murders as well as the three killings in the US, the death penalty breached the international law norms that the US had committed to following.¹⁶⁴

Although the American Convention did not form the basis of Garza's petition to the Inter-American Commission, it did play a major role in the Court's decision not to give weight to the Commission's decision. According to the Court, the weight courts should give to opinions by the American Commission depended largely on whether the country in question had ratified the American Convention.¹⁶⁵ Although the Commission was established before the American Convention, and the Commission relied solely on the American Declaration as opposed to the American Convention, the Court emphasized that should the US ratify the American Convention, domestic courts should give more weight to opinions by the American Commission, although its decisions would not be binding as those of the Inter-American Court of Human Rights.¹⁶⁶ In effect, according to the court, the distinction arises from the dual nature of the Statute of the Inter-American Commission on Human Rights, which sets out two distinct procedures for dealing with countries that have ratified the American Convention on Human Rights and those who have not.¹⁶⁷

The *Garza* Court therefore effectively relied on the distinction between Article 18 and 19 of the Statute of the Inter-American Commission on Human Rights.¹⁶⁸ Article 18 lays out the power of the Commission to issue recommendations and examine communications submitted to it in relation to all

¹⁶¹ *Garza*, 253 F.3d at 919-20.

¹⁶² *Id.*

¹⁶³ *Id.* at 920.

¹⁶⁴ *Id.*

¹⁶⁵ *Id.* at 925.

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ *See id.*; American Convention, *supra* note 146, arts. 18, 19.

members of the Organization of American States.¹⁶⁹ Meanwhile, Article 19 establishes the right of the Commission to take cases to the Inter-American Court in cases where the state party has ratified the American Convention.¹⁷⁰ However, while the Court noted that "[n]othing in the OAS Charter suggests an intention that member states will be bound by the Commission's decisions before the American Convention goes into effect,"¹⁷¹ it did not discuss whether the American Convention provisions concerning the American Commission or human rights issues in general amount to the object and purpose of the American Convention. Indeed, the Court expressly refused to consider the American Convention, emphatically noting that "[t]he rub is this: although the United States has signed the American Convention, it has not ratified it, and so that document does not yet qualify as one of the "treaties" of the United States that creates binding obligations."¹⁷²

The *Garza* Court's reluctance to give any weight to the provisions or object and purpose of the American Convention was seemingly adopted by other federal courts, many of which borrowed their language directly from the Seventh Circuit. For instance, *Flores-Nova v. Att'y Gen. of United States* and *Flores v. Southern Peru Copper Corp.* supported viewing the American Convention largely as an aspirational document and demonstrated the American courts' hesitation to give precedential authority to unratified documents, especially those that did not confer individual rights even if ratified.

In *Flores-Nova*, a couple, who were both lawful permanent residents, remained abroad for a period longer than authorized under American immigration laws.¹⁷³ Consequently, the plaintiffs were refused re-entry into the United States, even though they had three American-born children.¹⁷⁴ The plaintiffs argued that the immigration refusal was in violation of various domestic legal rules and principles, as well as the American Declaration, as interpreted by the American Commission in previous cases, and the United Nations Convention on the Right of the Child, another treaty not yet ratified by the US.¹⁷⁵ In essence, the crux of the plaintiff's argument was that the US was bound "by the [American Commission's] finding that removing lawful permanent residents without giving them an opportunity for a meaningful

¹⁶⁹ American Convention, *supra* note 146, art. 18.

¹⁷⁰ American Convention, *supra* note 146, art. 19.

¹⁷¹ *Garza*, 253 F.3d at 925.

¹⁷² *Id.*

¹⁷³ *Flores-Nova v. Att'y Gen. of the United States*, 652 F.3d 488, 490-91 (3d. Cir. 2011).

¹⁷⁴ *Id.*

¹⁷⁵ *Id.* at 493.

hearing would violate numerous articles of the 'American Declaration of the Rights and Duties of Man.'"¹⁷⁶

The *Flores-Nova* Court heavily relied on *Garza* in holding that domestic courts were not bound by the prior American Commission decisions.¹⁷⁷ Relying almost solely on *Garza*, the Court in *Flores-Nova* held that the Organization of American States (OAS) never considered the American Commission's decisions to have binding force on members states, at least before the American Convention came into effect.¹⁷⁸ The Court found the Seventh Circuit's reasoning persuasive, and reiterated that there was no binding language in the OAS Charter when it came to the prior American Commission decisions, whereas the American Commission's own statute established two separate procedures for dealing with countries which have and have not ratified the American Convention.¹⁷⁹ Meanwhile, and most importantly for the purposes of the VCLT Article 18 analysis, the Court noted that "to the extent the [American Commission] operates under the authority given to it by the American Convention, its decisions are not enforceable domestically."¹⁸⁰ This is because, "[a]lthough the United States is a signatory to the American Convention, it has not ratified [it] to date, and thus, [it] does not have the force of law in the United States."¹⁸¹

Thus, in *Flores-Nova*, the Court did not examine whether the American Convention required state parties to discuss the merits of the American Commission decisions, even if they would not be bound by those decisions. By declining to engage in this discussion, the Court effectively dismissed the American Convention and the object and purpose analysis from the start, adopting a more literal and technical approach to treaty interpretation – one that relied solely on the status of the treaty in the domestic framework, without reference to its fundamental objectives. Furthermore, the Court did not engage in an analysis aimed at establishing whether the American Commission's decisions in fact organically shaped and defined the object and purpose of the American Convention, a process that would have made engaging in an object and purpose analysis even more crucial under Article 18 of the VCLT. However, the Court adopted a different approach when it came to analyzing the status of the Convention on the Rights of the Child.¹⁸² With regards to that treaty, the Court, while not engaging in full object and purpose analysis, at least considered the

¹⁷⁶ *Id.*

¹⁷⁷ *Id.* at 494.

¹⁷⁸ *Id.* at 493.

¹⁷⁹ *Id.* at 493-94.

¹⁸⁰ *Id.* at 494.

¹⁸¹ *Id.*

¹⁸² *Id.* at 495.

possibility that the article referred had become customary international law, but ultimately dismissed the claim as, even if that was the case, federal legislation would have pre-empted the claim.¹⁸³

Before *Flores-Nova*, however, the Second Circuit adopted an ever so slightly different approach in *Flores v. S. Peru Copper Corp.*¹⁸⁴ In *Flores*, the Second Circuit was asked to determine whether Peruvian citizens allegedly harmed by the actions of an American mining company in Peru were entitled to compensation under the Alien Tort Claims Act.¹⁸⁵ Part of the plaintiff's claim was based on Article 4 of the American Convention that established the right to life.¹⁸⁶ Although the Second Circuit's analysis of the American Convention claim was relatively short, it nevertheless demonstrated another approach and willingness to consider a treaty's object and purpose first, before considering its status in domestic courts in general.¹⁸⁷

The *Flores* Court first established that, in the context of the International Covenant on Civil and Political Rights, a treaty signed and ratified by the US, a similar "right to life" provision is "insufficiently definite to give rise to a rule of customary international law."¹⁸⁸ Consequently, the Court held, since the American Convention only included a similar provision, without ever mentioning environmental pollution, allowable parameters, or unacceptable limits, the American Convention claim also failed for lack of definiteness.¹⁸⁹

It is only after this analysis that the Court mentioned that, even if the American Convention would provide a specific remedy for environmental pollution, it was not ratified by the United States.¹⁹⁰ Furthermore, the Court stressed that the United States had refused to ratify the treaty for over 30 years.¹⁹¹ Citing *Garza*, the Court then stated that because of this, the American Convention did not "yet qualify as one of the 'treaties' of the United States that create[d] binding obligations."¹⁹² However, the Court also mentioned that part of the weight of the non-ratification comes from the fact that the Convention is not embraced by all of the prominent states in the region.¹⁹³ Therefore, the Court

¹⁸³ *Id.*¹⁸⁴ *Flores v. S. Peru Copper Corp.*, 343 F.3d 140 (2d Cir. 2003).

¹⁸⁴ *Flores v. S. Peru Copper Corp.*, 343 F.3d 140 (2d Cir. 2003).

¹⁸⁵ *Id.* at 143-44.

¹⁸⁶ *Id.* at 164.

¹⁸⁷ *See id.*

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

¹⁹² *Id.* (quoting *Garza v. Lappin*, 253 F.3d 918, 925 (7th Cir. 2001)) (internal quotation marks omitted).

¹⁹³ *Id.* at 163-64.

appeared to leave open the possibility that had Canada and all the other states in the region ratified the treaty, the outcome of the treaty analysis may have been at least procedurally different.

These three cases concerning the American Convention show an intriguing aspect of US treaty interpretation regarding international human rights treaties. On the one hand, the courts seem more unwilling to give human rights treaties the same analytical treatment as treaties establishing more definite and uncontroversial provisions, such as UNCLOS. At the same time, however, especially the Supreme Court has utilized the American Convention and other prominent human and political rights treaties to establish international customary law and prevalent international norms.¹⁹⁴ In effect, therefore, international human rights treaties seem to play a dual role in US jurisprudence – while they do not create enforceable rights or principles that plaintiffs or defendants can use in litigation, they do assist the courts in analyzing the state of international norms and practices, supporting the courts' analysis under more conventional instruments.

C. International Covenant on Economic, Social and Cultural Rights

The International Covenant on Economic, Social and Cultural Rights (ICESCR) is one of the most widely supported human rights treaties. It was adopted by the United Nations General Assembly in 1966 before entering into force ten years later in 1976.¹⁹⁵ It has thus far been signed by 164 parties,¹⁹⁶ who, according to the treaty, are committed to advancing justice through enhancing self-determination and by granting various economic, cultural and social rights to all peoples.¹⁹⁷ The Covenant focuses heavily on labor rights, and right to health, education, and an adequate standard of living.¹⁹⁸ While enjoying popular support, six countries, including the United States, have not ratified the treaty.¹⁹⁹ In the United States, the administration of President Jimmy Carter signed but did not actively push for the treaty's ratification due to political

¹⁹⁴ See, e.g., *Roper v. Simmons*, 543 U.S. 551, 576 (2005) (using the American Convention to support the statement that the majority of the countries prohibit death penalty for juveniles).

¹⁹⁵ International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, S. Treaty Doc. No. 95-19, 6 I.L.M. 360 (1967), 993 U.N.T.S. 3.

¹⁹⁶ International Covenant on Economic, Social and Cultural Rights, UNITED NATIONS TREATY COLLECTION, https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-3&chapter=4&lang=en (last visited Nov. 22, 2015).

¹⁹⁷ International Covenant on Economic, Social and Cultural Rights art. 1, Dec. 16, 1966, S. Treaty Doc. No. 95-19, 6 I.L.M. 360 (1967), 993 U.N.T.S. 3.

¹⁹⁸ International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, S. Treaty Doc. No. 95-19, 6 I.L.M. 360 (1967), 993 U.N.T.S. 3.

¹⁹⁹ International Covenant on Economic, Social and Cultural Rights, UNITED NATIONS TREATY COLLECTION, https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-3&chapter=4&lang=en (last visited Nov. 22, 2015).

reasons.²⁰⁰ Meanwhile, the administrations of both President Ronald Reagan and George H.W. Bush viewed the covenant as establishing aspirational social goals, instead of binding treaty obligations, and did not therefore pursue its ratification.²⁰¹ There is evidence that subsequent administrations, including the administration of President Barack Obama have continued this same policy.²⁰²

Although the ICESCR is similar to the American Convention in the sense that it is largely a human rights treaty that does not seem to establish any individually enforceable rights upon the citizens of the member states, it enjoys almost universal acceptance, and it appears that the courts are more likely to give its provisions consideration, even if they do not ultimately find the treaty binding upon the United States.²⁰³ As with the American Convention, the Covenant is often only employed in the process of establishing governing international standards and customary international law, and the cases involving claims largely dependent on the Covenant are few and far between. In *Flores v. Southern Peru Copper Corp.*, the Southern District of New York and the Second Circuit critically helped shape ICESCR jurisprudence,²⁰⁴ whereas various other federal cases include short discussions of claims dependent on the Court's interpretation of the Covenant. *Moore v. Ganim*,²⁰⁵ on the other hand, exemplifies a State Supreme Court's approach to ICESCR interpretation, and arguably to federal treaty interpretation at large.

In *Flores*, the petitioner relied on various international treaties, including the ICESCR, claiming that they suffered asthma and lung disease as a result of the environmental pollution from the defendant's mining and refinery operations.²⁰⁶ The District Court for the Southern District of New York limited its discussion concerning the various claims based on international treaties, largely relying on the Fifth Circuit's precedent in *Beanal v. Freeport-McMoran*,²⁰⁷ where the Court held that Beanal's claims against an American mining company under international treaties were either not established or not specific enough.²⁰⁸ Flores argued that the issue in *Flores* was distinguishable from that in *Beanal* because the petitioners characterized their claims as based

²⁰⁰ Economic, Social and Cultural Rights: Questions and Answers, AMNESTY INTERNATIONAL USA 6, available at http://www.amnestyusa.org/pdfs/escr_qa.pdf.

²⁰¹ *Id.*

²⁰² See *id.* (discussing George W. Bush's approach with regards to the Covenant. There is no significant proof that the Obama administration would have acted differently).

²⁰³ See, e.g., *Flores v. Southern Peru Copper Corp.*, 253 F. Supp. 2d 510, 519-20 (S.D.N.Y. 2002) (analyzing the ICESCR in detail while noting that it has been ratified by numerous countries).

²⁰⁴ *Flores v. Southern Peru Copper Corp.*, 253 F. Supp. 2d 510 (S.D.N.Y. 2002), *aff'd*, 343 F.3d 140 (2d Cir. 2003).

²⁰⁵ *Moore v. Ganim*, 660 A.2d 742 (Conn. 1995).

²⁰⁶ *Flores*, 343 F.3d at 162-63; *Flores*, 253 F. Supp. 2d at 519-20.

²⁰⁷ *Beanal v. Freeport-McMoran, Inc.*, 197 F.3d 161 (5th Cir. 1999).

²⁰⁸ *Id.* at 163-67.

on human rights law, rather than environmental law, and by pointing to the specific rights they invoked.²⁰⁹ Unlike in *Beanal*, where the claims were largely based on environmental violations and genocide, *Flores* dealt solely with the general human right to life established by international treaties.²¹⁰ Therefore, Flores argued that his reliance on the ICESCR should be afforded closer consideration, and not dismissed for failure to state a claim under the treaty.

The trial court nonetheless held that the petitioners' claims failed, because the international treaties and conventions that they relied upon did not clearly establish enforceable rights that were adequately clear and precise.²¹¹ In particular, the District Court noted that Article 12 of the ICESCR only provided that "[t]he States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health."²¹² The Court held that these general human rights principles, standing alone, were insufficiently determinate to establish binding customary international law, and did not describe prohibited conduct relevant to the case.²¹³ At the same time, however, the court did note that the treaties in question, namely the ICESCR, the Universal Declaration of Human Rights, and the World Charter for Nature, had been recognized by other countries, and were thus likely representative of the dominant international customary law and relevant norms.²¹⁴ Regardless, the Court did not engage in further analysis of the role of the customary international law for this case and whether the conduct alleged here violated the object and purposes of these treaties.

On appeal, the Second Circuit affirmed the District Court's ruling in *Flores* with regards to the weight of the international treaties relied on by the plaintiff.²¹⁵ The Court held that the principles reflected in the treaties "[were] boundless and indeterminate. They express virtuous goals understandably expressed at the level of abstraction needed to secure the adherence of States that disagree on many of the particulars" of how to achieve them.²¹⁶ In effect, therefore, the Circuit Court did not consider the relevance of the applicable provisions to the object and purpose of the treaty but rather adopted a more functional and pragmatic approach. The Court also rejected the argument that the principles involved had become so ingrained in customary international law

²⁰⁹ *Flores*, 253 F.Supp.2d at 519.

²¹⁰ *Id.*

²¹¹ *Id.* at 519-23.

²¹² *Id.* at 520; International Covenant on Economic, Social and Cultural Rights art. 12, Dec. 16, 1966, S. Treaty Doc. No. 95-19, 6 I.L.M. 360 (1967), 993 U.N.T.S. 3.

²¹³ *Flores*, 253 F.Supp.2d at 519.

²¹⁴ *Id.* at 519-20.

²¹⁵ *Flores v. S. Peru Copper Corp.*, 343 F.3d 140, 171-72 (2d Cir. 2003).

²¹⁶ *Id.* at 161.

that they would be enforceable against any individual who violated them.²¹⁷ According to the Court, the standards were too broad and provided no adequate limitations to the class of defendants or violations so as to make them effectively enforceable.²¹⁸

However, the Second Circuit in *Flores* did not stop here. The Court went on to discuss the ICESCR in detail, particularly its environmental provisions. Noting that Article 12 refers to environmental pollution and sets out that everyone has the right to the "highest attainable standard of physical and mental health," the Court then focused on Article 12(2)(b), which required state parties to take all necessary steps to improve "all aspects of environmental and industrial hygiene."²¹⁹ Although Article 12(2)(b) arguably sets out clear obligations for the state parties, the Court believed that these obligations were not particular enough in the sense that they did not set out specific measures or levels of acceptable pollution.²²⁰ Without further ado, the Court then dismissed the provision as aspirational, and noted that there is no evidence that the signatories had taken any steps to comply with the provision in general.²²¹ Finally, the Court explicitly indicated that, even if the provision was specific and universally accepted, in effect making it customary international law, it would not be relevant in *Flores* as the treaty's provisions only applied to state actors and not private individuals or companies.²²²

What is noticeable in the Second Court's treatment of *Flores* is that the Court did not explicitly discuss the fact that the United States had not ratified the ICESCR. Instead, the Court only mentioned this in passing.²²³ It performed a full analysis on the treaty,²²⁴ and although it does not specifically analyze whether the provisions in question constituted the object and purpose of the treaty, it nevertheless acknowledged that there was a chance that US courts would be inclined to follow it if there was more evidence of the provision's status in the international law regime.²²⁵ While it is unclear, it appears as if the Court used the state parties' reluctance to comply with Article 12(2)(b) as evidence for the argument that it could not have constituted an integral part of the treaty.²²⁶ Overall, although the Court did not explicitly discuss the object and

²¹⁷ *Id.*

²¹⁸ *Id.*

²¹⁹ *Id.* at 164; International Covenant on Economic, Social and Cultural Rights art. 12, Dec. 16, 1966, S. Treaty Doc. No. 95-19, 6 I.L.M. 360 (1967), 993 U.N.T.S. 3.

²²⁰ *Flores*, 343 F.3d at 164.

²²¹ *Id.*

²²² *Id.*

²²³ *Id.*

²²⁴ *Id.* at 163-64.

²²⁵ *See id.* at 162-64.

²²⁶ *Id.* at 164.

purpose of the treaty, and most definitely did not reference Article 18 of the VCLT, it nevertheless seemed to apply the same principles that would arguably seem appropriate when performing a VCLT Article 18 treaty analysis.

Although the ICESCR has been mainly utilized to support general statements of prevailing international norms with relatively minimal discussion, it seems to be dismissed out-of-hand as an unratified treaty less often than the American Convention on Human Rights.²²⁷ Quite often, discussions of the ICESCR do not necessarily even mention that it remains unratified.²²⁸ Even in cases that mention the status of the ICESCR, courts tend to give it more weight, albeit still non-determinative, than they give to the American Convention. The Connecticut Supreme Court's approach in *Moore v. Ganim*,²²⁹ while more extensive than in most other cases, seems to exemplify the general deference given to the ICESCR by courts, as well as serving as an example of how state courts may approach treaty interpretation issues when the treaty remains unratified.

In *Moore*, the plaintiffs argued that Connecticut's statute terminating general assistance benefits after nine months was unconstitutional according to the Connecticut Constitution.²³⁰ Although the majority affirmed the lower court's ruling, holding that the Connecticut Constitution did not establish a minimum subsistence level, nor an affirmative obligation on the government to provide such minimum subsistence, therefore making the statute constitutional,²³¹ without referring to international law or prevailing norms. However, the concurrence by Chief Justice Peters meticulously analyzed this issue in detail.²³²

While referring to historical precedence and international agreements, the *Moore* concurrence emphasized that it had been historically and universally established that governments have an obligation to take care of their citizens and provide a minimum level of subsistence to the poorest individuals.²³³ The Chief Justice then focused on Article 11(1) of the ICESCR, which says that the "States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing

²²⁷ Compare *Hyder v. Obama*, 2011 WL1113496 at *1 (E.D. Tex. 2011) (finding that the plaintiff cannot pursue his claims against the ICESCR as the treaty does not give individual citizens standing to enforce its provisions) with *Diop v. Gonzales*, 2008 WL490625 *5 (W.D. Okla. 2008) (dismissing the plaintiff's American Convention out of hand after noting that the US has not signed the treaty).

²²⁸ See, e.g., *Hyder*, 2011 WL1113496 at *1.

²²⁹ *Moore v. Ganim*, 660 A.2d 742 (Conn. 1995).

²³⁰ *Id.* at 743-50.

²³¹ *Id.* at 770-71.

²³² *Id.* at 779-782 (Peters, C.J., concurring).

²³³ *Id.*

and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure realization of this right..."²³⁴ This, in effect, laid out the Chief Justice's main argument regarding the international norms regulating government actions when it came to minimum subsistence to a nation's citizens.²³⁵

The Chief Justice acknowledged that the United States had not ratified the ICESCR, and noted that because of this, the Covenant provisions could not create customary international law applicable to the United States.²³⁶ However, the Chief Justice argued that regardless of the ICESCR's status in the US, the "wide international agreement" reflected by the Covenant and its kind, created a strong presumption that supported the plaintiff's claim.²³⁷ He further indicated support for the proposition that US courts should rely upon the ICESCR more frequently when interpreting state constitutions.²³⁸

Overall, it seems that while the ICESCR establishes relatively soft rights, making it unlikely that domestic courts would enforce it without specific Congressional action even if the US had ratified it, the courts are more likely to give it serious consideration and discussion than to some of the other human rights treaties, such as the American Convention.²³⁹ While it is not possible to draw any definite conclusions as to why this is the case, it seems that the wide acceptance of the ICESCR and it being effectively a continuation the Universal Declaration of Human Rights may explain at least some of this deference.²⁴⁰

Nevertheless, it is important to note that, similar to the American Convention, courts rarely explicitly refer to the VCLT Article 18 when discussing whether the ICESCR was dispositive, nor do they perform any other clear object and purpose analysis. However, considering that the courts nevertheless often analyze whether the ICESCR provisions would apply in the case notwithstanding its domestic status, for example by looking at whether it establishes stringent, clearly enforceable standards and parameters, the courts seem to be concerned about violating the text and spirit of the Covenant, and thus applying at least an elementary object and purpose test. This is particularly noticeable as, unlike in the majority of the American Convention cases, the

²³⁴ *Id.* at 780-781 (Peters, C.J., concurring); International Covenant on Economic, Social and Cultural Rights art. 11, Dec. 16, 1966, S. Treaty Doc. No. 95-19, 6 I.L.M. 360 (1967), 993 U.N.T.S. 3.

²³⁵ Moore, 660 A.2d at 779-782 (Peters, C.J., concurring).

²³⁶ *Id.* at 781 (Peters, C.J., concurring).

²³⁷ *Id.*

²³⁸ *Id.* (referencing law review articles supporting the idea that the International Covenant should inform state constitution interpretation).

²³⁹ *See, e.g.*, *Diop v. Gonzales*, 2008 WL490625 *5 (W.D. Okla. 2008).

²⁴⁰ *See Moore v. Ganim*, 660 A.2d 742 (Conn. 1995) (Peters, C.J., concurring).

courts do not usually dismiss the claims under the ICESCR out-of-hand after noting that the Covenant is not ratified by the United States.

IV. Common Approaches and Implications

Based on an analysis of the preceding three treaties that have been signed but not ratified by the United States, it appears that not all treaties are born equal. Although it is difficult, if not impossible, to draw definite conclusions from a small sample size, even when dealing with a relatively limited pool of cases concerned with unratified treaties, it seems that more technical and uncontroversial treaties that set specific standards and benchmarks have more weight in domestic courts than those that deal primarily with general human rights. Furthermore, courts dealing with human rights treaties and issues are less likely to engage in explicit object and purpose analysis, whereas with relatively technical treaties, such as UNCLOS, courts sometimes specifically discuss the object and purpose requirements of treaty interpretation.

Although courts regularly take into account unratified treaties and consider their object and purpose explicitly or implicitly, they hardly ever refer to Article 18 of the VCLT when doing so.²⁴¹ With the exception of the *Royal Caribbean Cruises* cases,²⁴² courts do not seem to employ VCLT Article 18 at all. While it is unclear why the courts do not utilize Article 18 in their analysis or in justifying looking at the object and purpose of the treaty, it is arguably possible that this is because of the VCLT's status as an unratified treaty itself. By presuming Article 18 is persuasive, the courts' reasoning would be circular: it would assume that unratified treaties were authoritative because an unratified treaty states this proposition. By not relying on Article 18, the courts preserve their leeway in deciding how much weight they want to give an international treaty that has not been ratified. Additionally, by not invoking Article 18, the courts arguably decline to take a stand on fundamental constitutional questions.

It is also clear that the courts regularly employ similar strategies when interpreting unratified and ratified treaties. Based on the case studies previously discussed, it is clear that whenever courts run through the applicability as well as the object and purpose analysis, they tend to employ statutory interpretation principles and the intent of the parties is rarely considered. Additionally, the courts also seem to generally adopt a nationalistic approach when interpreting unratified treaties. Treaties that would pose a prospective challenge to the sovereignty of the state are given less effect than those that only chip away a very limited, technical part of state autonomy.

²⁴¹ See, e.g., *Sarei v. Rio Tinto PLC*, 221 F. Supp. 2d 1116, 1161 (C.D. Cal. 2002).

²⁴² *United States v. Royal Caribbean Cruises*, 24 F. Supp. 2d 155, 160 (D.P.R. 1997); *United States v. Royal Caribbean Cruises*, 11 F. Supp. 2d 1358, 1362, 1370-71 (S.D. Fla. 1998).

Referring to Article 18 when considering the object and purpose of unratified international treaties would go beyond considering whether the provisions in question have reached the status of customary international law, and would allow the object and purpose of treaties not of customary international law status to be arguably enforceable in US courts. Legitimizing Article 18 would effectively establish a norm of examining the object and purpose of unratified treaties that the US courts will follow in interpreting treaties, which again would draw into question the separation of power between the legislative and executive branches. Article 18 would arguably require courts to bypass the will of Congress by giving effect to treaties to which the Senate has refused to consent, and move treaty making power, at least partially, more to the realm of the President and the executive branch. Meanwhile, it seems likely that if the courts look at the object and purpose without reference to the VCLT and outside the parameters set by Article 18, they still acknowledge the fact that looking at the object and purpose of unratified treaties has arguably evolved into a customary international norm, while reserving the right to decide to what extent and which treaties should be given special consideration.

At the same time, it is important that domestic courts pay at least cursory attention to the object and purpose of unratified international treaties in order to preserve the legitimacy of the judicial system itself as well as the administration internationally. In the absence of clear guidance from Congress or the Supreme Court regarding the status of Article 18, the lower courts are left to decide not only whether Article 18 has any relevance for US courts either in itself or as a reflection of the status of customary international law, but also whether the US courts should follow it in either case. By adopting a semi-informal approach, the lower courts can secure their position and demonstrate judicial restraint by merely looking at the treaty's object and purpose without referring to Article 18 on a case-by-case basis. At the same time, lower courts can refrain from making separation of power decisions that they likely believe the Supreme Court should decide.

Furthermore, even if Article 18 does not represent generally accepted customary international law, the lower courts preserve the reputation of the US on the international stage by giving at least some deference to unratified treaties. Additionally, by looking at the object and purpose of the treaties regardless of the status of Article 18, the courts unavoidably analyze whether the provisions or principles invoked have reached the status of customary international law, and are therefore binding on the US. This approach is clear in cases where the court refuses to give Article 18 any effect, even as customary international law,

but still considers that the court should examine whether the principles of the treaty in question suffice as customary international law in themselves.²⁴³

Based on this relatively limited analysis, it seems that the overarching theme in US courts is to look at the object and purpose of the unratified treaty outside the parameters of Article 18 of the VCLT, with the purpose of defining whether the treaty or its provisions have reached the status of customary international law. The number of courts who do not take into account whether the treaty is ratified or specifically refer to Article 18 and run the full object and purpose analysis is limited, and the cases are often concerned with relatively uncontroversial and specialized treaties.

V. Conclusions

Article 18 of the Vienna Convention on the Law of Treaties sets out an expansive requirement that states should refrain from violating the object and purpose of the treaty after they have signed it and before ratification. If taken to its logical extreme, this requirement would undermine the modern treaty practice that often relies upon ratification of treaties by state parties. In the US, if the courts would apply a strict reading of Article 18 while adopting an expansive interpretation of the object and purpose of the treaty in question, this could potentially change the power dynamic and affect the separation of power between the legislative and executive branches.

However, as indicated by Article 18's *travaux préparatoires*, it is uncertain that Article 18 was based on prevailing international norms at the time of drafting, and consequently that it should have that effect today. In other words, while customary international law has traditionally recognized a general "good faith" requirement with regards to treaties, and it seems many international courts still follow that principle, it is not clear VCLT Article 18 should be read to convey any more expansive obligations. Consequently, due to the fact that most judges do not deal with treaty interpretation regularly and thus may not have an intricate understanding of it, and since there is no real difference between the more limited reading of the VCLT Article 18 and the historical customary international law "good faith" requirement, domestic courts should refrain from invoking Article 18 by name when interpreting unratified treaties as doing so would risk institutionalizing the broader reading of the provision and raise serious constitutional questions. It is preferable for domestic courts to only consider the object and purpose of an unratified treaty, and consequently to give effect to it, only to the extent it is required by customary international law principles notwithstanding VCLT Article 18.

²⁴³ See, e.g., *Royal Caribbean Cruises*, 11 F.Supp. 2d at 1362, 1370-71.

As this paper has shown, the domestic courts in the US largely follow the approach outlined above. They hardly ever refer to Article 18 by name, rather adopting a more *ad hoc* approach to interpreting unratified treaties. While they do not always discuss the object and purpose of the treaty, they always consider whether the treaty implicates customary international law, and should therefore be given effect in the US. This arguably amounts to an elementary object and purpose analysis that may be motivated by the implications of giving weight to Article 18 in the absence of clear guidance from the Supreme Court and the legislative branch. The danger of using Article 18 when interpreting unratified treaties is highlighted by the few courts which have done so and ended up giving too much weight to the treaty, especially taking into account their expansive reading of the object and purpose of the treaty. In these cases, the courts often read Article 18 to say that the courts are obliged to uphold all provisions of the treaty in question.

Meanwhile, with regards to the general object and purpose requirement, the courts' treatment of unratified treaties depends on the type of treaty in question. Technical treaties that have a strong foundation in customary international law are given the highest deference, while human rights treaties are often considered more aspirational, and an analysis of their object and purpose is often truncated, if not completely dismissed. This is especially the case with smaller human rights treaties, such as the American Convention.

The fact that the executive branch has embraced Article 18 does not help us here, as adopting the expansive version of the object and purpose requirement expressed in Article 18 would be particularly beneficial to the executive. Overall, domestic courts in the US usually adopt a fairly conservative and cautious approach to unratified treaty interpretation, using a more limited concept of the object and treaty requirement codified in the VCLT. In view of the contentious history of the article and the lack of guidance from the Supreme Court and Congress, this is arguably the more sustainable approach.

BY REASON OF SERVING THEIR COUNTRY: THE CASE FOR LIMITING CAPITAL PUNISHMENT AT COURTS- MARTIAL TO SERVICE CONNECTED OFFENSES

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I. Introduction

There are dangers lurking in military trials which were sought to be avoided by the Bill of Rights and Article III of our Constitution. Free countries of the world have tried to restrict military tribunals to the narrowest jurisdiction deemed absolutely essential to maintaining discipline among troops in active service[.]¹

In *Loving v. United States*,² the last military death penalty case before the Supreme Court, Justice John Paul Stevens wrote in his concurring opinion “[w]hen the punishment may be death, there are particular reasons to ensure that the men and women of the Armed Forces do not by reason of serving their country receive less protection than the Constitution provides for civilians.”³ The “particular reason” warranting equal treatment is in each case the state is seeking to exterminate a life. Yet despite the indistinguishable finality of the outcome, the civilian and the Service Member face separate systems of justice.

For the civilian, when the United States seeks to take her life it must do so according to established constitutional norms: it must seek an indictment from a grand jury composed of citizens;⁴ it must try the defendant before an

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¹ *United States ex rel. Toth v. Quarles*, 350 U.S. 11, 22 (1955).

² *Loving v. United States*, 517 U.S. 748, 774 (1996) (Stevens, J., concurring).

³ *Id.*

⁴ U.S. CONST. amend. V.

Article III judge with life tenure;⁵ and, it must present its case before the most democratic of institutions—an impartial jury.⁶ Conversely, the Service Member faces a capital court-martial bereft of those norms. Instead of a grand jury designed to thwart an abusive prosecution⁷ and a trial before an impartial jury, the Service Member’s commanding officer makes the sole decision to seek the death penalty⁸ and then refers those charges to a panel composed of military members hand-selected by him.⁹ And although a Service Member is given numerous procedural and substantive protections before,¹⁰ during¹¹ and after trial,¹² the one remaining fact is that United States is permitted to execute an individual through a separate system. Yet, if the finality and severity of the outcome is the same, why the need for two systems?

The reasons for prosecuting Service Members by court-martial are well established. This separate system is traditionally justified by the specialized role of the military, which is to “fight or be ready to fight wars”,¹³ and the concomitant need to instill good order and discipline as a way to promote this function. The court-martial was incidental to this greater role.¹⁴ As such, the military justice system comes from a teleological pedigree distinct from the civil criminal justice system. Unlike the civil system, the court-martial was rooted solely in the need to obtain discipline¹⁵: It was an “*instrumentalit[y] of the executive power . . . to aid him in properly commanding the army and navy and enforcing discipline therein[.]*”¹⁶ To meet these ends, the court-martial took on distinct procedural structures, oftentimes at the expense of limiting an

⁵ *Id.* at art. III, § 1.

⁶ *Id.* at amend. VI.

⁷ AKHIL R. AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* 84-87 (1998).

⁸ *MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 407* (2012) [hereinafter MCM].

⁹ Article 25, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 820 (2012).

¹⁰ *See, e.g.*, MCM, *supra* note 8, R.C.M 405 (pretrial investigation).

¹¹ *See, e.g.*, *Id.* at R.C.M 1004 (capital sentencing scheme).

¹² *See, e.g.*, Articles 66—67, UCMJ (mandatory appellate review of capital sentences).

¹³ 350 U.S. 11, 22 (1955).

¹⁴ *Id.*

¹⁵ The American military justice system was rooted in the British system. The latter system was created as a tool to instill discipline in the army and not as a separate system of justice. This view was personified by Sir William Blackstone in his influential work, *Commentaries on the Laws of England*:

Martial law, which is built upon no settled principles, but is entirely arbitrary in its decisions, is, as Sir Matthew Hale observes, in truth and reality no law, but something indulged rather than allowed as a law. The necessity of order and discipline in an army is the only thing which can give it countenance.

WILLIAM BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND*, 413 (10th ed. 1786) [hereinafter “COMMENTARIES”].

¹⁶ WILLIAM WINTHROP, *MILITARY LAW & PRECEDENTS* 49 (2d. ed. 1920).

individual's rights.¹⁷ Indeed, the fact that the Fifth Amendment Grand Jury Clause specifically exempts cases "arising in the land and naval forces" evinces that the Framers countenanced such departures¹⁸: to require a commander to seek a grand jury indictment during the midst of battle before he could punish breaches of discipline would be impractical and ill-advised.

These historical justifications are as relevant today as they were during the founding of our country. For even in a democratic society existential necessities may justify exceptions to the norm.¹⁹ Today, the stark reality is that conflicts are still amongst us and orders issued by the commanding officer must still be followed. As the need for armed forces exists, the court-martial will maintain its relevancy. But even so, are these historical justifications sufficient to permit differential treatment of Service Members when presented with the most severe and final of punishments?

To put this question in its proper frame, we must recognize two factors about the modern capital court-martial. First, through the passage of the Uniform Code of Military Justice (UCMJ), Congress granted the military full jurisdiction over the common law offense of murder, regardless of where and when the crime was committed.²⁰ Thus, a Service Member may be tried and executed by a court-martial for offenses that have no service connection. Second, the Supreme Court's modern death penalty jurisprudence has resulted in the increased due process owed to a Service Member facing capital punishment.²¹ As a result, today's capital court-martial is no longer a swift and efficient forum for imposing punishment.

So, is the execution of a Service Member by way of an aberrant system still justified? The answer is yes, but only when the death penalty is limited to offenses that are directly related to the purposes that justify the system's departures. In other words, when it comes to the state's ability to inflict the death penalty, disparate treatment amongst groups should only be countenanced for those offenses that are connected to military discipline or otherwise supported by military necessity.

¹⁷ Compare Article 25, UCMJ, 10 U.S.C. § 825 (2012) (codification of the historical practice at courts-martial that the commanding officer personally select the members), with U.S. CONST. amend. VI (right to an impartial jury).

¹⁸ U.S. CONST. amend. V.

¹⁹ See, e.g., U.S. CONST. art. I, § 9, cl. 2 (allowing the suspension of the writ of habeas corpus during cases of rebellion or invasion).

²⁰ See *infra* Part II p. 12 (discussing the evolution of court-martial jurisdiction over capital offenses).

²¹ See *infra* Part III p. 38 (discussing how Supreme Court precedent has shaped modern day court-martial practice).

Although the death penalty is still authorized for non-homicide military offenses—e.g., desertion during a time of war²²—today’s capital court-martial is in practice reserved for murderers.²³ Accordingly, this paper will focus primarily on the normative argument for imposing limits to murder offenses.²⁴ In doing so, it will take Justice Stevens’ position²⁵ and argue that capital punishment ought to be limited to offenses with a service connection to the military other than the status of the defendant. Specifically, the paper shall argue that a service connection requirement should restrict the death penalty to those capital murders²⁶ that are committed: (1) against another Service Member or associated civilians; (2) on a military installation; or (3) while the Service Member is stationed abroad. Any other murder offense, such as those committed against a civilian outside a military installation, would not be punishable by death.

In presenting this argument, this paper will incorporate the two part approach used by Justice Stevens: it will use both the historical understanding of the role of the death penalty at courts-martial and the modern day death penalty jurisprudence as support.²⁷ Part I will begin with a summary of three Supreme Court opinions that concern the scope of court-martial jurisdiction as it relates to capital punishment and the service connection requirement—*Loving v. United States*,²⁸ *O’Callahan v. Parker*,²⁹ and *Solorio v. United States*.³⁰ An overview of these cases will establish the proper background and structural framework for this paper. From there, Part II will contain the historical argument. It will demonstrate that the use of capital punishment at courts-martial stems from a distinct pedigree from non-capital offenses; and that the

²² Article 85, UCMJ, 10 U.S.C. § 885 (2012).

²³ In the last two decades, every Service Member on death row was sentenced to death for a murder conviction. *United States v. Loving*, 34 M.J. 956 (A.C.M.R. 1992) (two murders); *United States v. Gray*, 32 M.J. 730 (A.C.M.R. 1991) (two murders and an attempted murder); *United States v. Parker*, 65 M.J. 626 (N-M. Ct. Crim. App. 2007) (two murders); *United States v. Akbar*, 2012 CCA LEXIS 247 (A. Ct. Crim. App. July 13, 2012) (two murders, numerous attempted murders); *United States v. Witt*, 2010 CCA LEXIS 108 (A.F. Ct. Crim. App. Apr. 21, 2010) (two murders and an attempted murder). See also Vance Spath et al., *IS DEATH DIFFERENT? Death Penalty Litigation in the Air Force and the Court-Martial of Senior Airman Andrew Witt*, 34 REPORTER 2, 2 (Mar. 2007).

²⁴ But see Richard Federico, *The Unusual Punishment: The Call for Congress to Abolish the Death Penalty Under the Uniform Code of Military Justice for Unique Military, Non-Homicide Offenses*, 18 BERKELEY J. CRIM. L. 1 (2013) (advocating for the abolishment of capital punishment for unique military offenses—e.g. desertion—but does not argue for either abolishing or limiting capital punishment for murder).

²⁵ *Loving*, 517 U.S. at 774.

²⁶ Under the UCMJ, not all homicides are death eligible, only premeditated murder and “felony-murder” are capital offenses. Article 118, sections 1 & 4, 10 U.S.C. § 918 (2012).

²⁷ *Loving*, 517 U.S. at 774.

²⁸ *Id.*

²⁹ 395 U.S. 258 (1969).

³⁰ 483 U.S. 435 (1987).

Framers—both during the Revolutionary War and at the Constitution’s ratification—narrowed the use of capital punishment to military type offenses. Ultimately, what the historical analysis will illustrate is that the Framers did not intend for the death penalty to occupy the entire field, but instead restricted its use to military type offenses. Anything beyond this would have been an improper extension of federal power. Lastly, Part III will examine the modern death penalty jurisprudence as it applies to courts-martial. In this section, the paper will first outline how Supreme Court death penalty jurisprudence has measurably changed the prosecutions of capital courts-martial. From there, the paper will argue that the changes brought by Supreme Court precedent remove the historical justifications for the use of capital punishment for non-service connected offenses.³¹

Before we progress into the substance of this paper, one item should be clarified: this paper does not advocate the removal of common law murder from court-martial jurisdiction. Its argument is focused solely on the availability of the death penalty for non-service connected offenses. As will be outlined below, the modern death penalty jurisprudence places a qualitative component to the overall analysis that supports limits to capital punishment at courts-martial and not necessarily limits to court-martial jurisdiction.³² With that said, this paper will now explore the question presented.

II. An Aberrant System of Justice for Death?

In *Loving*, Justice Stevens argued in favor of limiting capital punishment to offenses that have a “service connection.”³³ In arguing for this limitation, Justice Stevens was alluding to the Supreme Court’s prior and overruled opinion in *O’Callahan v. Parker*,³⁴ where the Court first established a “service connection” requirement for military offenses.

In *O’Callahan*, the petitioner, a Service Member stationed in Hawaii, was convicted of attempted rape and an assault of a female civilian that occurred

³¹ But see John O’Connor, *Don’t Know Much About History: The Constitution, Historical Practice, and the Death Penalty Jurisdiction of Courts-Martial*, 52 U. MIAMI L. REV. 177 (1997) (providing a contrarian position to this paper and an argument against Justice Stevens’ concurring opinion in *Loving*).

³² See, e.g., *Coker v. Georgia*, 433 U.S. 584 (1977) (making the death penalty for rape unconstitutional, but the offense of rape is still a valid crime).

³³ *Loving*, 517 U.S. at 774.

³⁴ 395 U.S. at 261.

off post while he was on liberty.³⁵ The issue the Court addressed was whether a court-martial has:

[J]urisdiction to try a member of the Armed Forces who is charged with commission of a crime cognizable in a civilian court and having no military significance, alleged to have been committed off-post and while on leave, thus depriving him of his constitutional rights to indictment by a grand jury and trial by a petit jury in a civilian court?³⁶

The Court first recognized that the military justice system was a separate criminal system in that the “exigencies of military discipline require the existence of a special system of military courts in which not all of the specific procedural protections deemed essential in Art. III trials need apply.”³⁷

The Court’s focus was the Fifth Amendment’s exception for “cases arising in the land or naval forces”³⁸. Once a case fits this definition, the accused becomes exempt from the rights of grand jury indictment and trial by jury.³⁹ In deciding the scope of this phrase, the Court looked at court-martial jurisdiction that existed when the Fifth Amendment was written. The Court found: (1) there was a general reluctance in both Britain and the United States to extend court-martial jurisdiction to common law offenses, (2) an intention to limit court-martial jurisdiction to offenses related to military discipline, and (3) an equally strong preference to use the laws of the land to try common law crimes.⁴⁰ Further, although there had existed under military law a “general article” which made a host of common law offenses subject to court-martial, the Court noted that those offenses must have a “direct impact on military discipline” in order to be prosecuted.⁴¹ In an effort to save the Service Member from the evisceration of the “benefits of indictment and trial by jury”, the Court held that jurisdiction should extend only to crimes that are service connected.⁴² In defining crimes that are service connected, the Court looked to, among other things, whether the Service Member was on leave, whether the crime was committed at or near a military installation and whether the crime involved victims who are either Service Members or associated civilians.⁴³

³⁵ *Id.* at 259.

³⁶ *Id.* at 261.

³⁷ *Id.*

³⁸ U.S. CONST. amend. V.

³⁹ *O’Callahan*, 395 U.S. at 262.

⁴⁰ *Id.* at 269-72.

⁴¹ *Id.* at 271 (citing *WINTHROP*, *supra* note 16).

⁴² *Id.* at 273.

⁴³ See *Relford v. Commandant, U.S. Disciplinary Barracks*, 401 U.S. 355, 365 (1971) (providing an illustrative list of factors for courts to consider in determining if an offense was service connected).

Eighteen years after the Court established the service connection requirement it abandoned it in *Solorio v. United States*.⁴⁴ The *Solorio* Court, however, did not base its opinion on an examination of the Fifth Amendment. Instead, it focused entirely on Congress's enumerated power to "make Rules for the Government and Regulation of the land and naval Forces."⁴⁵ For the Court, Congress historically exercised plenary authority under this article. In the past, the only factor that the Court looked to was whether the defendant was a member of the armed forces.⁴⁶ The Court believed the *O'Callahan* ruling incorrectly turned away from this "status test" based on a flawed reading of history.⁴⁷ For example, *O'Callahan's* reliance on Great Britain's historical reluctance to extend court-martial jurisdiction was misplaced. British reluctance stemmed from the fear of the crown abusing the power of the army and not on a desire to remove all common law offenses from courts-martial. But such historical transference to the American system was mistaken because the Framers specifically bifurcated the power of the armed forces between Congress and the Executive.⁴⁸ Moreover, the *O'Callahan* court overstated its case: the *Solorio* Court pointed to numerous historical examples of Service Members court-martialed for common law offenses.⁴⁹

In *Solorio*, the Court held, "the history of court-martial jurisdiction in England and in this country during the 17th and 18th centuries is far too ambiguous to justify the restriction on the plain language of Clause 14 which *O'Callahan* imported into it."⁵⁰ What is more, the Court paid significant attention to the fact that the "service connection" requirement was difficult to apply in practice.⁵¹ As a result, it overruled the service connection test and reinstated the military status test to determine court-martial jurisdiction.⁵²

Justice Thurgood Marshall issued a dissent in *Solorio* where he averred that what *O'Callahan* sought to protect—the complete evisceration of a Service Member's rights to a grand jury indictment and trial by jury—*Solorio* now permits.⁵³ According to Justice Marshall, the majority failed to consider that the *O'Callahan* opinion was primarily concerned with the restrictions that the Fifth and Sixth Amendments placed on Congress's authority under Article I, and not

⁴⁴ 483 U.S. at 450.

⁴⁵ U.S. CONST. art. I, § 8, cl. 14.

⁴⁶ 483 U.S. at 439-41.

⁴⁷ *Id.* at 442-45.

⁴⁸ *Id.* at 446.

⁴⁹ *Id.* at 444-45.

⁵⁰ *Id.* at 445.

⁵¹ *Id.* at 450.

⁵² *Id.* at 450-51.

⁵³ *Id.* at 452-53 (Marshall, J., dissenting).

on whether Congress had authority to regulate the armed forces.⁵⁴ In that respect, Justice Marshall believed that the *O'Callahan* Court rested on the principle that the Fifth Amendment grand jury exception must be read to have a limited application, otherwise a class of Americans would be deprived of their Constitutional trial rights simply because of their service to the country.⁵⁵ That, according to Justice Marshall, was exactly what the Solorio's "status" test accomplished:

[E]very member of our Armed Forces, whose active duty members number in the millions, can now be subjected to court-martial jurisdiction -- without grand jury indictment or trial by jury -- for *any* offense, from tax fraud to passing a bad check, regardless of its lack of relation to "military discipline, morale and fitness."⁵⁶

Indeed, Justice Marshall's pronouncement turned out to be correct- passing a bad check is now a punishable offense at courts-martial.⁵⁷

Both Justice Marshall's dissent and the majority opinion in *O'Callahan* present the core principle that this paper incorporates, namely, the protection of an individual's rights by restricting the federal government's power to impose punishment by way of a separate system. For the *O'Callahan* Court, the historical record partially informed this view.⁵⁸ Yet neither *O'Callahan*⁵⁹ nor *Solorio*⁶⁰ involved capital punishment. The unresolved question is whether there are limitations to Congress's power to subject a Service Member to the death penalty by court-martial. Justice Stevens addressed this question in his concurring opinion in *Loving*.⁶¹

In examining Justice Stevens' concurrence, it should be clarified that he presented two arguments in favor of limiting the death penalty.⁶² Indeed, Justice Stevens raised the historical argument found in *O'Callahan* and *Solorio*,⁶³ but he also presented an argument based on modern death penalty jurisprudence.⁶⁴

⁵⁴ *Id.* at 453.

⁵⁵ *Id.* at 454-55.

⁵⁶ *Id.* at 467 (quoting *Schlesinger v. Councilman*, 420 U.S. 738, 761, n. 34 (1975)).

⁵⁷ MCM, *supra* note 8, ¶ 68, IV-107 (offense of "Check, worthless, making and uttering—by dishonorably failing to maintain funds).

⁵⁸ 395 U.S. 258, 268 (1969).

⁵⁹ *Id.* at 260 (involving a conviction for rape and assault).

⁶⁰ 438 U.S. at 437 (involving a conviction for child abuse).

⁶¹ 517 U.S. 748, 774. (Stevens, J., concurring).

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.*

As to the historical, Justice Stevens posits that unlike the record for non-capital offenses, the historical record “undermine[s] any contention that a military tribunal's power to try capital offenses must be as broad as its power to try noncapital ones.”⁶⁵ As to the jurisprudential, Justice Stevens seems to offer the Court’s “death is different” case law as a reason to limit the use of capital punishment.⁶⁶ For Justice Stevens, whether a Service Member can be put to death by a separate system ought to be based on something more than simple status.⁶⁷

Having outlined the legal framework for this paper, we shall now move to the historical argument.

⁶⁵ *Id.*

⁶⁶ *Id.* Justice Steven’s concurring opinion is best understood when viewed in conjunction with his past opinions on the death penalty. Justice Stevens was not on the Supreme Court during *Furman v. Georgia*, 408 U.S. 238 (1972), the decision that ostensibly rendered the death penalty unconstitutional. However, in *Gregg v. Georgia*, 428 U.S. 153, 188 (1976), Justice Stevens concurred in the judgment of the Court affirming the Georgia capital sentencing scheme, thus effectively reinstating the death penalty. *Gregg* is relevant here because Justice Stevens joined the opinion that affirmed the principle first asserted in *Furman* that death is qualitatively different in kind from other punishments. *Id.* As a result, the state must now enact procedures that sufficiently guide and channel the sentencer’s discretion. *Id.* at 188—90. Later in *Gardner v. Florida*, 430 U.S. 349 (1977), Justice Stevens concretely established the Court’s and his belief in the qualitative difference of the death penalty:

From the point of view of the defendant, [the death penalty] is different in both its severity and its finality. From the point of view of society, the action of the sovereign in taking the life of one of its citizens also differs dramatically from any other legitimate state action.

Id. at 357—58. In *Lockett v. Ohio*, 483 U.S. 586 (1978), one of the seminal cases that altered the role of mitigation evidence in capital cases, Justice Stevens specifically joined Part III of the Court’s opinion, which established that the defendant’s opportunity to present mitigation evidence must not be narrowly prescribed. Specifically, this part of the opinion included the oft-cited passage:

[T]he Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.

Id. at 604. Thus, when Justice Stevens writes that there are “particular reasons” for ensuring equal treatment for Service Members facing the death penalty, he speaks with the aforementioned history in mind. For Justice Stevens, the punishment of death imbues a qualitative factor that must be part of any analysis on the appropriate process and treatment owed to a capital defendant.

⁶⁷ *Loving*, 517 U.S. at 774.

III. Historical Use of the Death Penalty at Courts-Martial

The military has historically treated capital offenses differently.⁶⁸ Indeed, at this nation's beginning, the United States could court-martial a Service Member for a myriad of offenses, including common law crimes,⁶⁹ yet it could only seek the death penalty for a specific set of offenses that involved conduct connected with military discipline or for circumstances related to military operations.⁷⁰ In other words, the United States could not seek the death

⁶⁸ For example, the separate treatment of capital offenses dates back to at least 1662 with the passage of the Laws and Ordinances of War in the British system, a precursor to the American military court-martial. This law established two types of trials: one for capital offenses and the other for non-capital offenses. DOUGLAS JONES, NOTES ON MILITARY LAW 14—15 (1881). Under the 1662 law, if capital punishment was sought then the accused must be tried “according to the known laws of the land,—if the offence was not so punishable, then the trial was to take place by special Royal Commission under the Great Seal.” *Id.* at 14.

⁶⁹ See Articles of War of 1775, art. 50, reprinted in WINTHROP, *supra* note 16, at 957. The exact language of Article 50 is below:

All crimes, not capital, and all disorders and neglects, which officers and soldiers may be guilty of, to the prejudice of good order and military discipline, though not mentioned in the articles of war, are to be taken cognizance of by a general or regimental court-martial, according to the nature and degree of the offence, and be punished at their discretion.

Known as the “general article”, it ostensibly granted commanders the authority to court-martial soldiers for non-capital common law offenses. However, there was a debate played out in the *O’Callahan* and *Solorio* opinions as to whether those offenses had to be directly related to military discipline or duties in order for the court-martial to obtain jurisdiction. Compare *O’Callahan*, 395 U.S. at 271 (citing WINTHROP, *supra* note 16) (arguing that general article offenses must have had a direct impact on military discipline), with *Solorio*, 483 U.S. at 444—45 (arguing that in practice Service Members were routinely prosecuted for pure common law offenses).

⁷⁰ Under the Army Articles of War of 1776, the following offenses were punishable by death:

Mutiny and sedition (§ II, art. 3); failure to suppress mutiny and sedition (§ II, art. 4); striking a superior officer in the execution of his duties (§ II, art. 5); desertion (§ VI, art. 1); sleeping on post (§ XIII, art. 6); causing a false alarm in camp (§ XIII, art. 9); causing violence to persons bringing provisions into camp (§ XIII, art. 11); misbehavior before the enemy (§ XIII, art. 12); inducing others to misbehave before the enemy (§ XIII, art. 13); casting away arms or ammunition (§ XIII, art. 14); disclosing the watch-word (§ XIII, art. 15); forcing a safeguard (§ XIII, art. 17); aiding the enemy (§ XIII, art. 18); correspondence with the enemy (§ XIII, art. 19); abandoning post in search of plunder (§ XIII, art. 21); and subordinate compelling surrender (§ XIII, art. 22).

Articles of War of 1776, reprinted in WINTHROP, *supra* note 16. Additionally, the Navy Articles of 1800 authorized the death penalty for the following offenses:

Failing to clear a ship for battle upon command (art. IV); treacherously yielding or pusillanimously crying for quarter (art. IV); disobeying the

penalty for common law offenses committed within this country; it could only do so for military type offenses.⁷¹

As will be outlined below, a nexus existed between the state's power to execute its military members and the particularized needs of the military. This nexus embodied the Framers' belief, evinced by practice, that the state's ability to execute a citizen through military law should be cabined in order to preserve an individual's rights. For the Framers, the court-martial was subordinate to the civil court, and the federal or state court remained the intended tribunal for violations of any of the other numerous capital offenses that existed at the time. It is in those jurisdictions and under the laws of the land that the accused's case would be tried and, if convicted, he would be executed.

commanding officer during battle (art. V); desertion of duty in sight of the enemy (art. V); wrongful withdrawal from battle (art. VI); correspondence with the enemy (art. X); failure to reveal correspondence received from the enemy (art. XI); spying (art. XII); mutiny and attempted mutiny (art. XIII); disobeying a superior officer (art. XIV); desertion to the enemy (art. XVI); desertion and enticing others to desert (art. XVII); misbehavior by watchstanders (art. XX); murder committed abroad (art. XXI); and setting fire to a public building (art. XXV).

An Act for the Better Government of the Navy [hereinafter "Navy Articles"], reprinted in JAMES E. VALLE, *ROCKS AND SHOALS: NAVAL DISCIPLINE IN THE AGE OF FIGHTING SAIL*, 280 (1996).

⁷¹ Other scholarly works have used the term "military offenses" to denote only those offenses that have no common law equivalent. See, O'Connor, *supra* note 31, at 184. For instance, desertion is a unique military offense because there is no similar common law offense for permanently leaving your employment—in the civilian world it is called "quitting". Conversely, assault on a superior officer is not a unique military offense because assault is a recognized common law offense. The term "unique military offense" may be a useful categorical tool, but it is too narrow. Namely, even though assault on a superior officer is not a military offense it is punishable by the death penalty precisely because of its relationship to the military. In other words, the offense is made capital not to deter assaults generally, but to deter and give normative value to assaults on a particular individual—*i.e.* a superior officer. Further, murder is a common law offense, but the reason the Navy was granted authority over murder committed abroad was because of the fact that the Navy continuously operated overseas and the failure to punish such acts by court-martial may mean that the sailor would either be subject to trial in a foreign jurisdiction or he may be unpunished. See *infra* Part IIB. Accordingly, this paper will not use the term "unique military offense" but instead will use the term "military type offense" to denote offenses that relate to military discipline and military operations. One may argue that all criminal acts in some respect affect military discipline or operations; therefore, this term has no moment. However, a butterfly that flaps his wings can be said to be the "cause" of a hurricane in the Atlantic Ocean that interferes with Naval operations. Nevertheless, it would be absurd to hold that breeding butterflies should be a court-martial offense. Cf. Edward Lorenz, *Deterministic Nonperiodic Flow*, 20 J. ATMOS. SCI. 130 (1963) (outlining the "butterfly effect" on weather). This infinite regress illustrates that a general cause argument must be limited by some "proximate cause" or else it ventures into absurdities. Cf. *Palsgraf v. Long Island Railroad Co.*, 162 N.E. 99, 101 (N.Y. 1928). And in matters of the death penalty, the link between a capital offense and courts-martial must be one that is greater than a general "good order and discipline" argument. See *infra* Part III. Hence, the term "military type offense" denotes those offenses that have a direct relationship to military discipline or operations.

However, in the midst of the Civil War and eighty years after the Framers ratified the Constitution, Congress for the first time broke from the limited categories established by the Framers and expanded death penalty jurisdiction for common law offenses committed during war or rebellion.⁷² Congress authorized that, during times of war or rebellion, soldiers could be charged at court-martial for “murder, assault and battery with an intent to commit murder, manslaughter, mayhem, wounding by shooting or stabbing with an intent to commit murder, robbery, arson, burglary, rape, assault and battery with an intent to commit rape, and larceny.”⁷³ What is more, this same act detailed that such punishment for the aforementioned offenses “shall never be less than those inflicted by the laws of the state, territory, or district in which they may have been committed.”⁷⁴ Consequently, a soldier could be subjected to the death penalty during war or rebellion for any of the above common law offenses if the state, territory or district authorized such punishment.

Court-martial jurisdiction over these “wartime or rebellion” offenses remained unchanged for almost fifty years. However, in the 1916 Articles of War, Congress removed (1) the requirements that those offenses be committed during a time of war and (2) that the punishment be dictated by the state, territory or district wherein the offense was committed.⁷⁵ Instead, the punishment for these offenses was “as a court-martial may direct”, which had the legal effect of making them non-capital offenses.⁷⁶ The only exceptions were for the offenses of murder and rape.⁷⁷ Notably, Congress limited jurisdiction over acts of rape or murder within the United States to those offenses committed during a time of war; however, Congress retained court-martial jurisdiction over such acts committed outside of the United States.⁷⁸ It

⁷² See Act of March 3, 1863, ch. 75, 30, 12 Stat. 731, 736.

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ Act of August 29, 1916, ch. 418, 1342, 39 Stat. 619, 650.

⁷⁶ *Id.* art. 93.

⁷⁷ *Id.* art. 92.

⁷⁸ *Id.* This peacetime restriction to the use of capital punishment for domestic crimes mirrors the historical practice first recognized in the British Articles of War. From the start, British military law treated capital offenses differently from non-capital offenses. This attitude dated back to at least 1662 and the enactment by the Crown of the Laws and “Ordinances of War which established two types of trials: one for capital offenses and the other for non-capital offenses. DOUGLAS JONES, NOTES ON MILITARY LAW, 14 (1881) (monarchy set out the rules because parliament did not want to expend the money). Under the 1622 law, if capital punishment was sought then the accused must be tried “according to the known laws of the land . . . if the offence was not so punishable, then the trial was to take place by special Royal Commission under the Great Seal.” *Id.*) The law recognized the common view that the soldiers were citizens subjected to only civil tribunals when stationed within the territories of the Kingdom. Accordingly, the monarchy was forbidden from imposing capital punishment upon British citizens by military courts for offenses committed within the Kingdom during peacetime. The Articles of War of 1688 established by James II is an example of this

was not until 1950, when Congress passed the Uniform Code of Military Justice (UCMJ), that the court-martial was granted plenary jurisdiction over all murder and rape offenses regardless of when and where they were committed.⁷⁹

Thus, the court-martial's plenary authority over murder offenses is a relatively recent event. For the first eighty years, the court-martial had no authority to try murder, and it took a civil war for Congress to extend jurisdiction to domestic murder, which it limited to offenses committed during war. Hence, almost two centuries after the Framers established the first American military justice system, Congress's removal of the wall separating military from civilian law was complete with the passage of the UCMJ. Consequently, a Service Member can now be tried and sentenced to death by court-martial for the common law offense of murder, regardless of whether the crime has any connection to the military.⁸⁰ But as will be supported by the Framers' practice, this was an unjustified extension of capital punishment.

First, in order to demonstrate this position, it is worth comparing the draconian system of justice that the Framers set out for a Service Member facing capital punishment to the system of justice they established for a civilian. The *O'Callahan* Court emphasized that the Service Member loses his Fifth Amendment right to a Grand Jury and his Sixth Amendment right to an impartial jury when prosecuted by court-martial.⁸¹ But at the nation's beginning the Service Member lost more than just these rights; at that time, the Bill of Rights did not in practice apply at courts-martial. In light of the stark environment a Service Member faced, one can see why capital punishment was limited to military type offenses.

prohibition:

All other faults, misdemeanors and Disorders not mentioned in these Articles, shall be punished according to the Laws and Customs of War, and discretion of the Court-Martial; Provided that no Punishment amounting to the loss of Life or Limb, be inflicted upon any Offender in time of Peace, although the same be allotted for the said Offence by these Articles, and the Laws and Customs of War[.]

Article LXIV, in the Rules and Articles for the Better Government of His Majesties Land Forces in Pay reprinted in WINTHROP, supra note 16, at 920.

⁷⁹ See Act of May 5, 1950, ch. 169, arts. 118, 120, 64 Stat. 107, 140.

⁸⁰ *Id.*

⁸¹ 395 U.S. 258, 262-63 (1969).

A. How Could a Republic Launch a Monarchy?

How comes it that, by virtue of a law solemnly ratified by a Congress of freemen, the representatives of freemen, thousands of Americans are subjected to the most despotic usages, and, from the dock-yards of a republic, absolute monarchies are launched, with the “glorious stars and stripes” for an ensign?⁸²

After having shed the yoke of a tyrannical monarchy, one of the first acts of Congress in 1789 was the adoption of an Articles of War for the Army based on the British system.⁸³ Ten years later, once the country saw fit to reconstitute its Navy, Congress in 1799 hastily adopted regulations for governing the Navy based on the British version, and subsequently revised those regulations in 1800 through the passage of “An Act for the better government of the Navy of the United States.”⁸⁴ Both the Army and Navy articles authorized capital punishment. However, both systems severely lacked the constitutional rights and protections afforded to capital defendants in federal court.

First among these rights were the jury rights—the Fifth Amendment’s right to a grand jury indictment⁸⁵ and the right to a trial by an impartial jury before an Article III court, initially established in Article III⁸⁶ and re-affirmed in the Sixth Amendment.⁸⁷ These rights acted as democratic checks against an overly aggressive central government.⁸⁸ Unlike today, the Grand Jury played a more active role in “ferreting” out official corruption or wrongdoing and “inform[ing] and mobiliz[ing]” the electorate about “publick bad men, and publick bad measures.”⁸⁹ As for the right to an impartial jury, it is safe to say that it received a higher place on the constitutional pedestal than most other rights. It was a right so cherished that its denial constituted a basis of grievance in the Declaration of Independence—“[f]or depriving us in many cases, of the benefits of trial by jury.”⁹⁰ The First Continental Congress affirmed this “inestimable privilege” of the jury trial in both its 1774 Declaration of Rights⁹¹ and the 1775 Declaration of the Causes and Necessity of Taking Up Arms.⁹² Blackstone in his commentaries described a trial by jury as the “glory of the

⁸² HERMAN MELVILLE, *WHITE JACKET OR, THE WORLD IN A MAN-OF-WAR*, 297 (2002).

⁸³ *See* Act of Sept. 29, 1789, ch. 25, 4, 1 Stat. 95, 96.

⁸⁴ *See* Act of Apr. 23, 1800, ch. 33, 1 Stat. 45.

⁸⁵ U.S. CONST. amend. V.

⁸⁶ U.S. CONST. art. III, § 2.

⁸⁷ U.S. CONST. amend. VI.

⁸⁸ AMAR, *supra* note 7, at 84.

⁸⁹ *Id.* at 85 (quoting 2 *THE WORKS OF JAMES WILSON* 537 (Robert Green McCloskey ed., 1967)).

⁹⁰ *THE DECLARATION OF INDEPENDENCE* para. 20 (U.S. 1776).

⁹¹ *DECLARATION OF RIGHTS OF THE CONTINENTAL CONGRESS* art 5. (1774).

⁹² *DECLARATION OF THE CAUSES AND NECESSITY OF TAKING UP ARMS* para. 3 (1775).

English law It is the most transcendent privilege which any subject can enjoy, or wish for, that he cannot be affected either in his property, his liberty, or his person, but by the unanimous consent of twelve of his neighbours and equals.”⁹³ Yet despite this significance, the Framers intentionally excluded these rights from the court-martial when it passed the Fifth Amendment.⁹⁴ Thus, instead of a grand jury indictment and a trial before an impartial jury, the accused faced a panel of officers hand-selected by the commanding officer who had authorized the charges against him.⁹⁵

In addition to the lack of jury rights, the accused Service Member was not, in practice, afforded the assistance of counsel as prescribed in the Sixth Amendment. Under the early Articles there was no mention of an accused’s right to counsel; instead, the judge advocate appointed to the court-martial was assigned as prosecutor, legal advisor and counsel for the accused.⁹⁶ Albeit, the Articles did not prohibit the accused from obtaining counsel, and such counsel were permitted to assist the accused, so long as they did not “open [their] mouth in Court.”⁹⁷ But this limited “right” to counsel is in stark contrast to the right to counsel granted to a federal defendant facing capital punishment.⁹⁸ Under the Crimes Act of 1790, a capital defendant received the assistance of a counsel learned in the law who would receive special access to the defendant.⁹⁹ Of

⁹³ BLACKSTONE, *supra* note 15, at 379.

⁹⁴ Although there is no similar language in the Sixth Amendment excluding “land or naval forces”, the Supreme Court has reasoned that, because courts-martial are intentionally excluded from the grand jury provision, by fair implication the Framers meant to exclude them from the Sixth Amendment jury requirement. *See Ex parte Milligan*, 71 U.S. 2, 123 (1866) (dicta); *see also Ex parte Quirin*, 317 U.S. 1, 39–40 (1942) (dicta).

⁹⁵ American Articles of War of 1786, arts. 1 & 2, reprinted in WINTHROP, *supra* note 16, at 972.

⁹⁶ *Id.* at art. 6 (“The judge advocate . . . shall prosecute in the name of the United States of America; but shall so far consider himself as counsel for the prisoner, after the said prisoner shall have made his plea, as to object to any leading question, to any of the witnesses, or any question to the prisoner, the answer to which might tend to criminate himself[.]”).

⁹⁷ THE ARMY LAWYER, THE HISTORY OF THE JUDGE ADVOCATE GENERAL’S CORPS 1775-1975, 29–31 (1976) (describing an early court-martial in 1809 in which the case was overturned for defense counsel’s active involvement in the accused’s defense).

⁹⁸ *See* Crimes Act of 1790, § 29, 1 Stat. 118–19.

⁹⁹ The specific provision discussing the rights afforded to capital defendants is outlined below:

[I]n other capital offences, [the accused] shall have such copy of the indictment and list of the jury two entire days at least before the trial: And that every person so accused and indicted for any of the crimes aforesaid, shall also be allowed and admitted to make his full defence by counsel learned in the law; and the court before whom such person shall be tried, or some judge thereof, shall, and they are hereby authorized and required immediately upon his request to assign to such person such counsel, not exceeding two, as such person shall desire, to whom such counsel shall have free at all reasonable hours; and every such person or persons accused or indicted of the crimes aforesaid, shall be allowed and admitted in his said defence to make any proof that he or they can produce, by lawful witness or witnesses, and shall have the

considerable importance is that this federal right to learned counsel applied only to capital offenses and it existed prior to the passage of the Sixth Amendment's right to counsel. Thus, from the start, the Framers realized the importance in providing special protections to those facing the death sentence; yet, such importance was not placed at courts-martial.

In addition, the court-martial proceeded without an independent judge, or without any judge as a matter of fact. Instead, a chosen officer—among the panel of officers that were hand selected by the accused's commander—acted as the president of the court-martial.¹⁰⁰ Further, the accused Service Member could be executed without having a chance to confront his accusers as required by the Sixth Amendment: “[T]he prisoner was entitled to be present . . . but confrontation in the sense that the tribunal had an opportunity to see a live witness, ‘and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief,’ was a right not available to the military accused.”¹⁰¹ Lastly, the accused was not safe from being twice put in jeopardy, for his commanding officer could return a panel's verdict on the basis that the sentence was too lenient.¹⁰²

Why would the Framers condone such a draconian system for the execution of an American citizen? In other words, how could a Republic—based on such lofty ideals as America—launch a Monarchy? The answer is simple—the Framers understood that the exceptions at courts-martial were “essential to the common defense.”¹⁰³ In that respect, the primary purpose for the court-martial was to instill discipline. Therefore, the Founders made concessions to further those ends. As noted by the Supreme Court:

[I]t is the primary business of armies and navies to fight or be ready to fight wars should the occasion arise. But trial of soldiers to maintain discipline is merely incidental to an army's primary fighting function. To the extent that those

like process of the court where he or they shall be tried, to compel his or their witnesses to appear at his or their trial, as is usually granted to compel witnesses to appear on the prosecution against them.

Id.

¹⁰⁰ See WINTHROP, *supra* note 16, at 170 (discussing the role of the president of the court-martial); see also Weiss v. United States, 510 U.S. 163, 178 (1994) (recognizing that the position of judge was not instituted into courts-martial practice until 1968).

¹⁰¹ Frederick B. Weiner, *Courts-Martial and the Bill of Rights: The Original Practice II*, 72 HARV. L. REV. 266, 282 (1958) (quoting *Mattox v. United States*, 156 U.S. 237, 242-43 (1895)).

¹⁰² See, e.g., *Swaim v. United States*, 165 U.S. 553 (1897) (President of the United States returned a court-martial sentence to the panel in order to obtain a dismissal of the accused from the service).

¹⁰³ THE FEDERALIST NO. 23, at 15254 (Alexander Hamilton)

responsible for performance of this primary function are diverted from it by the necessity of trying cases, the basic fighting purpose of armies is not served.¹⁰⁴

Essentially, a system of justice with the corresponding rights and protections of a federal court could not operate in a military environment, especially at war or in a foreign land. For instance, composing a grand jury to indict an accused Service Member or a twelve-member jury “wherein the crime shall be committed” was an impossible requirement when forces were actively engaged in combat or stationed abroad. Further, the idea of the court-martial as a bulwark against an oppressive government was anathema to its intended purpose—to ensure obedience to the commander. This concept was best personified by a letter from General William Tecumseh Sherman written almost 100 years after the signing of the Declaration of Independence: “An army is a collection of armed men obliged to obey one man. Every enactment, every change of rules which impairs the principle weakens the army, impairs its values, and defeats the very object of its existence.”¹⁰⁵

At the nation’s founding, a private citizen received the shields and swords provided by the Constitution. But once the same citizen enlisted into the armed forces he would be stripped of the rights he so freely possessed the day before. The only due process owed to the citizen soldier was the process dictated by military law.¹⁰⁶ The idea that the Bill of Rights applies, in part, to the military is a modern concept that did not exist at the Constitution’s ratification.¹⁰⁷ Fifty years after the Bill of Rights was passed those sacred Amendments were only raised in a military trial in one instance, and in that instance “the denial of its applicability to the military on that occasion was approved by no less an authority than the father of the Bill of Rights himself.”¹⁰⁸ Almost two hundred years after the Constitution’s ratification, the Supreme Court in *Reid v. Covert* made the telling statement that “[a]s yet it has not been clearly settled to what extent the Bill of Rights and other protective parts of the Constitution apply to military trials.”¹⁰⁹

¹⁰⁴ *United States ex rel. Toth v. Quarles*, 350 U.S. 11, 17 (1955).

¹⁰⁵ Letter to General W. S. Hancock, President of Military Serv. Inst., from W.T. Sherman (Dec. 9, 1879), reprinted in WILLIAM T. SHERMAN, *MILITARY LAW* 130 (1880).

¹⁰⁶ *See Reaves v. Ainsworth*, 219 U.S. 296, 304 (1911) (“to those in the military or naval service of the United States the military law is due process[.]”); *see also Ex parte Milligan*, 71 U.S. 2, 138 (1866) (“we think, therefore, that the power of Congress, in the government of the land and naval forces and of the militia, is not at all affected by the fifth or any other amendment[.]”).

¹⁰⁷ *See Reid v. Covert*, 354 U.S. 1, 37 (1955) (plurality opinion).

¹⁰⁸ *Weiner*, *supra* note 101, at 291.

¹⁰⁹ 354 U.S. at 37; *see also Burns v. Wilson*, 346 U.S. 137, 140 (1953) (plurality opinion) (“The rights of men in the armed forces must perforce be conditioned to meet certain overriding demands of discipline and duty, and the civil courts are not the agencies which must determine the precise balance to be struck in this adjustment. The Framers expressly entrusted that task to Congress.”).

It was not until six years after Congress created a civilian court of military appeals to review court-martial sentencing that this court affirmatively asserted, "[the] protections of the Bill of Rights, except those which are expressly or by necessary implication inapplicable, are available to members of our armed forces."¹¹⁰ Yet at the time of the passage of the Bill of Rights, the Framers knew full well the fate that would befall a Service Member if tried by court-martial. Could the Framers have been so callous and flippant about the rights of its citizens, especially in matters of life and death? The answer is no. Instead of prescribing such a dark intent on the Framers, the inherent contradiction between the court-martial and the Constitution can be logically reconciled if one concludes that the use of the death penalty at court-martial was meant to be narrowly tailored to military type offenses.

Indeed, the court-martial was initially created to instill discipline among the troops and not as a plenary system of justice. In fact, Winthrop labeled courts-martial as "instrumentalities of the executive power . . . to aid [the President] in properly commanding the army and navy and enforcing discipline therein[.]"¹¹¹ This view continues today, but in a more diluted form as Chief Justice John Roberts demonstrated recently when he labeled military justice as a "rough form of justice."¹¹²

But the undiluted version of this view prevailed among the Framers. Many of them experienced or witnessed first-hand the draconian and arbitrary hand of military justice, and they recognized the need for such a system.¹¹³ At the same time, they believed in the limited role of the government, the rights of the individual, the subjugation of the military over the civil, and the strong role that federalism plays in preserving states' rights. The only way to give true faith to these beliefs would be for the Framers to restrict the use of the death penalty to offenses that pertain to the reasons justifying this aberrant system. An analysis of the genesis and historical use of the death penalty at courts-martial supports this view.

B. Revolutionary War: Death Only for Military Offenses and Murder Committed Abroad

Almost two months after the start of the Revolutionary War, the

¹¹⁰ *United States v. Jacoby*, 29 C.M.R. 244, 247 (C.M.A. 1960).

¹¹¹ WINTHROP, *supra* note 16, at 49.

¹¹² *United States v. Denedo*, 556 U.S. 904, 918 (2009) (Roberts, C. J., dissenting) (citing *Reid v. Covert*, 354 U.S. 1, 35-36 (1955) (plurality opinion)).

¹¹³ JAMES SNEDEKER, *A BRIEF HISTORY OF COURTS-MARTIAL* 20 (1954).

Second Continental Congress authorized the creation of a Continental Army.¹¹⁴ Immediately thereafter, the Congress created a committee composed of George Washington and others to author rules for the government of the army.¹¹⁵ On June 30, 1775, the Congress adopted the committee's proposal of sixty-nine articles of war mostly derived from the British Articles of War.¹¹⁶ As the colonies were attempting to turn away from British authority, they turned towards it to establish the rules for its armed forces.

The original Articles of 1775 limited capital punishment to only three offenses which dealt directly with conduct unique to the military: shamefully abandoning one's post,¹¹⁷ disclosing the watch-word,¹¹⁸ and forcing an officer to surrender to the enemy.¹¹⁹ However, shortly upon its adoption, Congress amended the Articles in November and added two more capital offenses.¹²⁰ Once again, both concerned conduct unique to the military: treacherous correspondence with the enemy¹²¹ and causing or joining a mutiny or sedition.¹²² Hence, like the British Articles of War, the original American Articles maintained a strict nexus between the use of the death penalty at court-martial and military discipline.

In 1776, the Continental Congress established a "committee on spies" to revise the nascent articles of war in order "to consider what is proper to be done with persons giving intelligence to the enemy or supplying them with provisions."¹²³ The 1776 Articles expanded the number of capital offenses from five to sixteen.¹²⁴ Notably, these offenses were once again distinctly military type offenses, such as, striking a superior officer during the course of his duties,¹²⁵ desertion¹²⁶ and causing violence to persons bringing provisions into camp.¹²⁷

¹¹⁴ WILLIAM C. DE HART, OBSERVATIONS ON MILITARY LAW & THE CONSTITUTION AND PRACTICE OF COURTS MARTIAL 3 (1863).

¹¹⁵ WINTHROP, *supra* note 16, at 21.

¹¹⁶ David A. Schleuter, *The Court-Martial: An Historical Survey*, 87 MIL L. REV. 129, 147 (1980).

¹¹⁷ See Articles of War of 1775, art. 25, reprinted in WINTHROP, *supra* note 16, at 955.

¹¹⁸ *Id.* at art. 26, at 955.

¹¹⁹ *Id.* at art. 31, at 956.

¹²⁰ See Additional Articles of War of Nov. 7, 1775, reprinted in WINTHROP, *supra* note 16, at 959—60.

¹²¹ *Id.* at art. 1, at 959.

¹²² *Id.* at art. 5, at 959.

¹²³ WINTHROP, *supra* note 16, at 22.

¹²⁴ See, *supra* note 70.

¹²⁵ Articles of War of 1776, § II, art. 5, reprinted in WINTHROP, *supra* note 16, at 962.

¹²⁶ *Id.* § VI, art. 1, at 963.

¹²⁷ *Id.* § XIII, art. 11, at 966.

At the time the 1776 Articles were adopted the colonies had declared their independence from the British Crown and were deeply mired in a battle for existence. According to some historians, the Continental Congress “hastily adopted” these Articles in order to meet this emergency.¹²⁸ The principle author of the Articles, John Adams essentially copied and proposed the adoption of the British Articles “*totidem verbis*”.¹²⁹ He believed that these Articles, being draconian in nature, would have been substantially modified given the fever of liberty infecting the minds of his fellow politicians. Yet, to his dismay, the Articles were adopted in total.¹³⁰

However, notwithstanding its draconian nature, the Articles still limited the use of capital punishment. This fact alone speaks volumes. Having been adopted in the midst of a war for independence, the Articles were a means of ensuring discipline in an Army that was necessary for the survival of the emerging Revolution. Hence, it would have been in the Continental Congress’s best interest to grant its military commanders—first among them General George Washington—every available tool and the utmost freedom to utilize such tools for imposing discipline. The primary reason for modifying the Articles of War was a warning from General Washington that the existing Articles did not go far enough to impose discipline. Thus, he requested to increase the availability of capital punishment for very serious offenses.¹³¹ The Continental Congress responded to General Washington’s entreaty and increased the number of capital offenses, but once again, they limited them to military type offenses.¹³²

Indeed, the 1776 Articles were born from a state of war. Yet despite the present existentialist crisis and dire need to maintain strict obedience and

¹²⁸ S.T. Ansell, *Military Justice*, 5 CORNELL L. Q. 1, 3 (1919).

¹²⁹ JOHN ADAMS, *DIARY & AUTOBIOGRAPHY OF JOHN ADAMS*, vol. III, 410 (1961).

¹³⁰ In his diaries, Adams noted his disbelief in Congress’ adoption of the Articles:

In Congress Jefferson never spoke, and all the labour of the debate on these Articles, Paragraph by Paragraph, was thrown upon me and such was the Opposition, and so indigested were the notions of Liberty prevalent among the Majority of the Members most zealously attached to the public Cause that to this day I scarcely know how it was possible that these Articles should have been carried. They were adopted, however, and they have governed our armies with little variation to this day.

Id.

¹³¹ Letter to the President of Congress, 24 September 1776, Writings of George Washington, VI, 114. Washington wrote: “Other Rules and Regulation’s may be adopted for the Government of the Army than those now in existence, otherwise the Army, but for the name, might as well be disbanded.”

¹³² See Articles of War of 1776, reprinted in WINTHROP *supra* note 17.

discipline, Congress did two contrary acts. First, it limited the use of the death penalty to enumerated military type offenses. Granted, the Continental Congress did grant military commanders wide authority under the “general article” to court-martial Service Members for acts that are prejudicial to “good order and military discipline.”¹³³ Service Members could ostensibly be court-martialed for non-military, common law offenses, like trespass and theft.¹³⁴ But the general article was reserved for “all crimes not capital.”¹³⁵ Hence, although a commander had significant discretion to deal with disciplinary acts that may also constitute common law offenses, he could not impose the death penalty for their breaches. In that respect, his authority was cabined to military type offenses. What is more, there was no central government in which Service Members could be tried and sentenced to death for other serious offenses—like the murder of a civilian. Thus, given the peripatetic nature of the Army, a long forced march could have freed a Service Member from being executed for offenses that would have been punishable by the colonies. Hence, the circumstances were ripe for Congress to open up courts-martial to all known common law capital offenses. But Congress did not.

Instead, Congress passed what has been aptly called the “turnover provision.”¹³⁶ This brings us to the Continental Congress’ second contradictory act. This provision required that a soldier accused of committing, among other things, a capital crime against a civilian or his property be turned over to the civilian authorities upon application by the victim.¹³⁷ Remarkably, this

¹³³ Articles of War of 1776, § XVIII, art. 5, reprinted in WINTHROP, *supra* note 16, at (the “general article”).

¹³⁴ See *Solorio v. United States*, 483 U.S. 435, 444 (1987) (noting that military records of the 18th century show that Service Members were charged at courts-martial for committing common law offenses such as theft and trespass against civilians).

¹³⁵ Articles of War of 1776, § XVIII, art. 5, reprinted in WINTHROP, *supra* note 16, at (the “general article”).

¹³⁶ Articles of War of 1776, § X, art. 1, reprinted in WINTHROP, *supra* note 16, at 964—65.

¹³⁷ The entire text of the turnover provision states:

Whenever any officer or soldier shall be accused of a capital crime, or of having used violence, or committed any offense against the persons or property of the good people of any of the United American States, such as is punishable by the known laws of the land, the commanding officer and officers of every regiment, troop, or party, to which the person or persons so accused shall belong, are hereby required, upon application duly made by or in behalf of the party or parties injured, to use his utmost endeavors to deliver over such accused person or persons to the civil magistrate; and likewise to be aiding and assisting to the officers of justice in apprehending and securing the person or persons so accused, in order to bring them to a trial. If any commanding officer or officers shall willfully neglect or shall refuse, upon the application aforesaid, to deliver over such accused person or persons to the civil magistrates, or to be aiding and assisting to the officers of justice in

provision stated that any commanding officer that refused to turn over the accused upon application shall be cashiered—i.e., dismissed from the Army.¹³⁸ According to the two seminal military treatises on military law, *Military Law and Precedents* by Colonel William Winthrop¹³⁹ and *Observations on Military Law* by William De Hart,¹⁴⁰ this provision embodied the principle that military law was subordinate to civil law:

[T]he further principle is uniformly asserted of the subordination, in time of peace and on common ground, of the military authority to the civil, and of the consequent amenability of military persons, in their civil capacity, to the civil jurisdiction, for breaches of the criminal law of the land.¹⁴¹

The provision was meant to “aid the civil authorities in the administration of justice, and to place it out of the power of a criminal to escape the just civil penalties of his acts, by entering the military service or claiming its protection when in it.”¹⁴²

In order to best understand the significance of the turnover provision, one must read the provision within two contexts. First, the principle behind the turnover provision must be read in context with the identical principle raised in one of the grievances in the Declaration of Independence: “For protecting [British Soldiers], by a mock Trial, from punishment for any Murders which they should commit on the Inhabitants of these States[.]”¹⁴³ The Continental Congress adoption of the “turnover provision” seems to resolve this grievance by preventing the continental soldier from escaping the Colony’s jurisdiction by enlisting.¹⁴⁴ However, absent this fix, the grievance listed in the Declaration goes unanswered.

Second, the provision must be read in context with the role that executions played for the state or colony at the time. Namely, state executions in the 1800’s served a far different purpose than they do today. Then,

apprehending such person or persons, the officer or officers so offending shall be cashiered.

Id.

¹³⁸ *Id.*

¹³⁹ WINTHROP, *supra* note 16, at 691.

¹⁴⁰ De Hart, *supra* note 114.

¹⁴¹ WINTHROP, *supra* note 16, at 691.

¹⁴² See *Ex parte McRoberts*, 16 Iowa 600, 603 (1804).

¹⁴³ THE DECLARATION OF INDEPENDENCE para. 17 (U.S. 1776).

¹⁴⁴ See *McRoberts*, 16 Iowa at 603.

executions for common law offenses were large public events in which different elements from the community would attend.¹⁴⁵ There were two purposes behind these public executions. First, for the defendant, his execution was meant to enable his repentance by focusing his thoughts so that he could die with the proper frame of mind.¹⁴⁶ In that respect, his execution would serve as a form of redemption, and the defendant would be given several weeks after he was sentenced in order to prepare to die.¹⁴⁷ Second, for the community where the crime occurred, the public execution was intended to heal the wounds wrought by the offender's actions and bring order back to society.¹⁴⁸ To be sure, the execution was meant to deter future conduct: thus was the need to have it done swiftly and as close as possible to where the crime was committed.¹⁴⁹ But the execution served an additional function:

[A]n execution was a dramatic portrayal of community at the moment when the fear of danger to the community was at its highest. Crime, then as now, prompted terror of disorder. At a hanging, where the criminal's repentance and God's forgiveness took center stage, the instigator of that terror could be symbolically reintegrated into society . . . the gain to the spectators was the demonstration that the rupture had been repaired and the community was back to normal.¹⁵⁰

On the contrary, executions in the military did not serve this additional function. Instead, the military execution was used as a tool to impose swift discipline. For example, as the commander of a Virginia Regiment in the 1750's, George Washington "terrif[ied] the soldiers" from deserting by executing deserters for disciplinary purposes.¹⁵¹ Then, during the Revolutionary War, General Washington, "felt strongly that executions deterred crime and preserved order, so he freely permitted his commanders to use capital punishment."¹⁵² In order to increase its effect as a disciplinary tool, military executions were carried out in front of the unit. In a Civil War era treatise on military law, the author described how executions were to be conducted:

¹⁴⁵ STUART BANNER, *THE DEATH PENALTY: AN AMERICAN HISTORY*, 24-31 (2003).

¹⁴⁶ *Id.* at 17 (noting that executions were delayed by weeks for the arrival of a priest).

¹⁴⁷ *Id.* at 16.

¹⁴⁸ *Id.* at 15.

¹⁴⁹ *Id.* at 16.

¹⁵⁰ *Id.* at 31-32.

¹⁵¹ JOHN D. BESSLER, *CRUEL & UNUSUAL: THE AMERICAN DEATH PENALTY & THE FOUNDERS' EIGHTH AMENDMENT* 126 (2012).

¹⁵² *Id.* at 127.

Capital punishment . . . should be carried into effect in the presence of all the troops or of such portion of the command as the convenience of the service may dictate. In case of capital punishment by shooting, great ceremony is ordinarily observed Death by hanging is witnessed by the troops formed in square on the gallows as a centre.¹⁵³

Essentially, military executions served to instill good order and discipline through swift and efficient punishment. However, the death penalty for common law offenses served more than just to deter: the criminal act was an offense against the community, therefore, the execution was also meant to heal the rupture caused by those acts. But allowing the military to prosecute and execute these offenders would deprive the community of either of these historical functions.¹⁵⁴ Although a military execution would result in the death of the soldier, it would not contain the symbolism of an execution by the state. It would likely be done before the accused's unit and in the community's absence.¹⁵⁵ An execution by the community, however, would be done at the place where the crime occurred and in front of a large public gathering.¹⁵⁶ Indeed, the community's execution of a soldier convicted of violating the laws of the land would symbolize that an individual, regardless of status as a soldier or civilian, will be held accountable to the laws and, more significantly, the judgment of the community.

Ultimately, the turnover provision was meant in part to limit the court-martial's reach and to preserve the symbolic and deterring effect of capital punishment to the colonies. During a time of war when the colonies' existence rested on the Army's efficacy, the Continental Congress enacted a provision that both affirmed the superiority of civil courts over the military, and which, most significantly, allowed for the one way removal of crucial personnel from the battlefield.¹⁵⁷

¹⁵³ STEPHEN VINCENT BENET, A TREATISE ON MILITARY LAW AND THE PRACTICE OF COURTS-MARTIAL 166 (1862).

¹⁵⁴ As noted above, the turnover provision was a statutory fix that was not mandated by the Constitution. As such, falling back on this provision as a way to answer the above charge is to claim that state sovereignty was dependent upon the federal government's good will in enacting a statutory provision. Given the strenuous debates on the scope of the federal government's authority, this argument does not seem supportable.

¹⁵⁵ See, e.g., BENET, *supra* note 153, at 166.

¹⁵⁶ See BANNER, *supra* note 145, at 24 (noting that attendance at some hangings would number in the thousands).

¹⁵⁷ Congress removed the turnover provision in 1950 when it enacted the UCMJ. See Weiner, *supra* note 101, at 12.

Like the British Navy, the early American Navy operated under a different set of articles. On November 28, 1775, the First Continental Congress adopted the *Rules for the Regulation of the Navy of the United Colonies*.¹⁵⁸ Like the 1776 Articles of War, the original American Navy Articles were largely copied from the British version.¹⁵⁹ Unlike the Articles of War, the Navy Articles were pithy, short and contained an anomaly. Namely, the Navy articles authorized courts-martial to try the common law crime of murder.¹⁶⁰ However, the crucial difference was that the sailor, unlike the soldier, spent the majority of his time abroad and in foreign ports; and even though the original American articles for the Navy did not expressly include a geographic limit to this offense, murder was punishable by death precisely because the sailor was constantly away from home and not subject to trial by the civil courts and, even worse, amenable to trial by a foreign nation.¹⁶¹ Regardless, the Navy did not conduct its first execution until 1798, and it happened to be a murder of a sailor committed abroad.¹⁶² The First Congress under the Constitution expressly affirmed this understanding of a geographical limit when it restricted murder prosecutions to offenses committed abroad.¹⁶³

C. Articles Adopted After the Constitution's Ratification

In 1789, the new United States Congress adopted the 1776 Army Articles in total.¹⁶⁴ As such, the dual concept of limiting capital punishment to military offenses and the subordination of the military law over the civil courts as evinced in the “turnover provision” survived the birth of the new Republic. The Navy was essentially disbanded after the Revolutionary War and therefore the Navy Articles were not officially adopted until 1799 under Congress’s “Act for the Government of the Navy.”¹⁶⁵ The act passed without recorded debate and was wordy and laden with errors and ambiguities that Congress sought to correct through the passage of the 1800 “Act for the better government for the Navy of the United States.”¹⁶⁶ The new Navy Articles expanded capital punishment to sixteen offenses.¹⁶⁷ All of the remaining offenses—save one—concerned military type offenses. The one exception was Article XXV, which

¹⁵⁸ SNEDEKER, *supra* note 113, at 49.

¹⁵⁹ Gerald F. Crump, *Part I: History of the Structure of Military Justice in the United States, 1775-1920*, 16 A.F. L. REV. 41, 43 (1974).

¹⁶⁰ Navy Articles, art. XXI, reprinted in VALLE, *supra* note 70, at 288.

¹⁶¹ VALLE, *supra* note 70, at 138.

¹⁶² *Id.*

¹⁶³ Navy Articles, art. XXI, reprinted in VALLE, *supra* note 70, at 288.

¹⁶⁴ See Act of Sept. 29, 1789, ch. 25, 4, 1 Stat. 95, 96.

¹⁶⁵ See Act of Mar. 2, 1799, ch. 24, 1 Stat. 709.

¹⁶⁶ Navy Articles, reprinted in VALLE, *supra* note 70, at 285.

¹⁶⁷ See VALLE, *supra* note 70 (outlining the sixteen capital offenses).

dealt with setting fire to or burning of “public property, not then in the possession of an enemy, pirate or rebel[.]”¹⁶⁸

Granted, this lone exception seems to undermine the argument that the Framers intended to limit capital punishment to military type offenses. Most significantly, the burning of public property is an offense that is not on its face directly related to military discipline or limited to acts committed abroad. However, the full text of Article XXV is worth setting out in order to understand and explain this putative anomaly:

If any person in the navy shall unlawfully set fire to or burn any kind of public property, not then in the possession of an enemy, pirate, or rebel, he shall suffer death: And if any person shall, in any other manner, destroy such property, or shall not use his best exertions to prevent the destruction thereof by others, he shall be punished at the discretion of the court-martial.¹⁶⁹

Like the Army Articles, the Navy Articles were derived from the British. If one looks at the corresponding British article, one will see that the British article applied to supplies belonging to the ship:

Every person in the fleet, who shall unlawfully burn or set fire to any magazine or store of powder, or ship, boat, ketch, hoy or vessel, or tackle or furniture thereunto belonging, not then appertaining to an enemy, pirate, or rebel, being convicted of any such offence, by the sentence of a court martial, shall suffer death.¹⁷⁰

Granted, the Navy Articles specifically used the phrase “public property” and Congress could easily have limited the text to ship’s property. However, there are several factors that point to a limited reading of the term “public property” to apply to ship’s property. First, the sailor as opposed to the soldier spent most of his career on board ship, out in sea, or in a foreign port;¹⁷¹ therefore, the Navy

¹⁶⁸ Navy Articles, art. XXV, reprinted in VALLE, *supra* note 70, at 289.

¹⁶⁹ *Id.*

¹⁷⁰ See The 1749 Naval Act, 22 Geo. II, cap. 33, available at <http://www.pdavis.nl/NDA1749.htm>.

¹⁷¹ The following quote best illustrates this point.

[R]outine discipline in the Old Navy overwhelmingly referred to shipboard discipline. Shore duty stations were exceedingly rare for all but the most senior officers before the Civil War, and virtually all enlisted men either served at sea or were temporarily billeted in receiving ships while awaiting

Articles usually applied to offenses committed outside of the United States, so a broad reading of the term “public property” that encompassed typical domestic buildings such as a local post office would be undermined by practice.¹⁷² Further, the qualification that the property must “not then be in the possession of an enemy, pirate, or rebel” indicates that the offense was related to combat conditions and was not simply enacted to prevent the day-to-day arson or destruction of public buildings.

Lastly, this limited reading is supported by the fact that the Navy Articles did not have a similar “turnover provision” like the Army Articles of War which would have required sailors to be handed over to the local authorities for crimes committed against citizens or their property. Thus, if the term “public property” was read expansively it would create two disparate outcomes. On one hand, the state could compel a commanding officer to turnover a soldier who sets fire to a state building. On the other hand, the state could not do so for a sailor who commits the same act. What is more, a sailor, having just embarked from his ship in Norfolk, could meander through the state of Virginia setting fire to public buildings, and the state would have no recourse if the ship’s commander decided to pursue capital punishment. Not only would this be anathema to the idea of state sovereignty, but also there is no compelling reason for the disparate treatment. For instance, unlike the Army, the fact that the Navy operated overseas was legitimate reason for giving a ship’s captain jurisdiction over the common law offense of murder—but once again, such power was limited to murder committed abroad. However, with domestic crimes there was no similar logic that supports expanding the Navy commander’s authority at the expense of state jurisdiction. In short, the only reading that *fits and justifies* the intended purpose of military law and that does not contradict federalism is one that defines the term “public property” to mean property that was connected to the ship.¹⁷³

Ultimately, the historical practice demonstrates that although a commander could court-martial a Service Member for a bevy of offenses, the death penalty was limited to military type offenses. Yet, despite this specific intent to curtail the use of capital punishment, what should we make of the fact

assignment to a ship. Navy yards and shore stations usually employed civilian labor, so most of their personnel were not under naval discipline.

VALLE, *supra* note 70, at 73.

¹⁷² *But see* O’Connor, *supra* note 31, at 195.

¹⁷³ *Cf.* Ronald Dworkin, *Hard Cases*, 88 HARV. L. REV. 1057, 1086 (1957) (“Which arguments of principle and policy might properly have persuaded the legislature to enact just that statute? It should not have pursued a policy designed to replace state criminal enforcement by federal enforcement whenever constitutionality possible. That would represent an unnecessary interference with the principle of federalism that must be part of Hercules’ constitutional theory.”).

that the same legislative body that approved the Declaration of Independence also passed Articles that were antithetical to the rights movement? As demonstrated above, this contradiction is resolvable if one views the Articles as a limited exception to those rights based upon specific and concrete needs of the military, and not as a plenary system. Further, the Articles were debated in *seriatim* and its passage evinces a reasoned response to the dangers the new government faced. Like the preceding Revolutionary War, the “Constitution was adopted in a period of grave emergency.”¹⁷⁴ Despite these real dangers, the First Congress—the body most familiar with the Framers’ intent—maintained the limits to a military commander’s authority to impose the death penalty. Moreover, although the nation was now at peace, the articles were meant to also apply in war.¹⁷⁵ It is during war when the need for discipline would be at its most severe; however, the Framers did not enact a triggering mechanism that would increase court-martial jurisdiction to encompass common law offenses, such as, murder. This omission speaks volumes about the Framers intent.

D. The Rest of the Story

The evolution of capital punishment did not stop at the Constitution’s ratification. As pointed out, Congress made the conscious decision to slowly break away from the categories employed by the Framers and extended capital

¹⁷⁴ *Home Bldg. & L. Ass’n v. Blaisdell*, 290 U. S. 398, 425 (1934). The full quote from the Supreme Court is worth setting out below:

Emergency does not create power. Emergency does not increase granted power or remove or diminish the restrictions imposed upon power granted or reserved. The Constitution was adopted in a period of grave emergency. Its grants of power to the Federal Government and its limitations of the power of the States were determined in the light of emergency and they are not altered by emergency. What power was thus granted and what limitations were thus imposed are questions which have always been, and always will be, the subject of close examination under our constitutional system The constitutional question presented in the light of an emergency is whether the power possessed embraces the particular exercise of it in response to particular conditions. Thus, the war power of the Federal Government is not created by the emergency of war, but it is a power given to meet that emergency. It is a power to wage war successfully, and thus it permits the harnessing of the entire energies of the people in a supreme cooperative effort to preserve the nation. But even the war power does not remove constitutional limitations safeguarding essential liberties.

Id. at 425-26.

¹⁷⁵ *See Curry v. Sec. of the Army*, 595 F.2d 873, 877 (D.C. Cir. 1979) (“Obedience, discipline, and centralized leadership and control, including the ability to mobilize forces rapidly, are all essential if the military is to perform effectively. The system of military justice must respond to these needs for all branches of the service, at home and abroad, in time of peace, and in time of war. It must be practical, efficient, and flexible.”).

punishment to non-service related offenses, such as murder.¹⁷⁶ To critics of this paper, this gradual expansion supports a broad reading of Congress' authority to regulate the armed forces.¹⁷⁷ To such critics, this paper's exclusive focus on the Framers' time period is myopic and self-serving.

Notwithstanding the fact that history is replete with examples of historical practices which were upheld and then eventually found to be unconstitutional,¹⁷⁸ Justice Marshall's dissenting opinion in *Solorio* provides the proper rejoinder to this criticism. The relevant issue is not whether Congress has the power to prescribe rules for the armed forces: this is patently and historically true. Instead, the proper inquiry is how this authority is limited in relation to the other enumerated protections found in the Bill of Rights.¹⁷⁹ Towards that end, a synchronic analysis of the Framers' practice is relevant precisely because it uncovers the stark truth that the Bill of Rights did not originally apply to court-martial practice. This constitutional void must be examined alongside the Supreme Court's view in *Solorio* that Congress's power to regulate the armed forces was plenary, and the only test for jurisdiction is the status of the accused.¹⁸⁰ Once we recognize that there was an absolute privation of an individual's constitutional trial rights at courts-martial we get a sharp understanding as to the unlimited range of Congress's authority at the time to regulate the armed forces, and consequently, its unlimited range to deprive a Service Member of his life. This harsh picture must be juxtaposed with the

¹⁷⁶ See *supra* Part II, at 14–16.

¹⁷⁷ See, e.g., O'Connor, *supra* note 31, at 200–04 (arguing that the steady and incremental 175 year expansion of Congressional authority demonstrated self-imposed limits by Congress and not any limits imposed by the Constitution.).

¹⁷⁸ See *Ohio v. Roberts*, 448 U.S. 56 (1980) (not a violation of the Sixth Amendment's Confrontation Clause to the admit hearsay statements if the proponent can show adequate indicia of reliability) *overruled by Crawford v. Washington*, 541 U.S. 36, 68-69 (2004) (The Court abandons the "indicia of reliability" standard for testimonial statements and holds that the Sixth Amendment Confrontation Clause requires that the government produce a live witness to introduce testimonial statements.). The *Crawford* case is a prime example of how modern departures from historical practice may have been unconstitutional missteps even though such departures were initially approved. Separately, as will be discussed, *infra* Part III, the death penalty adds another dimension to the analysis of whether past actions or departures that were once approved should now be re-examined in light of the Supreme Court's modern death penalty jurisprudence. Compare *McGautha v. California*, 402 U.S. 183 (1971) (finding that it is not a violation of the Due Process Clause to permit the jury to impose the death penalty without any governing standards), with *Furman v. Georgia*, 408 U.S. 238 (1972) (finding the death penalty unconstitutional under the Eighth Amendment in part because it was imposed in an arbitrary and capricious manner), and *Gregg v. Georgia*, 428 U.S. 153, 19395(1976) (holding that Georgia's death penalty statute was not a violation of the Eight Amendment because it gives the sentencing authority adequate information and guidance). Specifically, modern principles underlying the death penalty requires a re-examination of past practices and justifications which may lead to the conclusion that such practices and justifications are no longer constitutionally permitted or warranted.

¹⁷⁹ *Solorio v. United States*, 483 U.S. 435, 453 (1987).

¹⁸⁰ *Id.* at 450.

Framers' belief in limited government and the natural rights of the individual. The only way to reconcile these two positions is to cabin the reach of capital punishment at courts-martial. As demonstrated by the Framers' practice during war and at this nation's beginning, the historical nexus was meant to be a check to both Congress' power and to the complete deprivation of an individual's rights.

Today, however, certain provisions of the Bill of Rights have been incorporated into the military justice system¹⁸¹ and there are numerous statutory and rule based protections provided to a Service Member facing a court-martial.¹⁸² One may argue that this increased protection affords ample justification for extending court-martial jurisdiction to non-service connected offenses. Although this argument may be relevant for non-capital offenses, it does not apply to capital offenses. For one of the provisions of the Bill of Rights that has been incorporated into the military is the Eighth Amendment's ban on Cruel and Unusual Punishment. As will be discussed below, this Amendment supports limiting capital punishment to service connected offenses.

IV. Eighth Amendment Limitation to Capital Punishment at Courts-Martial

A. Modern Death Penalty Jurisprudence – Mitigation and Proportionality

There are two areas in the Supreme Court's death penalty jurisprudence that have considerable bearing on whether the use of courts-martial to impose capital punishment is still justified. First, since the seminal case of *Furman v. Georgia*,¹⁸³ the Court has adopted the "death is different" view. For example, the Court's holding in *Woodson v. North Carolina*, that mandatory death sentences were unconstitutional, "rest[ed] squarely on the predicate that the penalty of death is qualitatively different from a sentence of imprisonment, however long."¹⁸⁴ For the Court, a mandatory death sentence foreclosed the consideration of "relevant facets of the character and record of the individual offender or the circumstances of the particular offense."¹⁸⁵ The Court in *Lockett v. Ohio* took this "death is different" approach a step further and recognized that

¹⁸¹ See, e.g., *United States v. Marcum*, 60 M.J. 198, 205 (C.A.A.F. 2004) ("[T]his Court has consistently applied the Bill of Rights to members of the Armed Forces, except in cases where the express terms of the Constitution make such application inapposite.").

¹⁸² R.C.M 1004 (establishing a sentencing guideline for capital cases).

¹⁸³ 408 U.S. 238, 245-46 (1972) (Douglas, J., concurring); *id.* at 297-298 (Brennan, J., concurring); *id.* at 339 (Marshall, J., concurring).

¹⁸⁴ 428 U.S. 280, 305 (1976).

¹⁸⁵ *Id.* at 304.

it “calls for a greater degree of reliability when the death sentence is imposed.”¹⁸⁶ The *Lockett* Court reiterated that in death cases the sentencing authority must be allowed to consider “any aspect of a defendant’s character or record and any circumstances of the offense that the defendant proffers as a basis for a sentence less than death.”¹⁸⁷ Further expounding on the importance of an individualized determination in death cases, the Court in *Eddings v. Oklahoma* noted that the sentencing authority’s consideration of the defendant’s life history is a “part of the process of inflicting the penalty of death.”¹⁸⁸

As a result of these cases, the Court has recognized the importance a properly conducted mitigation investigation has on a death verdict.¹⁸⁹ In practice, this has changed how defense counsel prepares a capital case, now requiring counsel to place considerable emphasis on developing a comprehensive life history consisting of a multi-generational investigation into the accused’s background, as well as, the facts of the case.¹⁹⁰ Consequently, this has greatly increased the time and resources necessary to prepare a capital defense.¹⁹¹

Second, the Supreme Court has relied on the principle of proportionality to hold that the Eighth Amendment prohibited the death penalty for certain offenses—*i.e.* rape or felony murder¹⁹²—and offenders—*i.e.* the

¹⁸⁶ 483 U.S. 586, 605 (1978).

¹⁸⁷ *Id.*

¹⁸⁸ 455 U.S. 104, 112 (1982).

¹⁸⁹ See *Wiggins v. Smith*, 539 U.S. 510 (2003) (finding that counsel was ineffective for failing to perform an adequate mitigation investigation).

¹⁹⁰ See American Bar Association, *Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases*, 36 HOFSTRA L. REV. 677 (2008). Under the supplementary guidelines this investigation includes: medical history; complete prenatal, pediatric and adult health information; exposure to harmful substances in utero and in the environment; substance abuse history; mental health history; history of maltreatment and neglect; trauma history; educational history; employment and training history; military experience; multi-generational history, genetic disorders and vulnerabilities, as well as multi-generational patterns of behavior; prior adult and juvenile correctional experience; religious, gender, sexual orientation, ethnic, racial, cultural and community influences; socio-economic, historical, and political factors. *Id.* at 682.

¹⁹¹ See Carol S. Steiker & Jordan M. Steiker, *Entrenchment and/or Destablization? Reflections on (Another) Two Decades of Constitutional Regulation of Capital Punishment*, 30 LAW & INEQ. 211, 23133 (2012) (recognizing that the modern focus on mitigation has increased the cost in capital cases).

¹⁹² See *Coker v. Georgia*, 433 U.S. 584 (1977) (unconstitutional to impose the death penalty for rape of an adult); *Kennedy v. Louisiana*, 554 U.S. 407 (2008) (unconstitutional to impose the death penalty for child rape). The Court also held that it was unconstitutional to impose the death penalty against vicarious felony murderers who did not kill, attempt to kill, or intend to kill. See *Enmund v. Florida*, 458 U.S. 782 (1982).

mentally retarded or minors.¹⁹³ The concept of proportionality has two inquiries: “capital punishment is excessive when it is grossly out of proportion to the crime or it does not fulfill the two distinct social purposes served by the death penalty: retribution and deterrence of capital crimes.”¹⁹⁴ The latter inquiry is the most relevant for this paper and deserves further exploration.

In *Gregg v. Georgia*,¹⁹⁵ the Court examined, in part, whether capital punishment for murder can be justified by retribution and deterrence. It found that although retribution is not the dominant justification for punishment, it is not an improper one; and irrespective of whether the death penalty could effectively deter crimes, the Court believed that “certain crimes are themselves so grievous an affront to humanity that the only adequate response may be the penalty of death[.]”. Murder was one of those crimes.¹⁹⁶ Additionally, whether the death penalty deterred crimes was an open question, but this uncertainty did not foreclose the possibility that it did indeed have a deterring effect.¹⁹⁷ After *Gregg*, the Court looked, in part, at the two penological justifications in deciding whether the death penalty was an appropriate punishment for the mentally retarded¹⁹⁸ and minors.¹⁹⁹ In both circumstances, the Court looked to the diminished cognitive ability and culpability of the offender to find that the execution of the mentally retarded or of minors did not promote either purpose.²⁰⁰

B. The Use of Court-Martial to Impose the Death Penalty for Non-Service Connected Offenses Does Not Measurably Contribute to the Aims of Swift and Efficient Punishment and Good Order and Discipline

Having outlined the Supreme Court’s death penalty jurisprudence on individual sentencing and proportionality, the remainder of this paper will demonstrate how these two lines of cases support limiting capital punishment at courts-martial.

¹⁹³ See *Atkins v. Virginia*, 536 U.S. 304 (2002) (unconstitutional to impose the death penalty on the mentally retarded); see also *Roper v. Simmons*, 543 U.S. 551 (2005) (unconstitutional to impose the death penalty on minors).

¹⁹⁴ *Kennedy*, 554 U.S. at 441.

¹⁹⁵ 428 U.S. 153, 184-86 (1976).

¹⁹⁶ *Id.* at 184.

¹⁹⁷ *Id.* at 18586.

¹⁹⁸ See *Atkins*, 536 U.S. at 31821.

¹⁹⁹ See *Roper*, 543 U.S. at 56872.

²⁰⁰ See *Atkins*, 536 U.S. at 31821 (recognizing that the mental impairments of the mentally retarded make it less defensible to use the death penalty as retribution for past offenses and less likely that it would have a deterrent effect); see also *Roper*, 543 U.S. at 56872.

First, the proportionality analysis is significant because it opened up the issue of the death penalty's validity to an inquiry concerning its purposes. The Court noted that unless the use of the death penalty "measurably contributes to [retribution or deterrence], it 'is nothing more than the purposeless and needless imposition of pain and suffering,' and hence an unconstitutional punishment."²⁰¹ As noted above, the Court first applied this analysis to the question of the constitutionality of the death penalty as it relates to the offense; subsequently, the Court extended the analysis to reach the constitutionality of the death penalty as it applies to the offender. This paper argues that the proportionality analysis should be extended to the question about the constitutionality of the death penalty as it relates to the system that imposes it. Thus, similar to the Court's assessment of whether the death penalty for the offense or the offender was justified by retribution and deterrence, this paper will shift the inquiry to the system: the court-martial. Essentially, the heightened scrutiny now placed on the death penalty requires us to ask whether the Constitution would still countenance the imposition of the death penalty by this aberrant system of justice. Towards that end, this paper will look at the traditional basis supporting courts-martial—*i.e.*, the need to obtain swift and efficient punishment and good order and discipline²⁰²—and examine whether the use of the death penalty at courts-martial measurably contributes to these goals. It is in the particularities of this analysis that the Supreme Court's "death is different" line of cases now comes into play.

1. The Need for Swift and Efficient Punishment No Longer Supports the Use of Capital Punishment at Courts-Martial

In 1983, Military courts first applied the Supreme Court's death penalty jurisprudence in *United States v. Matthews*.²⁰³ *Matthews* was prompted by the lack of guidance that military panel members had in deciding on a death verdict. Using *Furman* and *Gregg*, the military's superior appellate court, the Court of Appeals for the Armed Forces' (CAAF),²⁰⁴ held that this procedure violated the

²⁰¹ *Enmund v. Florida*, 458 U.S. 782, 798 (1982).

²⁰² Because of the court-martial's distinct historical pedigree as an instrumentality to impose discipline within the armed forces, the paper shifts away from the Supreme Court's two justifications of retribution and deterrence and instead focuses on "swift & efficient punishment" and "good order and discipline". The infliction of punishment at courts-martial serves a unique purpose that cannot be aptly described under the label of retribution and deterrence. For instance, although the concept of "good order and discipline" incorporates the idea of deterrence it also extends beyond it. *See infra* Part IIIB(ii), at 49. Moreover, the idea of retribution may play a role in court-martial punishments, it has little relevancy to the question about the validity of the aberrant system to impose capital punishment. *See infra* Part IIIB(ii), at 54.

²⁰³ *United States v. Matthews*, 16 M.J. 354, 377 (C.M.A. 1983).

²⁰⁴ The court was initially called the Court of Military Appeals; however, it has changed its name to the Court of Appeals for the Armed Forces.

Constitution in that it did not sufficiently narrow the class of offenses subject to capital punishment. Moreover, there was no way to adequately determine whether the member's verdict was based on an "individualized determination" of the character of the accused and the circumstances of the crime. As a direct result of *Matthews*, the military adopted Rule for Courts-Martial 1004, which put into place an intricate capital sentencing scheme based on the existence of aggravating factors and countervailing mitigating circumstances.²⁰⁵

But the most important aspect of the *Matthews* opinion is that it marked the appearance of the "death is different" concept at courts-martial.²⁰⁶ The *Matthews* Court recognized that the Supreme Court "considers that the death penalty is unique and that the procedure used to impose it requires a greater degree of judicial scrutiny."²⁰⁷ Further, as noted by CAAF in a later opinion:

"Death is different" is a fundamental principle of Eighth Amendment law. This legal maxim reflects the unique severity and irrevocable nature of capital punishment, infuses the legal process with special protections to insure a fair and reliable verdict and capital sentence, and mandates a plenary and meaningful judicial review before the execution of a citizen.²⁰⁸

Military courts have fully embraced the "death is different" concept,²⁰⁹ and have done so with an emphasis on the reliability of the result.²¹⁰ Consequently,

²⁰⁵ 49 Fed. Reg. 3169 (Jan. 26, 1984); MCM, *supra* note 8, R.C.M. 1004.

²⁰⁶ *Matthews*, 16 M.J. at 377.

²⁰⁷ *Id.*

²⁰⁸ *Loving v. United States*, 62 M.J. 235, 236 (C.A.A.F. 2005) (*Loving II*); *see also* *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976).

²⁰⁹ *See* *United States v. Curtis*, 32 M.J. 252, 255 (C.M.A. 1991) (recognizing and adhering to the Supreme Court's dictate that the Eighth Amendment requires a different treatment of death-penalty cases); *Loving II*, 62 M.J. at 239 (same); *United States v. Walker*, 66 M.J. 721, 732 (N-M. Ct. Crim. App. 2008) (death is different concept requires a higher degree of scrutiny by appellate courts).

²¹⁰ *Walker*, 66 M.J. at 732 (quoting *United States v. Murphy*, 50 M.J. 4, 1415 (C.A.A.F. 1998)):

The Supreme Court has continuously echoed one theme since the late 1960s in their decisions in death-penalty cases: "reliability of result." . . . The reliability of the result trumps all other concerns in death-penalty cases and the appellate courts are called upon to ensure that the adversarial system has functioned properly. . . . The essential elements are "competent counsel; full and fair opportunity to present exculpatory evidence; individualized sentencing procedures; fair opportunity to obtain the services of experts; and fair and impartial judges and juries."

military courts have found that certain issues that would be condoned in non-capital cases are grounds for reversal in capital cases.²¹¹

Further, with this emphasis on reliability, subsequent military courts have placed considerable focus on the defense counsel's responsibility to prepare and present an adequate mitigation case. For instance, in *United States v. Curtis*, the then Chief Judge of CAAF voted to overturn the appellant's death verdict because:

[The appellant] did not receive a full and fair sentencing hearing and that, therefore, the sentence to death is wholly unreliable [A]ppellant's sentencing case was not fully developed because trial defense counsel lacked the necessary training and skills to know how to defend a death-penalty case or where to look for the type of mitigating evidence that would convince at least one court member that appellant should not be executed.²¹²

In keeping with this focus, military courts have overturned three recent death penalty cases due to counsel's ineffectiveness in preparing a mitigation case.²¹³

As a result of these changes, today's capital court-martial bears little resemblance to the one that existed either during this Nation's birth or the more modern one created in 1951 by the passage of the UCMJ. Essentially, because of the Supreme Court's modern capital jurisprudence, capital courts-martial now require a tremendous amount of time and resources to prosecute.²¹⁴ Hence, a major justification for the use of courts-martial—*i.e.*, the need to impose discipline through swift and efficient punishment²¹⁵—no longer seems to apply to today's capital cases.

²¹¹ Dwight Sullivan, *Killing Time: Two Decades of Military Capital Litigation*, 189 MIL. L. REV. 1, 49 (Fall 2006) (noting that the death is different standard has resulted in reversals in death cases for errors that would not be grounds for reversals in non-capital cases.).

²¹² 48 M.J. at 331 (1997) (Cox, C. J. concurring).

²¹³ See *United States v. Curtis*, 46 M.J. 129 (C.A.A.F. 1997) (granting appellant's petition for reconsideration and setting aside the death sentence based on ineffective assistance of counsel claims); *United States v. Murphy*, 50 M.J. 4 (C.A.A.F. 1998); *United States v. Kreutzer*, 59 M.J. 773 (A. Ct. Crim. App. 2004).

²¹⁴ Today, it takes roughly two years to prosecute a capital case. See Stephen C. Reyes, *Left Out in the Cold: The Case for a Learned Counsel Requirement in the Military*, THE ARMY LAWYER, Oct. 2010, at 4 (2010).

²¹⁵ *Ex parte Milligan*, 71 U.S. 2, 123 (1866) ("The discipline necessary to the efficiency of the army and navy required other and swifter modes of trial than are furnished by the common-law courts."); see also *Coleman v. Tennessee*, 97 U.S. 509, 513 (1878) (noting the "swift and summary justice of a military court.").

For instance, during the Revolutionary War, some soldiers were executed by way of a “drumhead” court-martial mere hours after they were convicted.²¹⁶ By the time of the Civil War, Union soldiers sentenced to death for murder were executed, on average, within seventy days from the date of the offense.²¹⁷ In World War I, the soldiers sentenced to death in the “largest murder trial in the history of the United States” were executed four months after the date of the offense.²¹⁸ Further, the average time for execution for convicted soldiers stationed in England during World War II was 134 days from the date of offense.²¹⁹ The last person to be executed by the military in 1961, Private John Bennett, was tried and sentenced to death one month after the date of the offense²²⁰ and was executed five years after his appeals and habeas petition were exhausted.²²¹ Today, it takes on average over two years to prosecute a capital court-martial²²² and over eight years for the case to complete direct appellate review.²²³ Also, the only Service Member with an approved death sentence was convicted over twenty-five years ago.²²⁴

While some of the delay in modern capital courts-martial comes from other sources, such as the two-tiered appellate structure established in the UCMJ,²²⁵ the vast majority of the delay is attributable to the military’s adoption of the Supreme Court’s death penalty law. For instance, both the prosecution and succeeding appellate review of death cases have increased in time post *Furman*. Private Bennett’s case—which occurred prior to *Furman*—took only one month to prosecute.²²⁶ However, since the military courts adopted the “death is different” approach it takes an average of two years to prosecute a death case.²²⁷ Moreover, the seminal scholar on the military death penalty noted that at the early stages of the UCMJ and prior to the Supreme Court’s modern

²¹⁶ HARRY M. WARD, *GEORGE WASHINGTON’S ENFORCERS: POLICING THE CONTINENTAL ARMY*, 195 (2006).

²¹⁷ HAROLD M. HYMAN, *A MORE PERFECT UNION: THE IMPACT OF THE CIVIL WAR AND RECONSTRUCTION ON THE CONSTITUTION*, 2130 (1973).

²¹⁸ See Fred L. Borch III, “*The Largest Murder Trial in the History of the United States*”: the *Houston Riots Courts-Martial of 1917*, *THE ARMY LAWYER*, Feb. 2011, at 1 (2011).

²¹⁹ J. Robert Lilly & J. Michael Thomson, *Executing US Soldiers in England, World War II*, 37 *BRIT. J. CRIMINOLOGY* 262, 270 (1997).

²²⁰ See Stephen C. Reyes, *Dusty Gallows: The Execution of Private Bennett and the Modern Capital Court-Martial*, 62 *NAVAL L. REV.* 103, 119 (2013).

²²¹ Richard A. Serrano, *Pvt. John Bennett Is the Only U.S. Soldier Executed for Rape in Peacetime*, *L.A. TIMES MAG.*, Sept. 10, 2000, at 10.

²²² See Reyes, *Left Out in the Cold*, *supra* note 214, at 13.

²²³ See Sullivan, *supra* note 211, at 41 (noting the length of delay in the appellate review for death cases).

²²⁴ *United States v. Gray*, 32 M.J. 730 (A.C.M.R. 1991).

²²⁵ See Articles 66 & 67, UCMJ, 10 U.S.C. §§ 866—867 (2012).

²²⁶ See Reyes, *Dusty Gallows*, *supra* note 226, at 119.

²²⁷ See Reyes, *Left Out in the Cold*, *supra* note 214, at 13.

death penalty jurisprudence, the appellate review of death cases were quickly completed compared to today's standards:

Consider, for example, the cases of two Soldiers who were hanged on the same day at the United States Disciplinary Barracks. On 1 April 1953, Private Thomas J. Edwards was sentenced to death for the premeditated murder of a woman in West Germany. On 15 July 1953--just 105 days after sentencing--an Army Board of Review affirmed the findings and sentence. Ten months later, the affirmed the Army Board of Review's ruling. The case of Private Winfred D. Moore went through the system even more quickly. Moore was sentenced to death on 19 August 1953, for the murder and robbery of a taxicab driver in Fayetteville, North Carolina. On 16 November 1953—a mere 89 days later--an Army Board of Review affirmed his findings and sentence. On 2 July 1954—less than eleven months after Moore was sentenced--the [CAAF] affirmed as well. But it would not be until February 1957 that the Army carried out the two Soldiers' executions.²²⁸

Conversely, the military appellate review of *United States v. Akbar*—one of the more recent death penalty cases to be reviewed by a military court—took almost seven years to complete the initial stage of direct appeal,²²⁹ which is in line with the eight year average for military capital case to make it through direct appellate review.²³⁰

In short, the constitutional changes to death cases have transformed capital courts-martial into a procedure that has little resemblance to the expedient and efficient process that existed during the Constitution's beginnings. This delay, however, removes the strong deterring effect that a swift and efficient execution would have, especially if that crime occurred during combat. The deleterious effects caused by "law's delay" was succinctly explained by General William Tecumseh Sherman:

In civil matters usually there is no great haste, so the "law's delay" must be borne cheerfully to give time for the necessary investigation; but in military matters the reverse is often the case. Sometimes the safety of an army, if not of the whole

²²⁸ Sullivan, *supra* note 211, at 40—41.

²²⁹ *United States v. Akbar*, 2012 CCA LEXIS 247 (A. Ct. Crim. App. July 13, 2012).

²³⁰ Sullivan, *supra* note 211, at 41.

fabric of Government, depends upon the instant and blind obedience to a simple order.²³¹

General Sherman's predictions were exemplified in combat. During the French and Indian War, George Washington protested the law that required a commander to receive permission before convening a court-martial because it interfered with the commander's ability to maintain good order and discipline. Washington believed that justice had to be dished out expeditiously in order to maintain discipline, "statute imposed delays harmful to the discipline of his command and was inadequate for offenses such as cowardice in the face of the enemy"²³² During the Civil War, Lincoln was forced to delegate approval of capital sentences to his commanding generals in order to assuage their complaints that the President's delay in reviewing death sentences "destroyed the effect of swift capital punishment following serious offenses."²³³ Indeed, this aversion towards "law's delay" at courts-martial is not necessarily a byproduct of early American military history. It has periodically resurfaced in more recent times as reasons for denying specific protections to Service Members at courts-martial.²³⁴

But with respect to the delay imposed by modern death penalty jurisprudence, the fundamental distinction between then and now is that those past issues of law's delay were overwhelmingly decided in favor of promoting swift punishment. The one major exception, the delay caused by the passage of the UCMJ, is a self-imposed delay that can ostensibly be eviscerated by an act of Congress. However, the delay associated with capital cases is imposed by the Constitution and cannot be similarly removed.²³⁵ Notwithstanding any criticism of this delay, it must be underscored that it is imposed because of the severity and finality of the punishment and the concomitant need for a reliable verdict. Hence, due to the delay caused by the Supreme Court's modern jurisprudence,

²³¹ SHERMAN, *supra* note 105, at 130.

²³² U.S. ARMY, JAGC, *THE ARMY LAWYER: A HISTORY OF THE JUDGE ADVOCATE GENERAL'S CORPS, 1775-1975*, 12-13 (1976).

²³³ ROBERT I. ALOTTA, *CIVIL WAR JUSTICE*, 4 (1989) (citing HAROLD M. HYMAN, *A MORE PERFECT UNION: THE IMPACT OF THE CIVIL WAR AND RECONSTRUCTION ON THE CONSTITUTION*, 188 (1973)).

²³⁴ *See, e.g., Middendorf v. Henry*, 425 U.S. 25, 45-46 (1976) ("In short, presence of counsel will turn a brief, informal hearing which may be quickly convened and rapidly concluded into an attenuated proceeding which consumes the resources of the military to a degree which Congress could properly have felt to be beyond what is warranted by the relative insignificance of the offenses being tried. Such a lengthy proceeding is a particular burden to the Armed Forces because virtually all the participants, including the defendant and his counsel, are members of the military whose time may be better spent than in possibly protracted disputes over the imposition of discipline.") (holding that Constitution does not require the presence of counsel at a summary court-martial).

²³⁵ Part IVC will address the question whether military exigencies would justify the military from departing from the procedural requirements set by the Eighth Amendment. *See infra* Part IVC.

the need to obtain swift and efficient punishment is no longer a legitimate justification for the use of the court-martial to impose capital punishment.

Despite this fact, there is one remaining justification for the court-martial that is worth exploring: namely, the general argument of “good order and discipline.” But “good order and discipline” should not act as a talisman which by its very nature will support any increase in court-martial authority. Indeed, “general propositions do not decide concrete cases.”²³⁶ What is more, the gravity of the death penalty should be reason enough to subject this general argument to increased rigor and examination. With that said, this paper shall now examine whether the use of a court-martial to impose the death penalty can be justified by this general argument.

2. The Need to Maintain Good Order and Discipline No Longer Supports the use of the Death Penalty for Non-Service Connected Offenses

We should first place the general “good order and discipline” argument in context, keeping the changes brought by the Eighth Amendment in mind. Namely, since the death sentence and subsequent execution will not occur until many years into the future and will likely be carried out far from the unit or the place where the crime occurred, it is the mere threat of a future execution and not the actual execution that is relevant to the discussion on whether the use of courts-martial to impose the death penalty is supported by the general argument.

Despite the delay, the general argument would seem to support the use of the court-martial for offenses that have a direct service connection. For instance, the types of offenses that the Framers set out as capital offenses come to mind—*e.g.* offenses that affect the military’s ability to function in combat, such as, desertion and disobeying a superior commissioned officer. For desertion, the historic justification for making it a capital offense is “because armies have been disintegrated and nations humbled by desertion.”²³⁷ The offense of disobeying a superior commissioned officer brings to mind General Sherman’s quote that the purpose of military justice is to instill obedience to one man.²³⁸

Further, there is a legitimate argument based on “good order and discipline” that capital punishment should be permitted for murders with a

²³⁶ *Lochner v. New York*, 198 U.S. 45, 76 (1905) (Holmes, J., dissenting).

²³⁷ JOHN M. LINDLEY, *A SOLDIER IS ALSO A CITIZEN: THE CONTROVERSY OVER MILITARY JUSTICE, 1917-1920*, at 205 (1990).

²³⁸ See SHERMAN, *supra* note 105, at 130.

service connection. For example, one can argue persuasively that the status of the victim as a member of the armed forces would be relevant. Similarly to the rationale behind making the murder of a United States official a capital offense,²³⁹ authorizing the death penalty for the murder of a superior officer places a normative value on that individual's position and therefore fosters respect and adherence to that individual's office and authority. Additionally, an argument can be made for murder committed on a military installation since such an act would bring into danger the very area that houses the military personnel and equipment necessary to face any future or ongoing hostility.

The legitimacy of the above cases, however, is based on the offenses having a connection to the military. But what about offenses that do not possess this characteristic: is the use of courts-martial to inflict capital punishment still justified? The answer is no. Indeed, for offenses that have no service connection the need to obtain and preserve good order and discipline does not countermand the individual's right to be tried by a system of justice that comports with constitutional norms. In those cases, there is no need to reject the Framers' preference and belief in the supremacy of the civil courts over the military. To prove this point, take for example the alleged murder of a civilian shopkeeper.

In this hypothetical, a Service Member, stationed in the United States, is accused of killing a shopkeeper who was working in a snack shop located in a national park. First, the shopkeeper's murder was committed outside of a military installation and within the United States. Since the crime occurred far from a military installation, there was no danger to military personnel or equipment. Furthermore, there is nothing geographically unique about the crime that requires the use of a court-martial since the federal court is open and available. Also, the shopkeeper's murder was not an attack or usurpation of military authority, it was a crime against a civilian and the surrounding community. Therefore, it does not bear on the commander's ability to maintain discipline in his unit. In this case, the need to maintain good order and discipline does not justify the use of the court-martial to inflict capital punishment. However, there are contrary arguments that are worth exploring.

a. Position of Trust

First, one may argue that such punishment for the shopkeeper's murder would be condoned precisely because of the Service Member's status, and society's need to hold him to a higher standard. But this argument creates a vicious circle that underscores Justice Stevens' concurrence in *Loving* that

²³⁹ 18 U.S.C. § 115a (2014).

“[w]hen the punishment may be death, there are particular reasons to ensure that the men and women of the Armed Forces do not by reason of serving their country receive less protection than the Constitution provides for civilians.”²⁴⁰ However, if we adopt this position of trust argument then an individual relinquishes his rights and must be executed by a separate system solely because she enlisted in the armed forces. Granted, Service Members understand and willingly accept that sacrifices must be made and rights must be watered-down when serving this country, but those relinquishments and extractions are connected to a military purpose and not done perforce because of mere membership.²⁴¹

Further, taken to its logical conclusion, this status or “position of trust” argument can be used in favor of subjecting police officers or firemen to a disparate system. Yet those groups are prosecuted in federal or state courts where they are afforded their full panoply of rights and privileges. One may counter that this is not a fair analogy because there is an inherent need for a Service Member’s absolute obedience, since he may be asked one day to follow orders that will likely lead to his own demise. But both police officers and firemen are given those life-ending commands, yet order has prevailed and fires have been extinguished without having to subject them to a separate form of justice.

b. Obedience to the Commander

The second argument that good order and discipline is served by executing the shopkeeper’s murderer is that doing so would promote obedience to the commander. As stipulated above, with the murder of a superior officer or other Service Member, there is both an imperative and normative judgment that emanates from an execution that promotes obedience, discipline, and unit cohesion. But this logic does not hold true for the shopkeeper’s murder. There, an execution would send out the specific edict: “Do not kill civilians!” or put more liberally, “People in the military shall not kill civilians!” or put more savagely “People in the military shall only kill the enemy during battle, and no one else.” However horrific the act of killing is, its disapprobation does not

²⁴⁰ *Loving v. United States*, 517 U.S. 748, 774 (1996). (Stevens, J., concurring).

²⁴¹ In discussion the application of the Bill of Rights to Service Members, the Supreme Court has generally looked at how the exercise of those rights would affect good order and discipline or the military’s ability to function and not just on the defendant’s status as a Service Member. *See, e.g.*, *Parker v. Levy*, 417 U.S. 733, 757 (1974). For instance, in assessing the extent of a Service Member’s First Amendment rights, the Court looked at how the exercise of this right would affect the command’s ability to fulfill its role and to impose discipline. *Id.*

instill obedience to the commander. “Thou shall not kill”²⁴² is an edict that has existed since time immemorial and predates any articles or war. If anything, the resulting punishment instills obedience to the law, but not the commander. Hence, the commander’s authority over his personnel or his ability to run his command is in no way undermined by his inability to charge the Service Member with capital punishment.

c. General Deterrence

The third and most ubiquitous argument is one of general deterrence. In essence, an aspect of a commander’s responsibility to maintain good order and discipline is to deter others in the unit from committing similar acts.²⁴³ Illegal acts have a deleterious effect on unit cohesion and readiness since they (1) disrupt morale and (2) cause other members in the unit to take up the defendant’s responsibilities while the defendant is awaiting trial. In assessing this argument, we must once again look at this within the context of the changes and delay imposed by the Constitution. In that context, there are serious questions concerning the deterring effect of capital punishment, especially since executions are few and far between.²⁴⁴ Even in combat situations, there is a question as to whether fear of punishment is a significant motivator.²⁴⁵ Granted, the sheer specter of a capital trial may influence others from committing similar misconduct. But giving commanders the authority to impose capital punishment over non-service connected offenses adds little to the deterring effect and normative judgment already conferred on such misconduct by the civil law, morality, religion, ethics and common sense. Such limited value does not outweigh the sanctity of the accused’s constitutional rights. This was the precise balance struck by the Framers when they regulated that these common law murders be turned over to the civil courts: a balance that tips further in the individual’s favor when considering the fact that under modern day jurisprudence the death penalty now adds a qualitative component to the equation.

²⁴² *Exodus* 20:13 (King James).

²⁴³ Notably, this is not a zero sum analysis since the federal government may still seek the death penalty in an Article III court.

²⁴⁴ In *Baze v. Rees*, Justice Stevens noted that the studies on the deterrent effect of capital punishment are inconclusive; nevertheless, he believed that taken as a whole there are more reasons to abandon capital punishment than there are reasons to sustain it. 533 U.S. 35, 79 n.13 (2008) (Stevens, J., concurring) (citing Jeffrey Fagan, *Death and Deterrence Redux: Science, Law and Causal Reasoning on Capital Punishment*, 4 OHIO ST. J. CRIM. L. 255 (2006); John J. Donohue & Justin Wolfers, *Uses and Abuses of Empirical Evidence in the Death Penalty Debate*, 58 STAN. L. REV. 791 (2005)).

²⁴⁵ See R. RIVKIN, *GI RIGHTS AND ARMY JUSTICE: THE SERVICEMAN’S GUIDE TO MILITARY LIFE & LAW* 33638 (1970) (noting studies that showed the fear of punishment is not a significant motivator in combat situations).

d. Retribution

The last argument is one of retribution.²⁴⁶ To place this argument in its proper context it must be recognized that unless the offense is purely military in nature and does not have a civilian counterpart—*e.g.* desertion during war—the defendant may still be executed for his crime. Therefore, the issue is whether execution by way of court-martial has retributive value. The fundamental flaw with the retributivist position is that it is a deontological argument that lends support to the use of capital punishment for a particular offense. It does not, however, have much bearing on the issue of whether it is justified to inflict capital punishment by way of a separate system. Granted, the capital trial of a Service Member before a court-martial composed of other Service Members has symbolic value. But this value is at its apogee only when the judgment concerns a service-connected offense—*e.g.*, a murder committed against a fellow Service Member should be judged by other Service Members. Nonetheless, even if the crime was committed against a fellow Service Member, retribution should not be a legitimate justification to depart from the constitutional norms and create a separate system of justice. If so, then an individual's expected rights would not be based on a concrete standard like the Constitution, but instead on the gravity of the crime.

²⁴⁶ Justice Stevens' comments in his concurring opinion in *Baze* on the role that retribution has in today's death penalty is worth noting:

[O]ur society has moved away from public and painful retribution toward ever more humane forms of punishment. State-sanctioned killing is therefore becoming more and more anachronistic. In an attempt to bring executions in line with our evolving standards of decency, we have adopted increasingly less painful methods of execution, and then declared previous methods barbaric and archaic. But by requiring that an execution be relatively painless, we necessarily protect the inmate from enduring any punishment that is comparable to the suffering inflicted on his victim. This trend, while appropriate and required by the Eighth Amendment's prohibition on cruel and unusual punishment, actually undermines the very premise on which public approval of the retribution rationale is based.

This argument applies equally as well to the military. Historically, military executions were done quickly and publically in front of the unit in order to promote military discipline. *See* BENET, *supra* note 153, at 166. In fact, how a person was executed—by the firing squad or by the gallows—had symbolic value. The latter was left for truly ignominious acts. *See* MANUAL FOR COURTS-MARTIAL, UNITED STATES, ¶ 103a, at 93 (1943). Today, military executions have not occurred in the last fifty years and any future executions would be done in private through lethal injection. *See* U.S. DEP'T OF ARMY, REG. 190-55, U.S. ARMY CORRECTIONS SYSTEM: PROCEDURES FOR MILITARY EXECUTIONS (23 July 2010)(executions will be administered by lethal injection); *see also* U.S. DEP'T OF NAVY, SEC'Y OF NAVY INSTR. 5815.4, PROCEDURES FOR EXECUTIONS WITHIN THE DEPARTMENT OF THE NAVY (1993) (same). As such, like the court-martial, even the Service Member's actual execution no longer serves its historical purposes.

Further, as noted, the only person with an approved death sentence was sentenced in the 1990s.²⁴⁷ This lengthy delay between sentencing and execution undermines any retributive value for a military execution that has occurred over two decades after the crime was committed. Lastly, the concept of retribution actually cuts against a military judgment when the crime is not connected to the service. For instance, the murder of the shopkeeper had a direct impact on his family and the surrounding community. In those circumstances, it is only fitting that the defendant be judged in and by the community where the crime was committed and not by a court-martial that is relationally and geographically disconnected to it.

C. Modern Death Penalty Jurisprudence and Military Exigencies

One of the central premises of this section's proportionality argument is that the constitutional demands placed on courts-martial render the historical justification for using courts-martial irrelevant for non-service connected capital offenses. A contrary argument to this premise is that these demands are not fixed and can be removed in cases of military exigency. In other words, the military willingly accepts the inherent delay and cost associated with these constitutional requirements during times of relative stability. However, any "law's delay" would be removed during an emergency, when the needs of the military outweigh the rights of the individual. It is in these emergency circumstances that the use of courts-martial to impose the death penalty retains its purpose. For instance, the *Matthews* court stated the following:

[T]here may be circumstances under which the rules governing capital punishment of Service Members will differ from those applicable to civilians. This possibility is especially great with respect to offenses committed under combat conditions when maintenance of discipline may require swift, severe punishment, or in violation of the law of war, e.g., spying.²⁴⁸

Thus, even though military courts have adopted the Supreme Court's capital jurisprudence, the military may remove these requirements in case of military exigency. For example, the President or Congress could repeal the procedural protections provided for capital courts-martial,²⁴⁹ make the death penalty

²⁴⁷ United States v. Gray, 51 M.J. 1, 49 (C.A.A.F. 1999).

²⁴⁸ United States v. Matthews, 16 M.J. 354, 368 (C.M.A. 1983).

²⁴⁹ MCM, *supra* note 8, R.C.M. 1004.

mandatory for certain offenses,²⁵⁰ or strip appellate courts of appellate review over capital cases.²⁵¹ Although the Supreme Court has never approved of this military exigency exception to the death penalty, the argument has some merit.

First, the Supreme Court has never explicitly held that its death penalty jurisprudence applies to courts-martial; instead, in *Loving*, the Court had assumed for the sake of deciding the case that it did.²⁵² Further, in declining a request for rehearing in *Kennedy v. Louisiana*, the Court stated that the case “involves the application of the Eighth Amendment to civilian law; and so we need not decide whether certain considerations might justify differences in the application of the Cruel and Unusual Punishments Clause to military cases (a matter not presented here for our decision).”²⁵³ Nevertheless, despite the openness of this question, the reality is that military courts have held that the modern death penalty jurisprudence does indeed apply to courts-martial.²⁵⁴ So the issue remains: would the Constitution approve of the military’s departure from modern death penalty jurisprudence based on military exigencies?

The answer to this issue leads us back to the “death is different” line of cases. Specifically, if the “death is different” principle is based on the need to ensure a reliable death verdict, should the Constitution condone the execution of a Service Member based on a less reliable procedure for the sake of obtaining

²⁵⁰ See Article 106, UCMJ, 10 U.S.C. 906 (2012) (imposing a mandatory death penalty for spying). *But see*, *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976).

²⁵¹ *Cf.* *Pulley v. Harris*, 465 U.S. 37, 44–54 (1984) (Constitution does not mandate a comparative review at the appellate stage for all death cases).

²⁵² *Loving v. United States*, 517 U.S. 748, 755 (1996) (“The Government does not contest the application of our death penalty jurisprudence to courts-martial, at least in the context of a conviction under Article 118 for murder committed in peacetime within the United States, and we shall assume that *Furman* and the case law resulting from it are applicable to the crime and sentence in question.”).

²⁵³ *Kennedy v. Louisiana*, 554 U.S. 945, 947 (2008). Notably, Justice Scalia wrote a concurring opinion in which they criticized the Court’s view on the Eighth Amendment’s application to the military.

Justice Kennedy speculates that the Eighth Amendment may permit subjecting a member of the military to a means of punishment that would be cruel and unusual if inflicted upon a civilian for the same crime. That is perhaps so where the fact of the malefactor’s membership in the Armed Forces makes the offense more grievous. One can imagine, for example, a social judgment that treason by a military officer who has sworn to defend his country deserves the death penalty even though treason by a civilian does not. (That is not the social judgment our society has made...but one can imagine it.) It is difficult to imagine, however, how rape of a child could sometimes be deserving of death for a soldier but never for a civilian.

Id. at 948 (Scalia, J., concurring).

²⁵⁴ See *United States v. Matthews*, 16 M.J. 354, 377 (C.M.A. 1983).

swift and severe punishment? Indeed, during a time of war, the federal government must still abide by the Constitution when seeking to execute a civilian even in instances when it may be helpful to the war effort to use a military tribunal instead.²⁵⁵ As the logic of the *Matthews* opinion would seem to dictate, when the same government wishes to execute a Service Member it may freely discard those protections during times of emergency regardless of the nature of the offense.²⁵⁶

This distinction is based on the specialized and particularly influential role that the armed forces would play in an emergency situation. But two factors must be considered. First, despite being faced with an existentialist crisis during and after the American Revolution, the Framers chose to limit the reach of capital punishment at courts-martial. Instead of opening up the harsh and draconian court-martial to all capital offenses, the Framers specifically limited this stark environment to military type offenses. Second, this disparate treatment once again raises the principle dilemma stated by Justice Stevens in *Loving*: Service Members would “by reason of serving their country receive less protection than the Constitution provides for civilians.”²⁵⁷

Thus, other than forsaking Service Members to a wholesale relinquishment of their rights resulting from their patriotic decision to enlist, the only way to logically resolve this dilemma is to restrict the reach of capital punishment at courts-martial to service connected offenses. In other words, if the military retains the authority to depart from those constitutional requirements for death cases, the Constitution should countenance such disparate treatment only for offenses relating to the reasons supporting such departures. For instance, according to the *Matthews* court, the military may depart from the Eighth Amendment standards for “offenses committed under combat conditions when maintenance of discipline may require swift, severe punishment.”²⁵⁸ However, such a departure would only make sense for offenses that are service connected. During war there are compelling reasons to ensure the swift punishment for offenses that directly affect the military’s ability to function in combat, such as the aforementioned offenses of desertion and disobeying a superior commissioned officer. Such swift punishment is necessary to instantaneously deter further misconduct from metastasizing into the unit. For example, absent the deterring effect of a swift and resolute execution, what is to stop a soldier or a platoon from disobeying the commanding officer’s orders and desert the battlefield to avoid impending death? Additionally, those combat type

²⁵⁵ *Ex parte Milligan*, 71 U.S. 2 (1866) (holding that it is unconstitutional to use military courts to try civilians even during time of war when the civil courts are still operational).

²⁵⁶ *Matthews*, 16 M.J. at 368.

²⁵⁷ *Loving*, 517 U.S. at 774 (Stevens, J., concurring).

²⁵⁸ *Matthews*, 16 M.J. at 368.

circumstances present a credible argument supporting mandatory death sentences.

Thus, irrespective of whether society or the Constitution would approve of such drastic changes, these service-connected offenses present legitimate reasons to support the state's abandonment of the Constitution's requirements in order to obtain swift and severe executions. Conversely, the case of the shopkeeper's murder lacks this legitimacy. In that case, there is no gripping reason to abandon constitutional requirements. First, there is no connection to the offense and the military's ability to operate within combat. Thus unlike desertion or the murder of a superior officer, the failure to mete out capital punishment for a murder committed out in town and against a civilian would not hinder the military from completing its mission. As such, there is no compelling reason that justifies the abandonment of the constitutional requirements in order to impose "swift punishment". Moreover, such departures would not be supported by the need to save the personnel and resources required for war. In fact, in light of the limited value of prosecuting this Service Member for the shopkeeper's murder, the best way to preserve resources would be to have the civil courts handle the case—as was practiced by the Framers during the Revolutionary War and the normal course of conduct for the first half of this country's history.

Finally, there is one broad counter argument that must be explored. Specifically, Congress must ensure that military commanders be given the broadest authority in order to counter any of the unknown obstacles that they may face during war. This position echoes the argument provided by Alexander Hamilton in support of Congressional authority to regulate the armed forces:

These powers ought to exist without limitation, because it is impossible to foresee or define the extent and variety of national exigencies, or the correspondent extent and variety of the means which may be necessary to satisfy them. . . .²⁵⁹

This argument plays to our worries, but it does so at the cost of the individual rights of our Service Members. In reality, neither Congress's nor the commander's authority is truly unlimited since the Constitution imposes restrictions.²⁶⁰ Desertions would undoubtedly cease if the accused were punished by *amende honorable*.²⁶¹ However, that would be cruel and unusual

²⁵⁹ THE FEDERALIST NO. 23, at 152 (Alexander Hamilton).

²⁶⁰ See, e.g., *Matthews*, 16 M.J. at 377.

²⁶¹ MICHEL FOUCAULT, DISCIPLINE & PUNISH: THE BIRTH OF THE PRISON, 35 (Sec. Vintage Book ed. 1995)

punishment.²⁶² How much is society willing to use the individual's constitutional rights as a doorstep in order to leave the commander's options wide open? Both the *O'Callahan* opinion²⁶³ and Justice Stevens' concurrence in *Loving*²⁶⁴ centered around the need to set proper limits to the deprivation of the individual's rights. Because death is different, there is a greater need when setting those limits to emphasize the rights of the individual over the needs of the state, especially in this situation when the needs of the commander are vague, amorphous and not set out in concrete terms.

V. Conclusion

The Framers placed in the Constitution a number of special protections for a capital defendant. Those protections ensured that there were limits to the United States power to deprive a citizen of his life. Nonetheless, the Framers permitted courts-martial to depart from these safeguards because of the unique need of the armed forces. But they purposefully limited capital punishment to military type offenses to ensure that a citizen's life would be deprived by an separate system only in specific and necessary circumstances. Today, however, there are no such limits, and the Service Member can be executed for crimes that are not service connected merely because of her status.

However, in a society that now recognizes that death is indeed different, what are the prevailing reasons for continuing to allow the state to deprive an individual of her life by a separate system? This paper has made the case that there are no longer any justifiable reasons for the use of courts-martial to impose the death penalty for non-service connected offenses. If society continues to support the execution of a Service Member based solely on the accused's status, then we must accept that we have judged a Service Member's life as less deserving of the constitutional protections than a civilian's: an odd thing to say about the execution of someone who has sworn to give up her life to defend the nation. Regardless of whether the defendant is a private citizen or a citizen-soldier, capital punishment results in the same ultimate condition—the extinguishment of life by the state. In light of the stakes at hand, disparate treatment should only be countenanced for offenses that are service connected.

²⁶² *Cf.* *Weems v. United States*, 217 U.S. 349, 358 (1910) (holding that the historical punishment of *cadena temporal* was cruel and unusual).

²⁶³ *O'Callahan v. Parker*, 395 U.S. 258, 261 (1969).

²⁶⁴ *Loving v. United States*, 517 U.S. 748, 774 (1996) (Stevens, J., concurring).

WATER IS THE NEW OIL: THE NATIONAL SECURITY IMPLICATIONS OF OUR LOOMING WATER CRISIS

Lieutenant Commander David M. Shull*

To take a Navy shower:
Turn on the water and wet your body (30 seconds).
Turn off the water, lather with soap and shampoo (30 seconds).
Turn on the water, rinse (1 minute).

Introduction

U.S. Navy vessels are equipped with evaporators – water distillers – that produce the ship’s freshwater supply from seawater. But water is a finite commodity on board many ships, even with evaporators producing freshwater at full output. With water in short supply, the “Navy shower” developed as a means to conserve freshwater resources. The term “Navy shower” is now cemented in the Navy’s lexicon, as is its antonym, the “Hollywood shower.” As memorialized in Tom Clancy’s *The Hunt For Red October*, “[a] Hollywood shower is something a sailor starts thinking about after a few days at sea. You leave the water running, a long, continuous stream of wonderfully warm water.”¹ Shipboard life has its sacrifices. But water shortages are no longer a problem reserved for sailors at sea or deployed forces abroad. The warming climate and unsustainable water use have placed increasing stress on the nation’s water supply. Water shortages are a growing concern for domestic military installations and facilities, particularly in arid portions of the West, where aggressive water conservation and reuse measures are already a reality of day-to-day operations.² So much so, in fact, that leaders in the Department of Defense (DoD) have said that water scarcity is one of the biggest threats facing the DoD.³

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¹ TOM CLANCY, *THE HUNT FOR RED OCTOBER* (1984).

² DEPARTMENT OF DEFENSE, 2014 CLIMATE CHANGE ADAPTATION ROADMAP (2014) [hereinafter 2014 CCAR].

³ Andy Medici, *DoD: Water scarcity a growing issue for installations*, FED. TIMES, Mar. 5, 2014.

Water, and particularly potable freshwater, is a mission-critical resource for military operations, both in the expeditionary environment and at permanent installations.⁴ An adequate supply of potable water is essential for personal consumption, hygiene, sanitation, food preparation, and medical care.⁵ Water is equally important for equipment maintenance, energy production, and firefighting.⁶ Water is also a necessary commodity for suppliers who produce goods and services for the DoD, and for energy processes that supply essential power to DoD installations.⁷ The DoD manages over 500 installations worldwide, comprised of some 562,000 facilities and spanning some 25 million acres of land, virtually all of which will be impacted by the effects of climate change.⁸ Without adequate water, the daily operations of these installations are impossible; it is as valuable a commodity as any fuel source. Reduced or degraded water supplies, and increases in operating costs for water delivery and wastewater removal, may force the military departments to cut back current operations, reassess future operations, and relocate missions to other installations or facilities.⁹ Maureen Sullivan, director of environmental management within the DoD, put it plainly: “You have to have it to open the gates and turn on the lights.”¹⁰ “Water,” Ms. Sullivan said, “is the new oil.”¹¹

So it is no surprise that the DoD is working to enhance its water security by taking steps to ensure military installations have adequate supplies of water of suitable quality to fully support mission requirements.¹² As part of this effort, the DoD issued a policy memorandum in the spring of 2013 to each of the military departments (i.e., Services—the Army, Navy, and Air Force) directing measures to plan, prepare, and provide for an adequate supply of water to meet mission needs.¹³ The memorandum cites increased demand, the effects of climate change, and near-term weather variability as factors that may worsen

⁴ DEPARTMENT OF DEFENSE, STRATEGIC SUSTAINABILITY PERFORMANCE PLAN FY 2014 (2014) [hereinafter 2014 SSPP].

⁵ *Id.*

⁶ *Id.*

⁷ *Id.* at 1-7.

⁸ OFFICE OF THE DEPUTY UNDER SECRETARY OF DEFENSE (INSTALLATIONS AND ENVIRONMENT, DEPARTMENT OF DEFENSE ANNUAL ENERGY MANAGEMENT REPORT FISCAL YEAR 2013 (2014) [hereinafter 2013 AEMR]; DEPARTMENT OF DEFENSE, BASE STRUCTURE REPORT – FISCAL YEAR 2014 BASELINE [hereinafter 2014 BSR].

⁹ ARMY ENVIRONMENTAL POLICY INSTITUTE, ARMY WATER SECURITY STRATEGY, (2011) [hereinafter ARMY WATER SECURITY STRATEGY].

¹⁰ Medici, *supra* note 3.

¹¹ *Id.*

¹² ARMY WATER SECURITY STRATEGY, *supra* note 9, at 9. Mission requirements, as defined herein, are requirements for the successful execution of DoD’s mission.

¹³ OFFICE OF THE UNDER SECRETARY OF DEFENSE FOR ACQUISITION, TECHNOLOGY AND LOGISTICS, WATER RIGHTS AND WATER RESOURCES MANAGEMENT ON DEPARTMENT OF DEFENSE INSTALLATIONS AND RANGES IN THE UNITED STATES AND TERRITORIES (2014).

water shortages and complicate water resource management.¹⁴ Calling for a proactive approach, the memorandum directs each DoD installation to: (1) locate and retain existing documentation of its water resources and rights; (2) be prepared to assert and preserve its water rights under Federal and State law as necessary to support the mission requirements; and (3) identify additional water quantities required to meet reasonably foreseeable mission requirements and water resources that may be available to fulfill those requirements.¹⁵

The focus of this policy memorandum on locating and securing federal and state water rights is, in one sense, unremarkable. Certainly, the DoD would be expected as part of its water security strategy to ensure domestic military installations have their internal houses in order, and that means documenting water uses, resources, and rights, adequately managing current water resources, and planning for future water needs. It is not as if this policy memorandum is an isolated measure, either; numerous efforts are underway at the DoD and Service component level to address water efficiency and conservation. The DoD, along with all Executive departments and agencies, is working to meet water consumption reductions required by Executive Order 13,693 to improve federal water use efficiency and management.¹⁶ Yet, in another sense, the memorandum's emphasis almost entirely on water rights is noteworthy. It is not altogether clear in the first instance what it means to "be prepared to assert and preserve" water rights (rights must generally be perfected and quantified to be preserved and successfully asserted against other claimants, and the DoD has not provided any clarifying guidance), nor that such an approach would ensure adequate supplies of water for military installations. And, to the extent this approach represents the DoD's primary line of effort in a world of increased competition over scarce resources, its viability is only one consideration. This approach must also be evaluated for its harmony with other DoD and federal water efficiency and conservation strategies, its implications for relations with the various States, and its normative consequences.

The policy memorandum also directs installations to estimate future water requirements and to look for additional water resources to meet that foreseeable need. This could suggest an even broader policy goal – securing additional water resources beyond what would be available to an installation under its existing federal and state water rights. Because of the complex legal mechanisms that govern water allocation in the United States, and the complicated and varying jurisdictional issues that each installation faces in determining its water rights, those in the military establishment may naturally be

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ 2013 AEMR, *supra* note 8, at 25; Exec. Order No. 13,693, 80 Fed. Reg. 15871.

inclined – in the name of national security – to champion broad federal water rights for military installations in the United States to ensure DoD water security. If this is the logical next step – first, secure existing water rights under federal and state law, and second, secure broader federal water rights as necessary – then it is important to assess whether asserting a broader federal water right for national defense is possible; whether it is an effective water security strategy; whether such an approach is consistent with other federal water efficiency and conservation goals; and what implications such an approach might have on state water rights regimes.

This article argues that a water rights-based approach offers, at best, an incomplete solution to the problem of water scarcity. The DoD must adopt a comprehensive water security strategy that seeks first to reduce, rather than to accommodate, demand. The DoD cannot look at water as a property entitlement to be secured against competing users, such that once secured, the DoD can confidently rely on its claims of right in perpetuity. This is an antiquated approach that assumes a measure of certainty that today's water rights regimes either no longer promise or cannot deliver upon.¹⁷ This is especially true in an era of global climate change, where existing legal regimes will be tested, formal legal expectations may yield more often to concepts of reasonable use and equitable or proportionate sharing, and new legal approaches or adaptation strategies may yet develop.¹⁸ While governmental and private party intransigence may sustain the status quo in the short term, long-term strategic water security planning cannot assume an unchanging legal landscape. Rather, water rights are simply one measure of risk allocation,¹⁹ and the DoD must be prepared to consider its water rights as one component of a risk management strategy that also includes concrete water conservation and efficiency policies. Integration of water rights with water use reduction is crucial to achieving a flexible adaptation strategy, one that recognizes the limitations of water rights but also one that sees over-assertion of water rights as potentially harmful to conservation goals. Further, this article also argues that expanded federal water rights, even if obtainable, would be enormously disruptive to existing water rights administration and could frustrate other federal policies encouraging water conservation and the efficient use of water resources.

Fortunately, many of the components of a comprehensive water security strategy have already been developed, so much of the groundwork has

¹⁷ A. Dan Tarlock, *Prior Appropriation: Rule, Principle, or Rhetoric?*, 76 NOTRE DAME L. REV. 881, 890, 909 (2000) (noting that some courts have subordinated the traditional principle of priority in Western water law to sharing, and further suggesting that global climate change will strain existing allocation schemes and induce different adaptation patterns).

¹⁸ *Id.* at 909-910.

¹⁹ *Id.* at 907.

already been laid. Water conservation is already integral to the DoD's energy management program.²⁰ Additionally, the Army in particular has undertaken expansive studies of water use and developed a (proposed) water security strategy to ensure Army water security.²¹ The Army has also promulgated policy guidance on water rights at Army installations in the form of a reference memorandum, although a less detailed Army directive subsequently superseded it.²² The next step should be to develop a DoD-wide water rights strategy, informed by water conservation goals, and then to merge that product into a unified water security strategy.

This article will, at the outset, summarize water allocation law in the United States. Part I will look generally at the predominant water rights regimes and how national defense water requirements are met within these regimes, including how water rights are created and what compliance obligations attach to those rights, with particular emphasis on those elements of water allocation law that can prove most challenging to the DoD in securing water rights. This will serve as the backdrop for the discussion to follow.

Parts II and III will then explore the water scarcity problem facing the DoD – more broadly, the risk that water scarcity poses to national security – as measured by the likelihood that water scarcity will impact the DoD's infrastructure in the United States and impede mission capabilities, as well as the severity of the harm to the DoD's mission, capability, and readiness. Part II begins with a brief summary of the effects of climate change on the water cycle globally and in the United States, and specifically how changes to the water cycle may affect the nation's water supply and water quality. Part II will also look at how other dynamics such as population growth and infrastructure decay make the water scarcity picture even more dire, and how changes to the water cycle increase competition and conflict, and make regional, State, and local water planning increasingly complex. Part III will then focus on the impacts of water scarcity on the national defense critical infrastructure in the United States, and specifically at the risks posed by water scarcity to military installations.

²⁰ See, e.g., DEPARTMENT OF DEFENSE ENERGY MANAGER'S HANDBOOK 136 (25 Aug. 2005).

²¹ PACIFIC NORTHWEST NATIONAL LABORATORY, U.S. ARMY, ARMY NET ZERO WATER BALANCE AND ROADMAP PROGRAMMATIC SUMMARY 23 (Oct. 2013), available at www.asaie.army.mil/Public/ES/netzero/docs/NZWProgrammaticSummary-FINAL-10-30-13.pdf [hereinafter 2013 ARMY NET ZERO]; ARMY WATER SECURITY STRATEGY, *supra* note 9; ELISABETH M. JENICEK ET AL., ENGINEER RESEARCH AND DEVELOPMENT CENTER, U.S. ARMY CORPS OF ENGINEERS, WATER SUSTAINABILITY ASSESSMENT FOR TEN ARMY INSTALLATIONS, ERDC/CERL TR-11-5, at 6 (Mar. 2011) [hereinafter USACE WATER SUSTAINABILITY ASSESSMENT].

²² OFFICE OF THE ASSISTANT SECRETARY OF THE ARMY (INSTALLATIONS, LOGISTICS & ENVIRONMENT), U.S. ARMY, POLICY GUIDANCE ON WATER RIGHTS AT ARMY INSTALLATIONS IN THE UNITED STATES (1995), *superseded by* SECRETARY OF THE ARMY, U.S. DEP'T OF ARMY, DIR. 2014-08, WATER RIGHTS POLICY FOR ARMY INSTALLATIONS IN THE UNITED STATES (12 May 2014).

Finally, Part IV will attempt to weigh the efficacy and propriety of the DoD's rights-based policy approach to securing water resources. Any definitive assessment of this sort would require detailed modeling to allow conclusions to be drawn as to specific installation water demands and water scarcity conditions. While such modeling should be – and is being – done, it is beyond the scope of this article. At the risk of oversimplification, the goal here is simply to identify some of the complicating factors that caution against a rights-based strategy generally, particularly one that seeks to expand the reach of federal water rights. Part IV predicts that a focus on securing existing federal and state water rights and on broadening the scope of federal water rights for military installations in the name of national security is an incomplete strategy at best, and could work against the DoD's wider water security strategy and similarly frustrate other federal policies and goals promoting water conservation and efficient use of water resources.

This article will examine the risks posed by climate-related water scarcity to national security, as measured by the ability of our national defense critical infrastructure – specifically, military installations, assets, and facilities in the United States – to meet present and future mission requirements.²³ With this end in mind, it is important to establish a few parameters. First, the focus of this article is on the problem of climate-related water scarcity – that is, the inadequate supply of water, or more precisely, the inadequate supply of water of suitable quality to support the uses for which the water is needed. The impacts of climate change on the water cycle are profound and widespread; water scarcity is just one of the many observed and projected consequences of climate-related changes to the water cycle. A full study of the wide-ranging effects of climate change on the water cycle is outside the scope of this article. Instead, for proper context this article will briefly summarize how climate change has affected the water cycle, but will then move more specifically to the problem of water scarcity.

Second, climate change threatens our national security by transforming *both* the threats that we face and our ability to effectively combat those threats.

²³ As used in this article, the term “national security” refers collectively to the national defense and foreign relations of the United States, and more broadly to the security posture of the United States, *i.e.*, the inviolability of the nation. The term “national defense” refers to military power. The terms “national defense critical infrastructure” and “defense critical infrastructure” refer to assets and facilities essential to project, support, and sustain military forces and operations worldwide. As used herein, the term refers primarily to military installations (built and natural physical infrastructure), though by definition the term also includes ports, bridges, power stations, telecommunications lines, pipelines, and other critical infrastructure. See JOINT CHIEFS OF STAFF, JOINT PUB. 1-02, DEPARTMENT OF DEFENSE DICTIONARY OF MILITARY AND ASSOCIATED TERMS (8 Nov. 2010); NATIONAL RESPONSE FRAMEWORK, CRITICAL INFRASTRUCTURE AND KEY RESOURCES SUPPORT ANNEX (May 2013).

Climate change can reasonably be expected to reduce crop yields and disrupt food supplies; raise energy prices; upset and potentially devastate ecosystems; increase instability and worsen existing stresses related to poverty, social and ethnic tension, and environmental degradation; take away livelihood opportunities, especially among the poor and socially disadvantaged or marginalized; displace peoples on an unprecedented scale and contribute to disruptive global migration; destabilize governments, particularly those governments plagued by corruption, weak institutions, and low legitimacy; and harm human health and safety.²⁴ Changes in water availability, or issues related to the delivery of water resources to meet competing needs of energy, food, and health, will undoubtedly accelerate instability and instigate intra- and international conflicts or humanitarian crises, and may heighten transnational threats from terrorist organizations, increasing the incidence and magnitude of situations and conditions under which the DoD may be called upon to conduct combat or security operations or to deliver humanitarian assistance.²⁵ A report prepared for the U.S. intelligence community in 2013 warned that we should expect to see events that exceed the capacity of states and societies to manage and that have grave enough global security implications to compel international response.²⁶ It is therefore imperative that the United States has the capability to effectively respond to these threats. But, climate change also threatens to degrade the DoD's critical mission capabilities – those capabilities that define the DoD's capacity to act – by impacting DoD physical infrastructure (built and natural), plans, operations, training, and equipment and resource acquisition.

This article presumes that climate-related water scarcity will lead to an expanded role for the DoD at home and abroad, and does not comment on what that role might look like. Instead, reasoning that an expanded role necessarily requires proportionate capacity, this article examines the impacts of climate

²⁴ DEPARTMENT OF DEFENSE, QUADRENNIAL DEFENSE REVIEW (2014) [hereinafter 2014 QDR]; 2014 CCAR, *supra* note 2; NATIONAL RESEARCH COUNCIL, CLIMATE AND SOCIAL STRESS: IMPLICATIONS FOR SECURITY ANALYSIS (John D. Steinbruner, Paul C. Stern, and Jo L. Husbands, eds., 2013), 3, 5, 19, 75-96.

²⁵ Water disputes date back millennia. But conflicts over water availability and delivery are likely to be defining features of climate-related conflicts and relief efforts around the world. CLIMATE AND SOCIAL STRESS, *supra* note 24, at 98. For an insightful summary of historical global water disputes, see Water Conflict Chronology Timeline List, Pacific Institute, <http://www2.worldwater.org/conflict/list>; International Water Event Database: 1950-2008, Oregon State University, <http://www.transboundarywaters.orst.edu/database/interwatereventdata.html>.

²⁶ CLIMATE AND SOCIAL STRESS, *supra* note 24, at 5; see also COLIN P. KELLEY, SHAHRZAD MOHTADI, MARK A. CANE, RICHARD SEAGER & YOCHANAN KUSHNIR, CLIMATE CHANGE IN THE FERTILE CRESCENT AND IMPLICATIONS OF THE RECENT SYRIAN DROUGHT, PROCEEDINGS OF THE NATIONAL ACADEMY OF SCIENCES, available at <http://m.pnas.org/content/early/2015/02/23/1421533112> (observing that before the Syrian uprising in 2011, the greater Fertile Crescent experienced the most severe drought in the instrumental record, and that for Syria, a country marked by poor governance and unsustainable agricultural and environmental policies, the drought had a catalytic effect, contributing to political unrest).

change on the DoD's mission capabilities, and more precisely whether water scarcity in the United States might impede the DoD's ability to accomplish the presumed breadth of future mission requirements. Put plainly, can we "keep the lights on," keep doing what we are doing in terms of current mission requirements, and have excess capacity to surge to meet expected demands?²⁷

Certainly, water scarcity on the home front is only one of several national security challenges posed by climate change and by the effects of climate change on the water cycle, and there are arguably more acute threats to the DoD's infrastructure and critical mission capabilities, as measured by probability of harm, severity of impact, exposure and vulnerability of people or valued materials, imminence, or our ability to mitigate adverse effects through effective response and recovery.²⁸ Indeed, the DoD's existing water use reductions and other efficiency and conservation measures may give military installations greater resiliency in combatting water scarcity. But, as the DoD's policy memorandum suggests, the DoD remains concerned that, notwithstanding its current adaptive and mitigative efforts, water scarcity will detrimentally affect military readiness in the future. Accordingly, the strategy the DoD employs to secure adequate water supplies for military installations in the United States is worthy of study and analysis.²⁹ To start to examine this strategy, we begin with a general summary of water allocation law in the United States.

²⁷ 2014 SSPP, *supra* note 4 ("The Department of Defense (DoD) vision of sustainability is to maintain the ability to operate into the future without decline—either in the mission or in the natural and man-made systems that support it. DoD embraces sustainability as a critical enabler in the performance of our mission, recognizing that it must plan for and act in a sustainable manner now in order to build an enduring future").

²⁸ For example, a two-foot rise in global sea level would likely cause a 2.9-foot rise at Hampton Roads, Virginia, leaving many areas vulnerable to flooding or inundation. Hampton Roads is home to one of the largest concentrations of DoD personnel, the largest naval base in the world, NATO's Allied Command Transformation, U.S. Joint Forces Command, U.S. Fleet Forces Command, the U.S. Air Force's Air Combat Command, U.S. Marine Corps Forces Command, and the U.S. Army Training and Doctrine Command. The region is already seeing the effects of sea level rise, and many installations in the area may eventually be forced to relocate. TOM KARL ET AL., GLOBAL CLIMATE CHANGE IMPACTS IN THE UNITED STATES 37 (2009); HAMPTON ROADS PLANNING DISTRICT COMMISSION, CLIMATE CHANGE IN HAMPTON ROADS PHASE III: SEA LEVEL RISE IN HAMPTON ROADS, VIRGINIA (2012); Nathalie Baptiste, *Atlantic Surging, Virginia Sinking*, THE AM. PROSPECT (Winter 2015); Jeff Goodell, *The Pentagon & Climate Change: How Deniers Put National Security at Risk*, ROLLING STONE, Feb 12, 2015.

²⁹ It may be helpful to reframe the above parameters in terms of hazard analysis and risk assessment. There are many observable and projected hazards stemming from climate change; this article focuses on one: water scarcity. Likewise, there are several ways one might measure the national security risk, i.e., the probability and severity of the potential harm that water scarcity poses to national security. One might look to the increasing threat of violence, likelihood of engagement, and consequent heightened demand on DoD resources. Or, one might look to the impact of water scarcity on the DoD's infrastructure and critical mission capabilities. This article presumes the former and examines the latter.

I. Water Allocation in the United States

Several scholars have written multi-volume treatises on water law in the United States – Professor Robert Beck’s *Waters and Water Rights* is a prominent example.³⁰ One might ask at the outset why there is a need to understand the complexities of the various federal and state water rights regimes. On this point, two realities of water law in the United States are important to understand. First, under our federal system, the various states determine private property rights in the use of water, and the federal government by and large defers to state water law even in the case of water sources on lands owned by the federal government.³¹ There is no national water rights regime – Congress has not enacted comprehensive federal water rights legislation – even in relation to federal lands. Accordingly, the DoD must generally work within existing state regimes, complemented by federal law. Military installations may have water rights through state law, through federal law, or through both, and may be subject to regulations and compliance obligations imposed by state law, at least to the extent that those obligations do not conflict with federal law.³²

Second, there is no national water policy or unified federal policy governing how federal agencies and installations acquire and manage water rights.³³ Even among federal agencies with responsibility over federal lands, including the DoD, there has historically been no uniform policy—or practice—regarding whether and to what extent the federal government must, or ought to, comply with state substantive and procedural law.³⁴ Likewise, there is no policy regarding how the federal government, or federal agencies specifically, should meet current and future water requirements, such as a preference that new federal water rights not be asserted unless absolutely essential, or a preference that federal water rights be determined insofar as possible via memoranda of agreement rather than lengthy, expensive comprehensive stream adjudications.³⁵

³⁰ WATERS AND WATER RIGHTS (Robert E. Beck ed., 1991-2008)

³¹ OFFICE OF LEGAL COUNSEL, U.S. DEP’T OF JUST., FEDERAL “NON-RESERVED” WATER RIGHTS, 6 Op O.L.C. 328, 332 (June 16, 1982) [hereinafter Olson memo]

³² Jeremy Nathan Jungreis, “Permit” Me Another Drink: A Proposal for Safeguarding the Water Rights of Federal Lands in the Regulated Riparian East, 29 HARV. ENVTL L. REV. 369, 371, 385 (2005).

³³ *Id.*; Harold A. Ranquist, *The Winters Doctrine and How It Grew: Federal Reservation of Rights to the Use of Water*, 1975 BYU L. Rev. 639, at 711.

³⁴ Olson memo, *supra* note 31, at 355 (“[T]here has never been a uniform policy among the agencies with primary responsibility over federal lands” – including DoD – “regarding the extent to which the federal government should or would comply with state laws and procedures in acquiring water rights or give notice to appropriate state agencies or officials of the water needs and uses of the agency.”).

³⁵ *Id.* at 356. The Task Force on Non-Indian Reserved Rights, Task Force 5a—President’s Water Policy Implementation, recommended just these types of preferences. FEDERAL NON-INDIAN RESERVED WATER RIGHTS TASK FORCE, DEP’T OF THE INTERIOR, TASK FORCE REPORT 66-67, 117 (1980) *see* Olson memo, *supra* note 31, at 356, n. 62.

Hence, the DoD has primary authority and wide discretion over the water rights claims of its military reservations and enclaves.³⁶

In general, there are four principal means through which the federal government, and therefore the DoD, can acquire an interest in water, subject to constitutional limitations. First, unappropriated (i.e., not subject to a possessory interest) water can be appropriated pursuant to state law.³⁷ Second, the federal government can acquire existing water rights through purchase, exchange, gift, or condemnation.³⁸ Third, Congress can withdraw certain lands from the public domain and reserve sufficient unappropriated water to meet the primary purpose of the reservation.³⁹ Fourth, and finally, Congress can expressly, or by necessary implication, appropriate unappropriated water necessary to meet the objectives of a federal program or land use.⁴⁰

A. State Surface Water Rights Regimes

In the United States, there are two major state surface water rights regimes: riparianism, which is prevalent in the East, and prior appropriation, which dominates in the West, although there is considerable variation among the states, with some western states adopting a mixed riparian-prior appropriation approach, and many eastern states adopting permit schemes common to appropriative jurisdictions.⁴¹ In addition to mixed approaches, the systems borrow concepts from one another, both doctrinally and in application.⁴² Neither of these regimes grants absolute ownership in water; instead, they establish the right to use water in specific quantities for specific consumptive and non-consumptive purposes, subject to the rights of other users and the rights of the public.⁴³

³⁶ Ranquist, *supra* note 33, at 714.

³⁷ Olson memo, *supra* note 31, at 365.

³⁸ *Id.*

³⁹ A reservation can also arise by treaty, executive order, or secretarial order. *Id.*

⁴⁰ *Id.* A potential fifth means, not addressed in detail here, is through historical consumptive use, i.e., “where water has been used historically by federal agencies for consumptive beneficial uses recognized by State law but without conforming” to state procedural law. Most of these uses are “de minimus” and “have been integrated into the regimen of water use and development in the watershed ... notwithstanding any past failure ... to conform to procedures prescribed by state law.” See SOLICITOR OF THE INTERIOR, DEP’T. OF THE INTERIOR, SUPPLEMENT TO SOLICITOR’S OPINION NO. M-36914, ON FEDERAL WATER RIGHTS OF THE NATIONAL PARK SERVICE, FISH AND WILDLIFE SERVICE, BUREAU OF RECLAMATION AND THE BUREAU OF LAND MANAGEMENT, 88 Interior Dec. 253, 255 (1981) (Martz Op.) [hereinafter Martz Supplemental], quoted in Lisa Leckie O’Sullivan, Marjorie Borozan Thomas, *The Metamorphosis of the Federal Nonreserved Water Rights Theory*, 4 Pub. Land L. Rev. 114, 122 (1983).

⁴¹ BECK, *supra* note 30, §§ 4.01, 4.05.

⁴² DAVID H. GETCHES, WATER LAW IN A NUTSHELL 3 (1997).

⁴³ *Id.* at 235; BECK, *supra* note 30, § 4.01.

1. Riparian Rights

The riparian doctrine has been adopted by twenty-nine states, mostly in the East where water has historically been abundant.⁴⁴ The doctrine is derived from English common law, although in most states common law riparianism has been superseded by statute.⁴⁵ Under a riparian rights theory, water rights arise by virtue of owning property abutting a natural water source, such as a stream or lake.⁴⁶ In other words, the right to use water is a real property right that runs with the land, independent of its exercise.⁴⁷ Riparian ownership also includes, among other things, the right to purity (unpolluted water), the right to fish, and a right of access.⁴⁸

Each riparian owner has a right to make reasonable use of adjacent waters, provided the use does not interfere with the rights of other riparians.⁴⁹ Reasonable use is a dynamic and variable concept determined based on a variety of factors, including the purpose of the use, the suitability of the use to the watercourse, the economic value of the use, the social value of the use, the extent of harm caused, the practicality of avoiding harm or of adjusting water use, the protection of existing uses and investments, and equity.⁵⁰ Importantly, all water uses are not equal; natural uses, such as to meet domestic needs, are generally preferred over artificial uses, including irrigation, industrial, and, notably, military uses.⁵¹

Riparian rights are not dependent on use, so a riparian is free to implement new reasonable uses, and other riparians must adapt their water use accordingly.⁵² This gives military installations in riparian jurisdictions flexibility in applying water to new reasonable uses, but also means that riparian rights can be hard to quantify and can change over time in relation to the reasonable uses of other riparians.⁵³ Where the water flow is diminished, all riparians must reduce usage in proportion to their rights.⁵⁴ And, each riparian must avoid unreasonable uses that interfere with the rights of other riparians.⁵⁵

⁴⁴ *Id.*; GETCHES, *supra* note 42, at 16.

⁴⁵ *Id.* at 5, 16.

⁴⁶ BECK, *supra* note 30, § 4.05; Olson memo, *supra* note 31, at 334.

⁴⁷ BECK, *supra* note 30, § 4.05

⁴⁸ GETCHES, *supra* note 42, at 23, 34.

⁴⁹ *Id.* at 48; Olson memo, *supra* note 31, at 334.

⁵⁰ *Id.* at 51, *citing* RESTATEMENT (SECOND) TORTS § 850A.

⁵¹ *Id.* at 35.

⁵² *Id.* at 5.

⁵³ Jungreis, *supra* note 32, at 374.

⁵⁴ GETCHES, *supra* note 42, at 4.

⁵⁵ *Id.* at 34.

The consequence of these facets of the doctrine, then, is that riparian rights are fluid and depend heavily on the uses of other riparians.

In a majority of states, riparian rights are limited to riparian lands, and further limited to lands within the watershed.⁵⁶ For vast military installations that cross watersheds or consist of riparian and non-riparian lands, then, the riparian doctrine may limit how water can be used on the installation. Riparian rights can also be severed when land is divided or conveyed,⁵⁷ so military installations located on acquired lands appurtenant to a stream may not have water rights to the stream. Likewise, a military installation might acquire riparian rights apart from the riparian land. But, when so acquired, the installation may be limited in its ability to enforce those rights against other riparians.⁵⁸ Finally, riparian rights may be limited by public rights, which include navigation and recreation.⁵⁹

Due to population growth and development, most riparian states have implemented statutory permit systems to control water allocation.⁶⁰ Such states are said to have adopted “regulated riparianism.”⁶¹ There is considerable variation amongst the states both in allocation and in administration, but the intent of these permitting regimes is generally to govern specific uses, such as large-scale dams or use by municipalities, to preserve public uses, such as recreation, or in some instances to account for environmental or aesthetic values.⁶² For example, some states require permits for large water uses but not for small, domestic uses.⁶³ Other states only require permits for water use in critical areas or in water emergencies.⁶⁴ Still others require permits only for new uses, excluding existing uses.⁶⁵ Many states regulate consumptive uses but not non-consumptive uses.⁶⁶ Notably, these statutory systems do not give absolute priority to earlier permit holders, although priority may be a factor in determining whether a use is reasonable.⁶⁷

⁵⁶ *Id.* at 30, 54-55.

⁵⁷ A conveyance of riparian land is presumptively a conveyance of the riparian rights that attach to that land, but that presumption is overcome by specific intent by the riparian owner to reserve the right to use water. *Id.* at 31, 57, 62.

⁵⁸ *Id.* at 66.

⁵⁹ *Id.* at 35.

⁶⁰ *Id.* at 21, 23.

⁶¹ Jungreis, *supra* note 32, at 371.

⁶² *Id.* at 381; GETCHES, *supra* note 42, at 49; Olson memo, *supra* note 31, at 334.

⁶³ GETCHES, *supra* note 42, at 59.

⁶⁴ *Id.*

⁶⁵ *Id.* at 75.

⁶⁶ Jungreis, *supra* note 32, at 382.

⁶⁷ GETCHES, *supra* note 42, at 49, 60.

Permit-system states deviate from common law riparianism in other important ways as well. For example, a permit might be issued for water use outside the watershed, or to a non-riparian landowner.⁶⁸ Additionally, some permitting regimes include forfeiture provisions when riparian rights are not exercised within a reasonable time, or where water use is discontinued.⁶⁹

Permits in most regulated riparian states are valid only for a term of years.⁷⁰ In addition, permits are sometimes subject to adjustment in the public interest.⁷¹ In periods of shortage, permits may be adjusted pro rata or, in some cases – borrowing from western water law – by priority (based on the date the riparian first obtains a permit).⁷² Permitting regimes also impose administrative requirements, including monitoring, reporting, and planning requirements, as well as permit application or registration fees.⁷³

A principle issue for military installations operating in regulated riparian jurisdictions, then, is the extent to which they are required to comply with state regulatory requirements, at least where such requirements do not conflict with federal law.⁷⁴ Put another way, when can a state assert regulatory power over the federal government in the exercise of water rights? We will return to this question later in this article.

2. Prior Appropriation

In the West, where water is less abundant, federal and state governments were historically the dominant landowners, and water was often put to use far from a water source, common law riparianism was ill suited and quickly lost ground to the doctrine of prior appropriation.⁷⁵ Under the doctrine's purest form, putting water to a beneficial use – not land ownership – perfects one's water right and, once perfected, the right is superior to anyone who makes later use of the water.⁷⁶ The beneficial use is also the basis, measure, and limit

⁶⁸ *Id.* at 56.

⁶⁹ *Id.* at 76.

⁷⁰ Jungreis, *supra* note 32, at 382.

⁷¹ *Id.*

⁷² *Id.* at 382, 384.

⁷³ *Id.* at 383.

⁷⁴ *Id.* at 371.

⁷⁴ GETCHES, *supra* note 42, at 49.

⁷⁵ Prior appropriation applies in nine states in the West: Alaska, Arizona, Colorado, Idaho, Montana, Nevada, New Mexico, Utah, and Wyoming. In addition, several western states that had initially recognized riparian rights subsequently adopted a prior appropriation system, or a mixed approach: California, Kansas, Mississippi, Nebraska, North Dakota, Oklahoma, Oregon, South Dakota, Texas, and Washington. *Id.* at 7-8.

⁷⁶ *Id.* at 6.

of the right; there is no entitlement to take more water than can be beneficially used.⁷⁷

The doctrine of prior appropriation can be traced to two important historical influences. First, prospectors and miners drove western expansion, encouraged by the federal government to move west to exploit the region's natural resources on public lands. Farmers were also incentivized to move west by the promise of land. Second, the lands of these western states were owned by-and-large by the federal government, which still owns large swaths of land in the West,⁷⁸ making the riparian doctrine largely unworkable for miners and farmers settling on public lands. The federal government, first by acquiescence and then later through recognition by Congress, rejected the idea of a national federal water law applicable to these lands, and instead sanctioned the use of water on public lands in accordance with the local custom that developed during the mining and homesteading era, thus tacitly endorsing the prior appropriation regime.⁷⁹ As a result, when many tracts of federal lands were later patented, the land was conveyed separately from the water and land grants were therefore subject to existing water rights.⁸⁰

Prior appropriation historically required three components: (1) a manifested intent to divert water for a specific (non-speculative) beneficial use; (2) "appropriation" by way of diverting the water from its natural source (traditionally, a diversion had to be physical and man-made); and (3) the beneficial use of water (e.g., domestic, municipal, agricultural, industrial, power,

⁷⁷ Olson memo, *supra* note 31, at 335.

⁷⁸ U.S. GENERAL SERVICES ADMINISTRATION, FEDERAL REAL PROPERTY PROFILE 2004, <http://www.gsa.gov/portal/content/102880>. It is also notable that federal reservations are normally in the uplands rather than the flatlands and, as a result, more than 60% of the average annual water yield in western states is from federal reservations. C. WHEATLEY, C. CORKER, T. STETSON & D. REED, STUDY OF THE DEVELOPMENT, MANAGEMENT AND USE OF WATER RESOURCES ON THE PUBLIC LANDS 402-406 (1969).

Nevada	84.5%
Utah	57.4%
Oregon	53.1%
Idaho	50.2%
Arizona	48.1%
California	45.3%
Wyoming	42.4%
New Mexico	41.8%
Colorado	36.6%
Washington	30.3%
Montana	29.9%

⁷⁹ GETCHES, *supra* note 42, at 81-84; Olson memo, *supra* note 31, at 341.

⁸⁰ *Id.* at 82.

recreation, fish & wildlife) within a reasonable time using due diligence.⁸¹ These elements are now largely incorporated into state permitting systems.⁸²

Once a water right is perfected, it is superior over later (junior) appropriators.⁸³ In a period of water shortage, senior appropriators can assert their full allotment of water prior to the delivery of any water to junior appropriators.⁸⁴ This is important for military installations in the West, many of which were established just before or during the Second World War.⁸⁵ To the extent that these installations' water rights derive from state law, then, they are subject to the rights of senior appropriators. That said, the right is conditioned on use for a specific purpose, at a specific quantity and place, via a certain point of diversion, and at specific times.⁸⁶ So, an appropriator cannot change the place of diversion, purpose, quantity, or time of use to the detriment of any other appropriator, junior or senior.⁸⁷ Similarly, such a change of use might be denied in some states on public interest grounds based on the environmental, economic or social effects of the change.⁸⁸ Moreover, there is no right to waste water, and relatedly, regulations in some states require that water be diverted and used efficiently.⁸⁹ Notably, some downstream appropriators depend on water wasted by upstream appropriators, so an increase in efficiency—along with recapture and reuse, if permitted—might cause harm to water users downstream, though this harm is not actionable by the downstream user provided there has been no change of use.⁹⁰ But, most often, the salvaged water cannot be used for new purposes or on new lands.⁹¹

The doctrine of prior appropriation does not require use of water for lands abutting a water source—water can be diverted considerable distances, including outside the watershed (sometimes subject to limitations to protect the local area of origin).⁹² Accordingly, military installations in the West may be able to use water to support the full expanse of the installation, even across watersheds, to the extent the right is so defined at the time it is perfected. Additionally, once water is put to a beneficial use and the water right is

⁸¹ *Id.* at 78, 94-104.

⁸² *Id.* at 92, 166. Colorado is the only prior appropriation state that lacks a permit system.

⁸³ *Id.* at 78.

⁸⁴ *Id.*; Olson memo, *supra* note 31, at 336.

⁸⁵ Michael J. Cianci, Jr., James F. Williams, & Eric S. Binkley, *The New National Defense Water Right—An Alternative to Federal Reserved Water Rights For Military Installations*, 48 A. F. L. Rev. 159, 162, 173 (2000).

⁸⁶ GETCHES, *supra* note 42, at 88.

⁸⁷ *Id.* at 109, 174, 189.

⁸⁸ *Id.* at 176.

⁸⁹ *Id.* at 110, 137-138.

⁹⁰ *Id.* at 140-141, 144.

⁹¹ *Id.* at 144.

⁹² *Id.* at 78, 171-173.

perfected, other more useful purposes (more socially or economically advantageous, or more efficient) generally aren't given preference; priority of beneficial use trumps the nature of the use.⁹³ As a consequence, a beneficial but less efficient or less socially valuable use, such as growing a high-water-demand crop, may have absolute priority over a municipality with junior rights to use water to support the needs of its growing population.⁹⁴ While many states do have use preferences in state laws (often favoring domestic or municipal use), these preferences are commonly subject to the rule of priority, such that where preference supplants priority, the owner of the appropriative water right is entitled to just compensation.⁹⁵ However, such preferences may play a role in choosing between new use applications.⁹⁶ These preferences are not likely to afford any benefits to military installations, as military uses are often not recognized as beneficial by state law in appropriative rights jurisdictions, much less given preference.⁹⁷

Unlike riparian law, the right to use water can be abandoned or forfeited if not used for an extended period, and there is no authority to divert more water than reasonably necessary for the beneficial use.⁹⁸ Appropriative rights holders must demonstrate to regulatory authorities that the amount of water diverted is reasonable and consistent with actual needs.⁹⁹ Additionally, not all water sources are subject to appropriation.¹⁰⁰ Some states give rights to riparian littoral landowners along lakes, preventing appropriation where it causes the water level of the lake to drop substantially.¹⁰¹ Further, some states expressly reserve certain watercourses, or segments of watercourses, from appropriation to preserve in-stream flows or for some future use.¹⁰² Existing appropriations are preserved unless those rights are purchased or the government exercises its power of eminent domain and pays the owner just compensation.¹⁰³

A perfected property interest in water can be sold or transferred, together or separately from land.¹⁰⁴ As a general rule, transfers that result in a change in the location or nature of use require state approval, and cannot harm

⁹³ *Id.* at 78, 106.

⁹⁴ *Id.* at 79, 107 (Noting that some states will allow municipalities to condemn less beneficial use).

⁹⁵ *Id.* at 112-113.

⁹⁶ *Id.* at 113.

⁹⁷ Olson memo, *supra* note 31, at 337; Cianci et al., *supra* note 85, at 162. *But see* note 331.

⁹⁸ GETCHES, *supra* note 42, at 129, 190.

⁹⁹ *Id.* at 130-131.

¹⁰⁰ *Id.* at 113.

¹⁰¹ *Id.* at 117.

¹⁰² *Id.* at 121.

¹⁰³ *Id.* at 123.

¹⁰⁴ *Id.* at 167.

junior appropriators.¹⁰⁵ Transfers are generally also limited to the lesser of historical consumptive use or the permitted amount.¹⁰⁶ Additionally, states can attach conditions or restrictions on transfer, including loss of priority upon transfer, restrictions on severability of water rights from the land, and prohibitions on changes in purpose.¹⁰⁷

Generally, a right in water cannot be perfected based on a planned future use.¹⁰⁸ However, some states grant municipalities rights to water to facilitate investments in order to accommodate future growth, and those rights can be perfected even if the water is not used until a future date.¹⁰⁹ Although military installations often share many of the same qualities as municipalities, supporting large populations of service members and their families, it does not appear that a similar exception has ever been applied to consider the future needs of a base or installation population.

Most appropriative rights states now have comprehensive water codes that govern recognition, administration, and enforcement of water rights.¹¹⁰ State water codes also define the uses that are considered “beneficial” by the state, sometimes establishing an order of preference when approving new applications for unappropriated water.¹¹¹ These states generally require a permit from a state administrative agency as the exclusive means to make a valid appropriation; in such states, priority is established by application for a permit.¹¹² The state administrator determines whether sufficient unappropriated water is available and whether the proposed use is beneficial under state law.¹¹³ Most state administrators also have authority to reject or condition applications based on the public interest.¹¹⁴ In assessing the public interest, these states look to local interests and the effect of proposed water use on the local economy, the present water supply, and projected water needs.¹¹⁵ The permit sets the conditions by which a water right can vest through beneficial use.¹¹⁶

Prior appropriation systems can pose particular challenges for military installations. First, there is no general procedural or substantive exemption in

¹⁰⁵ *Id.* at 167; Olson memo, *supra* note 31, at 336.

¹⁰⁶ *Id.* at 109, 174, 189.

¹⁰⁷ *Id.* at 168-170.

¹⁰⁸ *Id.* at 95.

¹⁰⁹ *Id.* at 107.

¹¹⁰ Olson memo, *supra* note 31, at 335, 337.

¹¹¹ *Id.* at 335.

¹¹² *Id.* at 336; GETCHES, *supra* note 42, at 149.

¹¹³ Olson memo, *supra* note 31, at 337.

¹¹⁴ GETCHES, *supra* note 42, at 156.

¹¹⁵ *Id.* at 158-159.

¹¹⁶ *Id.* at 153.

any of the western appropriative law states for water uses by the federal government.¹¹⁷ Likewise, there is no recognition among most appropriative states of uses that are unique and beneficial to the federal government that do not have an equivalent for private parties or municipalities, such as military water uses.¹¹⁸ As such, a federal use may be unauthorized under state law, and state law might conceivably permit a private use to substantially interfere with a federal use or the implementation of a federal program.¹¹⁹ Additionally, a problem not unique to military installations, but one that military installations will be forced to directly confront, is over-appropriation.¹²⁰ For many water sources, appropriative rights exceed the actual flow of water, especially during the growing season, meaning that junior appropriators are only able to exercise rights to water in the stream when flow is heavy or senior appropriators use less.¹²¹

Finally, military installations in prior appropriation jurisdictions must confront challenges to the prior appropriation doctrine itself that might lead both to flexibility and to instability in the future. Several scholars have all but pronounced the prior appropriation doctrine dead or irrelevant.¹²² While states continue to pay lip service to the doctrine, in practice they have increasingly deviated from its core tenets.¹²³ For these scholars, prior appropriation had its time – it served well as a frontier water code and facilitated the settlement of miners and farmers throughout the West.¹²⁴ But several diverse forces have changed the landscape – literally and figuratively – and increased the pressure on appropriative rights jurisdictions to depart from the doctrine.¹²⁵ Western populations have surged, and water is in greater demand to support major cities.¹²⁶ Additionally, there has been growing recognition of the need to restore and preserve ecosystems.¹²⁷ There are fewer small users, so concepts of priority aren't as simple and predictable, and hence don't provide the same degree of certainty among competing claimants.¹²⁸ Finally, notwithstanding that prior appropriation is adapted to the arid west, climate-related droughts and water shortages will continue to place increased stress on existing allocations of

¹¹⁷ Olson memo, *supra* note 31, at 337.

¹¹⁸ *Id.*; Cianci et al., *supra* note 85, at 162.

¹¹⁹ Olson memo, *supra* note 31, at 338. Federal water rights attempt to address this problem.

¹²⁰ GETCHES, *supra* note 42, at 155.

¹²¹ *Id.* at 155.

¹²² See generally Charles Wilkinson, *In Memoriam, Prior Appropriation, 1848-1991*, 21 ENVTL. L. v (1991); Tarlock, *supra* note 17; Reed D. Benson, *Alive But Irrelevant: The Prior Appropriation Doctrine in Today's Western Water Law*, 83 U. COLO. L. REV. 675 (2012).

¹²³ Benson, *supra* note 122, at 679.

¹²⁴ Tarlock, *supra* note 17, at 890.

¹²⁵ *Id.* at 890, 892, 896; Benson, *supra* note 122, at 677, 688.

¹²⁶ Tarlock, *supra* note 17, at 884; Benson, *supra* note 122, at 688.

¹²⁷ Tarlock, *supra* note 17, at 884; Benson, *supra* note 122, at 677.

¹²⁸ Tarlock, *supra* note 17, at 892.

water.¹²⁹ As a result, these scholars suggest that, at minimum, prior appropriation has lost its force as a legal doctrine.¹³⁰

Departing from the prior appropriation doctrine may have benefits for water policy, providing more efficient and flexible water use and protecting public values (e.g., through a redefined concept of beneficial use), but it could also make matters worse to the extent requirements on some water users are relaxed at the expense of other users.¹³¹ It is perhaps too soon to measure the trend lines, but what is most important, from a military installation perspective, is that the doctrine of appropriative rights is a doctrine in flux; formal legal expectations may yield more often to concepts of reasonable use or equitable or proportionate sharing, and new legal approaches or adaptation strategies may yet develop. How this will play out for each military installation is unknown, and should caution against over-reliance on formal legal rights in formulating a water security strategy.

3. Hybrid Approaches

In several states, the riparian and prior appropriation doctrines are both recognized to some degree.¹³² These include two states with significant military presence: California and Texas. These “hybrid” states recognize limited riparian rights with an appropriative rights overlay.¹³³ For instance, the rights of riparian landowners are limited to what is reasonably required for beneficial use.¹³⁴ Additionally, where water rights in riparian jurisdictions are not conditioned on their exercise, these hybrid states have limited (i.e., by way of scope or priority) or even extinguished unused water rights, with some exceptions for domestic purposes.¹³⁵ The combination of appropriative and riparian rights in these jurisdictions has muddled administration, with courts struggling to give effect to water rights under both regimes.¹³⁶ In times of shortage, this challenge is more acute, as the doctrines directly conflict with the duty of users to cut back their use to account for the rights of other users.¹³⁷

¹²⁹ *Id.* at 896, 909; Benson, *supra* note 122, at 712.

¹³⁰ Benson, *supra* note 122, at 714.

¹³¹ *Id.*

¹³² GETCHES, *supra* note 42, at 76, 205.

¹³³ *Id.* at 212-213.

¹³⁴ *Id.* at 213.

¹³⁵ *Id.* at 214, 219.

¹³⁶ *Id.* at 217.

¹³⁷ *Id.* at 217.

4. Summary

What does this mean in terms of the rights of military installations across the country to consumptive and non-consumptive uses of surface waters? In short, DoD faces considerable challenges regardless of the applicable water rights regime, and these challenges are only heightened during periods of water shortage. The rules that apply depend on many factors, including the uses to which water is put; the reasonableness of a given use (as determined by the state); the timing in which the right vests; whether the right attaches to the land and, if so, whether it is affected by the history of land conveyances; whether the right is held as a result of transfer and, if so, whether the right is affected by those transfers; the demands of other users along the same water source; the public interest; whether the water source is subject to public use or preservation (e.g., the water source is the habitat of an endangered species), and if so, to what extent that limits water rights; administrative requirements, to include whether a permit is the exclusive means to establish a water right and whether that right was perfected in accordance with state procedures; and the rules in place for storage of water for future use. In addition, each military installation must consider the power of the state to use eminent domain to condemn existing water rights, subject to compensation, as presumably this power might also reach rights held by military installations under state law.

B. State Groundwater Rights Regimes

State groundwater rights regimes are a recent development, largely because groundwater remains hard to quantify and its movement underground is not well understood.¹³⁸ In some cases, groundwater is not subject to any regulatory regime.¹³⁹ In other cases, surface water regimes were made applicable to groundwater, or more narrowly to tributary groundwater, or they are managed conjunctively – an approach that recognizes that groundwater and surface water are often interconnected.¹⁴⁰ Typically, where separate groundwater regimes exist, the rules are premised on land ownership, priority of use, the public interest, or a combination thereof – as further discussed below.¹⁴¹ Permit regimes are often in place to secure these rights, although the requirement to obtain a permit can vary based on the source of water.¹⁴² These

¹³⁸ *Id.* at 9.

¹³⁹ *Id.* at 9.

¹⁴⁰ *Id.* at 10, 293-294, 295. States that apply surface water appropriation law to groundwater interconnected with surface water include California, Colorado, New Mexico, Utah, and Washington. *But see* Fenit Nirappil, *Governor signs first California groundwater rules*, ASSOCIATED PRESS, Sept. 16, 2014.

¹⁴¹ *Id.* at 267.

¹⁴² *Id.* at 284.

permitting regimes, which can be quite complex, also protect critical areas and govern the rate of discharge to ensure a “safe yield”—a level of withdrawal that does not exceed recharge or depletes the water over an optimal period.¹⁴³

1. Overlying Land Ownership

Under the “absolute ownership” doctrine, the owner of land overlying groundwater has an unlimited right to withdraw that water.¹⁴⁴ This approach is the law in several eastern states as well as Texas.¹⁴⁵ However, most of these states have moderated the doctrine to some degree through regulation of use.¹⁴⁶

The “correlative rights” doctrine is similarly based on land ownership but apportions a share of the groundwater corresponding to the proportion of land overlying the aquifer.¹⁴⁷ The doctrine has been modified in some jurisdictions to introduce appropriative rights concepts.¹⁴⁸ In California, for example, groundwater rights are limited by historical use and surplus is allocated by priority.¹⁴⁹

2. Prior Appropriation

While some states do assign groundwater rights by prior appropriation—in the sense that states give some priority to senior appropriators of groundwater to protect their equities—the scope of these priority rights is generally balanced against other factors, including making full beneficial use of the groundwater and securing a sustainable water supply.¹⁵⁰ Senior appropriators in some instances are only protected from unreasonable harm, which would include an unreasonable drop in the water table or deterioration in the quality of the water.¹⁵¹ Additionally, most states consider groundwater to be a public resource, subject to regulation to ensure use is in the public interest.¹⁵²

¹⁴³ *Id.* at 290.

¹⁴⁴ *Id.* at 268.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.* at 268-269.

¹⁴⁷ *Id.* at 270.

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ *Id.* at 272-273, 276.

¹⁵¹ *Id.* at 288.

¹⁵² *Id.* at 273.

3. Reasonable Use

In many states, a reasonable use rule applies to groundwater withdrawals.¹⁵³ In its traditional formulation, water use for lands overlying the groundwater is reasonable, while use off of the land is unreasonable.¹⁵⁴ In correlative rights states, the reasonable use doctrine also requires pro rata reduction by all overlying landowners in periods of shortage in order to preserve water supply for all users.¹⁵⁵ Some jurisdictions go a step further and look at the nature of the competing uses and not simply the location of use or proportion of land ownership.¹⁵⁶ Still others look to economic impacts and expectations of rights holders.¹⁵⁷

C. Federal Water Rights

As the above illustrates, states are the primary actors in determining property rights to water, and that is the case even for lands in the public domain, where the federal government has largely deferred to the states.¹⁵⁸ In the West, Congress initially acquiesced and then later expressly recognized appropriative rights and facilitated the development of state administration of water resources on federal lands through various acts enacted in the 1860s and 1870s.¹⁵⁹ The states were free to choose for themselves whether and to what extent to recognize appropriative rights or preserve riparian rights in lands granted by federal patent, and federal policy was to only recognize those rights as perfected under state law.¹⁶⁰ At least with respect to private rights to water, then, the applicability of state law to federal land was relatively certain.¹⁶¹ What wasn't certain, though, was how water uses by the federal government on federal lands were to be governed, and whether and under what circumstances state law might be displaced to allow for federal use of unappropriated water for the management of federal lands.¹⁶² For some time, it was thought that—outside of

¹⁵³ *Id.* at 276.

¹⁵⁴ *Id.*

¹⁵⁵ *Id.* at 276-277.

¹⁵⁶ *Id.* at 278.

¹⁵⁷ *Id.* at 280.

¹⁵⁸ *Id.* at 339.

¹⁵⁹ *Id.* at 209; Olson memo, *supra* note 31, at 370; *See also* Ranquist, *supra* note 33, at 642-644.

¹⁶⁰ *GETCHES*, *supra* note 42, at 211, 339; *Cal. Or. Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 142, 158 (1935) (holding that the Desert Land Act “effected a severance of all waters on the public domain, not theretofore appropriated from the land itself”).

¹⁶¹ Olson memo, *supra* note 31, at 341.

¹⁶² *Id.* at 344, 370.

a narrow exception to preserve navigability—the federal government could obtain water rights only pursuant to state law.¹⁶³

This conclusion followed from the theory that congressional silence implied deference to state law, and not from any constitutional limitations on federal authority.¹⁶⁴ The federal government can exercise jurisdiction over water resources through several constitutional mechanisms in ways that preempt state law. First, the federal government can assert jurisdiction over waters on federal lands via the Property Clause of the Constitution.¹⁶⁵ This includes authority to reserve unappropriated water for use on federal land and to exercise eminent domain to acquire appropriated water for federal use, provided compensation is paid to holders of existing state water rights when required by the Constitution.¹⁶⁶ Second, state water rights are subject to federal jurisdiction over the navigable waters in the United States.¹⁶⁷ Third, and relatedly, water rights might be subject to regulation via the Commerce Clause of the Constitution and its negative implications.¹⁶⁸ Finally, the federal government might also restrict state authority over water through other federal powers, such as the General Welfare Clause, the treaty power, or the defense power.¹⁶⁹

With respect to national defense, congressional authority is premised on the power to provide for the common defense and to declare war.¹⁷⁰ However, this is rarely the primary basis on which federal jurisdiction is exercised over water resources. In one—and perhaps the only—notable instance,

¹⁶³ Jungreis, *supra* note 32, at 377; *United States v. Rio Grande Dam & Irrigation Co.*, 174 U.S. 690 (1899) (holding that Congress maintained its authority to preserve the navigability of navigable waterways). In *United States v. Rio Grande Dam & Irrigation Company*, the Supreme Court identified two ways in which the state authority over water resources was limited: first, in the absence of Congressional approval, a state cannot destroy the right of the United States, as the owner of lands bordering on a stream, to the continued flow of its waters as necessary for the beneficial uses of government property; and second, the federal government has superior power to secure the uninterrupted navigability of all navigable streams within the limits of the United States. The first point was dicta (though it later served as the basis for the federal reserved water rights doctrine); the Court's holding rested on the federal government's authority to preserve navigability.

¹⁶⁴ Jungreis, *supra* note 32, at 377.

¹⁶⁵ BECK, *supra* note 30, § 4.03; U.S. CONST. art. IV, § 3; GETCHES, *supra* note 42, at 338.

¹⁶⁶ BECK, *supra* note 30, § 4.03; GETCHES, *supra* note 42, at 338.

¹⁶⁷ BECK, *supra* note 30, § 4.03; GETCHES, *supra* note 42, at 373-380; *Gibbons v. Ogden*, 22 U.S. 1 (1824); *United States v. Rio Grande Dam & Irrigation Co.*, 174 U.S. 690 (1899); *Arizona v. California*, 283 U.S. 423 (1931).

¹⁶⁸ U.S. CONST. art. I, § 8; *Sporhase v. Nebraska*, 458 U.S. 941 (1982) (holding that the federal government may regulate the interstate commerce in water); BECK, *supra* note 30, § 4.03.

¹⁶⁹ BECK, *supra* note 30, § 4.03; GETCHES, *supra* note 42, at 338, 373; U.S. CONST. art. I, § 8, ART. II, § 2; *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288 (1936). Examples of treaties implicating water rights include the Mexico Treaty of 1944 (addressing the Colorado, Rio Grande, and Tijuana Rivers), the Columbia River Treaty (Canada), and the 1909 Boundary Waters Treaty (Canada).

¹⁷⁰ U.S. CONST. art. I, § 8, cls. 1, 11.

this authority was relied upon to authorize construction of the Wilson Dam “for the generation of electrical or other power and for the production of nitrates or other products needed for munitions of war.”¹⁷¹

Examples of the exercise of federal power in ways that have potential to limit state-created water rights and state water management include, *inter alia*, the Federal Power Act, Endangered Species Act, Clean Water Act, Reclamation Act, Fish and Wildlife Coordination Act, and Wild and Scenic Rivers Act.¹⁷² The scope of authority in this regard depends on congressional intent and constitutional authority.¹⁷³ Where federal action amounts to a taking of property, compensation may be required.¹⁷⁴

To understand the scope of federal water rights, it’s important to note a few features up front. First, federal lands are of three primary varieties: (1) lands in the public domain; (2) lands withheld from the public domain by statute, executive order, or treaty and reserved for a specific federal purpose (reserved lands);¹⁷⁵ and (3) lands acquired by the federal government from a private party through purchase, exchange, gift or condemnation.¹⁷⁶ Lands in this latter category might become part of the public domain, or might be set aside for a specific federal purpose (equivalent to a reservation).¹⁷⁷

Second, one must distinguish appropriated water—water that is subject to existing vested rights—from unappropriated water on federal lands.¹⁷⁸ Appropriated water rights are subject to federal acquisition through purchase, exchange, gift, or condemnation.¹⁷⁹ The controversy over the scope of federal water rights is about the second category—unappropriated water on federal land—and the extent to which state substantive and procedural law governs the appropriation of that water.

Third, federal water rights over unappropriated water generally fall into three categories. First, the federal government might acquire rights to use

¹⁷¹ *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 327 (1936) (citing National Defense Act of June 3, 1916, § 124, 39 Stat. 166, 215).

¹⁷² GETCHES, *supra* note 42, at 389-419.

¹⁷³ *Id.* at 419.

¹⁷⁴ *Id.* at 419-422 (Compensation is not always required. Consider, for instance, the doctrine of navigational servitude).

¹⁷⁵ There can also be lands withheld from the public domain but not expressly reserved for a specific federal purpose. As explained *infra*, for purposes of water rights, these lands do not have the same status as reserved lands.

¹⁷⁶ Olson memo, *supra* note 31, at 340.

¹⁷⁷ *Id.* at 339.

¹⁷⁸ *Id.*

¹⁷⁹ *Id.* at 332.

unappropriated water on federal lands through compliance with state law.¹⁸⁰ Second, the Supreme Court has recognized that on lands reserved by the federal government for a federal purpose, the federal government has an implied right to unappropriated water sufficient to meet the primary purposes of the reservation – this is called a federal reserved water right.¹⁸¹ Third, and most controversially, the federal government has a right to use unappropriated water for federal purposes or programs that does not stem from state recognition or the reserved right doctrine; this is called a federal non-reserved water right, or federal regulatory water right.¹⁸² Non-reserved water rights, put simply, are water rights that do not follow from a reservation of land and that are asserted without regard to state law in order to carry out federal purposes or programs. Non-reserved water rights are perfected through use, but arise only where congressional action expressly preempts state law, or where conditions imposed under state law on the use or disposition of water by a federal agency conflict with specific statutory directives authorizing the federal program or specific use of federal land, or where application of state law would frustrate the accomplishment of specific federal purposes mandated by Congress.¹⁸³

There is no constitutional distinction between federal reserved and federal non-reserved water rights. If there is a constitutional basis for federal appropriation of water, such as the Commerce or Property Clauses, the constitutional basis is equally valid whether the land is reserved or part of the public domain.¹⁸⁴ The real question is whether the Supremacy Clause works to preempt state jurisdiction, and that is a question of congressional intent.¹⁸⁵ In the case of reserved water rights, discussed below, the Supreme Court has found an implied intent to preempt state law to the extent necessary to fulfill the primary purposes of the reservation. In the case of non-reserved water rights, there must be Congressional action that, whether express or by necessary implication, requires preemption of state substantive or procedural law.¹⁸⁶ In the absence of evidence of specific congressional intent to preempt state law, the history of federal deference to the states requires a presumption that water rights must be acquired pursuant to and in compliance with state law.¹⁸⁷ In sum, whether reserved or non-reserved, courts will determine congressional intent,

¹⁸⁰ *Id.* at 330.

¹⁸¹ *Id.* at 331, 346.

¹⁸² *Id.* at 332. This article will later distinguish non-reserved water rights, which are of a proprietary nature, wherein the federal government appropriates unappropriated water for its own use, from regulatory water rights, wherein the federal government regulates in a manner that affects private interests in water. *See infra* note 320.

¹⁸³ Olson memo, *supra* note 31, at 332.

¹⁸⁴ *Id.*

¹⁸⁵ *Id.* at 332.

¹⁸⁶ *Id.* at 332, 383.

¹⁸⁷ *Id.*

and thereby the scope of the federal government's rights, through careful examination of the federal land reservation or authorizing statute governing the federal agency, project, program, or use of federal land.¹⁸⁸

1. Federal Reserved Water Rights: The Winters Doctrine

Under the federal reserved water rights doctrine, the federal government can reserve unappropriated water and exempt its appropriation from state law by withdrawing appurtenant federal lands from the public domain and reserving those lands for a particular government purpose.¹⁸⁹

The federal reserved water rights doctrine has its roots in lands reserved by the federal government for Indian reservations.¹⁹⁰ The doctrine is derived from the Supreme Court decision in *Winters v. United States*, which recognized that by "implication" the federal government had reserved a water right to fulfill the purposes for which federal land was reserved; namely, to support settlement, self-governance, and self-sufficiency of Indian tribes inhabiting the Fort Belknap Indian Reservation.¹⁹¹ Sufficient water was impliedly reserved, in other words, to support the present and future needs of Indians residing on the reservation.¹⁹²

Although the *Winters* Court only addressed reserved water rights on Indian lands, the Supreme Court subsequently extended the doctrine to all withdrawn public domain lands reserved for a particular government purpose, which would include lands set aside for national forests, wildlife refuges, and military installations.¹⁹³ The Court based the doctrine of reserved water rights on the Commerce and Property Clauses of the Constitution.¹⁹⁴

¹⁸⁸ *United States v. New Mexico*, 438 U.S. 696, 700 (1978); Olson memo, *supra* note 31, at 333; GETCHES, *supra* note 42, at 344.

¹⁸⁹ Olson memo, *supra* note 31, at 370; *Cappaert v. United States*, 426 U.S. 128, 145 (1976).

¹⁹⁰ GETCHES, *supra* note 42, at 12.

¹⁹¹ *Winters v. United States*, 207 U.S. 564 (1908); GETCHES, *supra* note 42, at 13, 342, 347; Ranquist, *supra* note 33, at 648.

¹⁹² *Arizona v. California*, 373 U.S. 546, 600-601 (1963); Ranquist, *supra* note 33, at 656 (noting that reservation for future use was a significant departure from western appropriative water law).

¹⁹³ *Arizona v. California*, 373 U.S. 546; *Cappaert*, 426 U.S. 128; *United States v. District Court for Eagle County*, 401 U.S. 520, at 522-23 (1971); GETCHES, *supra* note 42, at 335-336.

¹⁹⁴ *Cappaert*, 426 U.S. at 138. The reserved water rights doctrine "is not a source of federal power." Rather, the doctrine "rests instead on the supremacy clause, coupled with the power exercised in making the reservation of land, or with some other power incidentally exercised on the reserved land." Olson memo, *supra* note 31, at 363, *citing* F. Trelease, FEDERAL-STATE RELATIONS IN WATER LAW (Legal Study No. 5 prepared for the National Water Commission) at 139 (Sept. 7, 1971).

Under *Winters* and its progeny, priority for reserved water rights is generally determined as of the date the reservation is established.¹⁹⁵ The land must be expressly withheld and reserved or set aside for a particular purpose through an act of Congress, a treaty, or an executive order; it is not enough that the land is in the public domain.¹⁹⁶ The reservation of land for a federal purpose is not sufficient to create reserved water rights, however. Rather, the relevant consideration is the particular purpose for which the land is to be maintained and managed, and whether there is an express or implied expectation of sufficient water to meet that purpose.¹⁹⁷ Reserved rights will not be implied unless “without the water the purposes of the reservation would be entirely defeated.”¹⁹⁸ Thus, a careful examination is required into the content and context of the reservation.¹⁹⁹

The reserved water right is limited to the amount of unappropriated water necessary to fulfill the primary purpose of the reservation as established at the time the land is reserved.²⁰⁰ Only purposes contained within the instrument establishing the reservation will be considered.²⁰¹ So, in *Arizona v. California*, where the Supreme Court considered the scope of reserved water rights for the Chemehuevi, Cocopall, Yuma, Colorado River, and Fort Mohave Indian Reservations in Arizona, California and Nevada, the Court measured the scope of the federal reserved water right in terms of the practicable irrigable acreage of the Indian reservations, as the purpose of the reservation was to “enabl[e] the Indians to develop a viable agricultural economy...”²⁰² Any water in excess of that required to fulfill the primary purpose of the reservation is surplus water and is subject to state allocation.²⁰³ Similarly, to fulfill secondary (incidental or ancillary) purposes, the federal government must “acquire water in the same manner as any other public or private appropriator,” by resort to state substantive and procedural law.²⁰⁴ Additionally, the reserved water right applies

¹⁹⁵ *Cappaert*, 426 U.S. at 138; GETCHES, *supra* note 42, at 13, 332.

¹⁹⁶ *Fed. Power Comm'n v. Oregon*, 349 U.S. 435 (1955); GETCHES, *supra* note 42, at 336, 339.

¹⁹⁷ Olson memo, *supra* note 31, at 382 n. 109, 383 (concluding that “federal rights to water will not be found simply by virtue of the ownership, occupation, or use of federal land, without more,” but also observing that the reservation of land can sometimes be “probative evidence of congressional intent”).

¹⁹⁸ *United States v. New Mexico*, 438 U.S. 696, 700 (1978).

¹⁹⁹ *United States v. New Mexico*, 438 U.S. at 700; Olson memo, *supra* note 31, at 333; GETCHES, *supra* note 42, at 344.

²⁰⁰ *Cappaert*, 426 U.S. 128; *United States v. New Mexico*, 438 U.S. 696; GETCHES, *supra* note 42, at 336; Olson memo, *supra* note 31, at 349.

²⁰¹ GETCHES, *supra* note 42, at 336.

²⁰² Report of Special Master Rifkind at 265-66 (1960); *Arizona v. California*, 373 U.S. 546, *cited in* Ranquist, *supra* note 33, at 657.

²⁰³ GETCHES, *supra* note 42, at 368—369.

²⁰⁴ *United States v. New Mexico*, 438 U.S. at 702; Jungreis, *supra* note 32, at 379; Olson memo, *supra* note 31, at 333, 375.

only to unappropriated water; it does not reach water that has already been appropriated under state law, and cannot displace such private rights holders.²⁰⁵ Finally, reserved water rights must be quantified with “sensitivity” to existing state and private water users.²⁰⁶ These limitations, and the fact that state courts that are skeptical of the reach of federal reserved water rights have jurisdiction to adjudicate such claims, have largely meant that state water rights systems have not experienced significant disruption to date.²⁰⁷

The federal reserved water right is not restricted to water sources on the reserved land; water sources not contained within or appurtenant to the reservation can nonetheless be reserved.²⁰⁸ Additionally, the federal reserved water rights doctrine also likely applies to groundwater.²⁰⁹ The amount of water can also change over time, provided that the use is limited to the primary purposes of the reservation.²¹⁰ This means that the amount of water reserved is not readily quantifiable and could be considerable; it also means that water rights can expand to accommodate the primary federal purpose, such as where a military base expands in size and population or incorporates new missions.²¹¹ In light of this, and because federal reservations in some cases predate senior state law appropriators, many western states are openly hostile to assertions of federal reserved water rights.²¹² To manage quantification problems, some states

²⁰⁵ The federal government may nonetheless obtain these water rights through the power of eminent domain. Ranquist, *supra* note 33, at 672.

²⁰⁶ *United States v. New Mexico*, 438 U.S. at 718 (Powell, J., dissenting in part) (“I agree with the Court that the implied-reservation doctrine should be applied with sensitivity to its impact upon those who have obtained water rights under state law and to Congress’ general policy of deference to state water law.”).

²⁰⁷ This is not to say that state adjudications can refuse to recognize valid federal reserved rights in general stream adjudications, but rather than state courts may look narrowly at the reach of such claims. See, e.g., *United States v. Idaho*, 135 Idaho 655, 23 P.3d 117 (2001) (rejecting federal reserved water rights to preserve islands in the Snake River Migratory Waterfowl Refuge as secondary to the primary purpose of creating sanctuaries for migratory birds); see also Michael C. Blumm, *Reserved Water Rights*, in 4 WATERS & WATER RIGHTS § 37.03 (Robert E. Beck ed., repl. vol. 2004); *United States v. Dist. Court of Cnty. of Eagle*, 401 U.S. 520, 526 (1971) (upholding the right of state courts to adjudicate federal water rights in accordance with the McCarran Amendment, 43 U.S.C. § 666); William A. Wilcox, Jr. & David Stanton, *Maintaining Federal Water Rights in the Western United States*, Department of the Army Pamphlet 27-50-287 (October 1996).

²⁰⁸ GETCHES, *supra* note 42, at 349-350 (“Judicial references to such rights being ‘appurtenant’ to reserved lands apparently refer not to some physical attachment of water to land, but to the legal doctrine that attaches water rights to land to the extent necessary to fulfill reservation purposes”).

²⁰⁹ *Cappaert v. United States*, 426 U.S. 128 (1976); GETCHES, *supra* note 42, at 350; *In re Gen. Adjudication of All Rights to Use Water in the Gila River System and Source*, 989 P.2d 739 (Ariz. 1999); *In re SRBA*, at 8; Blumm, *supra* note 207, § 37.03.

²¹⁰ GETCHES, *supra* note 42, at 343.

²¹¹ *Id.* at 357.

²¹² Jungreis, *supra* note 32, at 379; Blumm, *supra* note 207, § 37.03.

attempt to quantify the federal right through comprehensive basin-wide water adjudications.²¹³

In practice, the effect of a federal reserved water right is to remove unappropriated water from state law appropriation that the federal government reserves for itself.²¹⁴ The federal government also retains a property interest in unappropriated waters on lands in the public domain that are not reserved for a federal purpose but which are subject to new federal reservations.²¹⁵ Where water is reserved, state law must defer to federal rights over water resources, even if the water is unused, and such rights might be later enforced at the expense of junior state water rights holders.²¹⁶ Federal water rights are not subject to state definitions of beneficial use, and the federal government generally does not need to perfect or exercise its rights pursuant to state law.²¹⁷

In prior appropriation states, where most federal land is located, federal reserved water rights have priority as of the date of the reservation.²¹⁸ Private rights existing prior to the date the reservation is established are superior to federal reserved rights and cannot be taken except through the power of eminent domain.²¹⁹ But, water rights holders on reserved lands whose use began after the reservation was established have junior appropriative rights that can be effectively extinguished if the federal government asserts its rights at a future date.²²⁰

In riparian states, the implications of federal reserved water rights are as yet unclear.²²¹ There is no priority of use, and it's uncertain how federal water rights might play in times of shortage, where riparian law mandates sharing the burden across riparian landowners.²²² As yet, no court in the East has adjudicated federal water rights, although there are federal installations in

²¹³ Cianci et al., *supra* note 85, at 162. Under the McCarran Amendment, 43 U.S.C. § 666, the federal government has waived sovereign immunity in suits leading to the adjudication of rights to the use of water and resolving all the rights of various owners on a given stream. See discussion *supra* note 207. The McCarran Amendment is often referenced as evidence of congressional deference to states' interests in regulating and administering water rights. Olson memo, *supra* note 31, at 345.

²¹⁴ GETCHES, *supra* note 42, at 340.

²¹⁵ *Id.* at 340, 348.

²¹⁶ *Id.* at 340.

²¹⁷ *Id.* at 341, 366. The federal government might still be required to comply with state reporting and registration requirements, and other ministerial acts.

²¹⁸ *Id.* at 340-341.

²¹⁹ *Id.* at 342.

²²⁰ *Id.* at 341.

²²¹ *Id.* at 342.

²²² *Id.*

the East established through the reservation of land from the public domain.²²³ Even if a court were to find *Winters* rights equally valid in the East, and that must be the operating presumption, the federal government would likely be challenged by other riparians who are deprived of their historical usage and who demand compensation under the Fifth Amendment – and such claims might be successful.²²⁴

The doctrine of reserved water rights has been interpreted to extend to lands acquired from private owners by the federal government and set aside for a specific federal purpose, although these lands are not characterized as reserved lands.²²⁵ Thus, all lands set aside for a particular federal purpose, including federal establishments and federal enclaves, fall within the scope of the reservation doctrine, whatever the prior ownership.²²⁶

2. Application of the Winters Doctrine to Military Installations

There is very little scholarship or case law interpreting how federal water rights apply to federal military reservations, although there is no question as to the doctrine's general applicability.²²⁷ For many years, water use for military installations went largely uncontested.²²⁸ In 1958, a district court in Nevada upheld the right of a Navy ammunition depot to withdraw groundwater without complying with state permitting requirements (the Navy had ceased filing claims for water with the state following the Supreme Court's 1955 ruling in *Federal Power Commission v. Oregon*, which rejected state authority over the licensing of a federal water project on reserved lands), noting that the ammunition depot was on lands withdrawn and reserved by executive order for exclusive use by the Navy.²²⁹ The opinion contains a strong admonition that state law should yield when its application would hinder the national defense,

²²³ Jungreis, *supra* note 32, at 387.

²²⁴ *Id.* at 407.

²²⁵ Olson memo, *supra* note 31, at 375; *see also* Klamath River Basin General Stream Adjudication, Findings of Fact and Order of Determination 42 (Mar. 7, 2013).

²²⁶ Olson memo, *supra* note 31, at 375. One notable distinction is that priority dates for water rights on acquired lands have, as a matter of practice, been claimed only based on the date of first use. Theoretically, however, priority could be asserted based on the date the lands were set aside for federal purposes. Assistant Attorney General Olson notes that "as a matter of policy, federal agencies could, of course, continue to assert priority for water rights on acquired lands based on the date of first use, in order to minimize dislocation or disruption of state and private expectations"). Olson memo, *supra* note 31, at 382.

²²⁷ Ranquist, *supra* note 33, at 683.

²²⁸ *Id.* at 682.

²²⁹ *Nev. ex rel. Shamberger v. United States*, 165 F. Supp. 600, 610 (D. Nev. 1958), *aff'd on other grounds*, 279 F.2d 699 (9th Cir., 1960); *Fed. Power Comm'n v. Oregon*, 349 U.S. 435 (1955); *see also* Ranquist, *supra* note 33, at 684, n. 185 (noting that the Navy adhered to state law for six years, until Nevada attempted to require that the Navy prove beneficial use).

noting that “[i]n these troubled days, particularly, a court should hesitate to impede the lawful and logical functions of the Department of the Navy, exercised in what it has been stipulated is ‘a major installation in the program of that Department for the defense of the Nation.’”²³⁰

Perhaps recognizing the growing demand on the water supply, state courts are not consistently deferential to the needs of military installations or to assertions of “national defense.” In 2001, an Idaho district court adjudicating claims in the Snake River Basin Adjudication rejected the federal government’s *uncontested* claims to reserved water rights to groundwater for the Mountain Home Air Force Base (AFB).²³¹ Mountain Home AFB is located some forty-nine miles southeast of Boise, Idaho, and is comprised of a combination of lands withdrawn from the public domain (3,680 acres), private lands acquired by condemnation (2,080 acres), and otherwise acquired lands (961 acres).²³² Of the total acreage, Mountain Home AFB improved some 740 acres beginning in the 1940s and continuing into the 1990s.²³³ Over that time, twelve wells were drilled to support the installation’s water needs.²³⁴ Improvements to the land include runways, administrative offices, warehouses, fuel storage facilities, a mess hall, clubs, family housing units and community buildings, schools, a hospital, an exchange, athletic fields, and a golf course.²³⁵ Improvements and water delivery systems were made without regard to whether the land was reserved or condemned, and as a result these improvements are intermingled on reserved and condemned lands.²³⁶ In some cases, buildings straddle and extend onto both reserved and condemned lands.²³⁷ The United States acknowledged, in documents filed with the court, that the AFB is a “checkerboard of public and acquired lands,” but argued that “[b]ecause of the jigsaw fit of the puzzles, and the nature of the base as an Air Force facility requiring long runways and geographically expansive operation, the water needs for the acquired and reserved public land cannot be divided. They are functionally an integrated whole.”²³⁸ The United States sought 6,162.9 acre-feet of water “to fulfill it [sic] present and future mission for national defense purposes.”²³⁹

²³⁰ *Shamberger*, 165 F. Supp. at 610; *See also United States v. Pub. Utils. Comm’n of Cal.*, D.C. Cal.1956, 141 F.Supp. 168, *aff’d*, 355 U.S. 534 (1958); Blumm, *supra* note 207, § 37.03.

²³¹ *In re SRBA Case No. 39576, Subcase Nos. 61-11783 et al.*, slip op. at 16 (*Idaho Dist. Ct. Apr. 6, 2001*), *vacated*, Order No. 27535 (*Idaho Oct. 11, 2002*); Blumm, *supra* note 207, § 37.03.

²³² *In re SRBA*, at 9.

²³³ *Id.*

²³⁴ *Id.*

²³⁵ *Id.* at 10-11.

²³⁶ *Id.* at 11, 26.

²³⁷ *Id.* at 26.

²³⁸ *Id.* at 11.

²³⁹ *Id.*

The court rejected the government's argument, finding no federal reserved water right on lands acquired by condemnation.²⁴⁰ The court noted that the condemned lands had not been subsequently set aside, and that the existing reservations did not reach condemned lands.²⁴¹ The court also looked skeptically at the government's claims of priority, and closely scrutinized the stated purpose for which the land was reserved.²⁴² The court rejected that the United States had made an adequate showing for *any* reserved water rights, finding that implicit in the land reservation was an acknowledgement that reserved lands would only form a portion of the total land comprising the AFB, and that therefore the base's water supply would have to include state-based water rights.²⁴³ Since reserved and condemned lands were intermingled, the primary purpose of the reservation would not be entirely defeated without a reserved water right.²⁴⁴ The court concluded that "Mountain Home AFB was established with the intent that it would be supplied with state-based water rights," citing as probative evidence the fact that the United States had previously deferred to, and complied with, state procedural law in establishing water rights for the base.²⁴⁵

The decision was subsequently vacated, but the case illustrates the hurdles an installation might face in acquiring federal reserved water rights, and the careful examination that a court might conduct into the nature of the land, the nature of the reservation, and an installation's historical posture vis-à-vis compliance with state law. National defense is by no means a trump card. The case also illustrates the limits of the federal reserved water rights doctrine and, although not expressly referenced, the resistance to a broader federal non-reserved water right, discussed further below.

²⁴⁰ *In re SRBA*, at 15, 20 ("[W]hen the federal government condemns land of a private individual, the federal government's interest in the land and appurtenant water, if any, is derivative of the interest held by the owner of the condemned land. Where the federal government condemns land with appurtenant water rights, it acquires only 'state-based' rights not federal reserved water rights. In the event there was no appurtenant 'state-based' water, or the government elected not to condemn appurtenant state-based rights, the federal government would still not establish a federal reserved water right because unappropriated 'appurtenant' water over which the federal government exercises control (under the second exception to the state's control over water) does not exist with respect to private property. Once the land passes to private ownership, any appurtenancy relationship that may have existed with respect to the public domain lands is severed. A private property owner must perfect a water right pursuant to state law. The federal government obtains this same interest when it condemns the land.")

²⁴¹ *Id.* at 23.

²⁴² *Id.* at 24-25 (rejecting a priority dating back to 1943 based on an earlier reservation for a temporary wartime facility intended to operate only World War II, and adopting instead a priority dating back to 1954, when the land was subsequently reserved for use of the Air Force in connection with Mountain Home AFB).

²⁴³ *Id.* at 27.

²⁴⁴ *Id.*

²⁴⁵ *Id.* at 28.

Adjudication of claims along the Giles River is also illustrative. The United States has claimed a federal reserved water right for Fort Huachuca (Arizona) for “military installation purposes.”²⁴⁶ Fort Huachuca is comprised of lands assembled as a result of two executive orders, three public land orders, voluntary conveyances, condemnation, land exchanges, and leases over an eighty-year span of time beginning with an executive order in 1881.²⁴⁷ Following a second executive order in 1883, Fort Huachuca spanned 44,800 acres.²⁴⁸ In the 1940s, the Secretary of the Interior withheld and reserved another 3,993 acres for use by the War Department as an artillery range (the East Range), the reservation being limited in duration to the period of national emergency declared by President Roosevelt with the outbreak of World War II.²⁴⁹ Later, the United States acquired an additional 9,588 acres of land through voluntary conveyances and condemnation that became part of the East Range.²⁵⁰ These lands were not reserved or withheld for a federal purpose.²⁵¹ Then, in 1957, the Department of the Interior withdrew and reserved an additional 13,463 acres of former State Trust Lands in the East Range (exchanged for public domain lands elsewhere) for use by the Department of the Army.²⁵² But, by express terms of the public land order, the reservation did not extend to any waters in or upon the lands, which remained subject to appropriation in accordance with state law.²⁵³ Fort Huachuca now comprises some 71,606 acres of land.²⁵⁴

Complicating matters further, in 1947 Fort Huachuca was declared to be “surplus” property by the War Department and, pursuant to the Surplus Property Act of 1944, was disposed to the State of Arizona.²⁵⁵ Between 1948 and 1950, the lands were quitclaimed to the State of Arizona through a series of four deeds.²⁵⁶ The transfer of title was on condition that in the event the President, Congress, Secretary of Defense, or Secretaries of the Army, Navy or Air Force determined that the land was needed for national defense purposes,

²⁴⁶ *In re Gila River*, Case No. W1-11-605, REPORT OF THE SPECIAL MASTER 14 (Apr. 4, 2008), <http://www.superiorcourt.maricopa.gov/SuperiorCourt/GeneralStreamAdjudication/docs/schade-sp605SMRpt40408.pdf>.

²⁴⁷ *Id.* at 16, 78.

²⁴⁸ *Id.* at 22.

²⁴⁹ *Id.* at 29. The reservations would have lapsed in 1952, but for Fort Huachuca being disposed to the State of Arizona. *See infra* note 255.

²⁵⁰ *Id.* at 32.

²⁵¹ *Id.* at 33-34.

²⁵² *Id.* at 34.

²⁵³ *Id.*

²⁵⁴ *Id.* at 36.

²⁵⁵ *Id.* at 36-56.

²⁵⁶ *Id.* at 47.

the title would revert to the United States.²⁵⁷ In 1951, the Secretary of the Air Force exercised that authority and title was transferred back to the United States between 1954 and 1957.²⁵⁸ The transfer deed did not refer to water rights or water sources, although the deeds transferring title to the State of Arizona had.²⁵⁹ As a result of these transfers, the Special Master adjudicating these claims was faced with a question of whether the previous withdrawals and reservations were defeated upon declaration of surplus and disposal to the State of Arizona, whether the United States retained a reversionary interest, or whether a reserve right was created when the land was reacquired.²⁶⁰

The Special Master examined the history of withdrawals and reservations, the development of water sources on the installation, the construction of distribution systems, the importance of water availability in the establishment of the installation, the language of the various conveyances, and Congressional intent under the Surplus Property Act.²⁶¹ The Special Master ultimately concluded that Congress intended for the future use of surplus property for national defense to be considered when that property is disposed and, when that intent is coupled with express conditions in the deeds, there was sufficient basis to find that the United States retained a reversionary interest in the water rights at Fort Huachuca, including reserved water rights.²⁶² The Special Master then engaged in an examination of the purposes of the reservation, looking to the history of the Fort.²⁶³ The Special Master found that the 1881 and 1883 reservations were for the purpose of establishing a military reservation.²⁶⁴

The Special Master then addressed the scope of the term “military purpose” in light of the *New Mexico* “primary-secondary purpose test.” The Special Master noted the variety of water uses on Fort Huachuca, to include municipal, domestic, effluent irrigation of the parade field and a golf course, recreation, wildlife, and impoundments for recreation including fishing, wildlife, game management, erosion control, sewage evaporation, fire prevention, vehicle

²⁵⁷ *Id.* at 50.

²⁵⁸ *Id.* at 54-55. Although that the reversion was initially triggered by the Secretary of the Air Force, Fort Huachuca ultimately remained an Army installation.

²⁵⁹ *Id.* at 57.

²⁶⁰ *Id.* at 58.

²⁶¹ *Id.* at 58-62, 69.

²⁶² *Id.* at 62 (“A military installation may have been surplus after demobilization following the end of World War II, but the installation, in whole or in part, might remain useful for national defense. The Congress intended that federal officials consider this possibility and potential when disposing of surplus property.”).

²⁶³ *Id.* at 65-71.

²⁶⁴ *Id.* at 71.

washing, and dust control uses.²⁶⁵ The Special Master deferred until the quantification stage findings as to the scope and extent of the purposes of the military reservation including the types of water uses that might fall within the reservation's primary purposes. However, the Special Master took notice that the United States defined its military purposes broadly; namely, to supply the domestic, municipal, and quasi-municipal requirements of the armed forces, associated civilian personnel, and military families—a current population of 16,000.²⁶⁶ The United States was asked to provide additional information on whether the reservation of land was intended to serve only the immediate needs of the region for defense against Indian attacks, or reserved for any and all future uses for military purposes.²⁶⁷ A finding of the former would exclude from the reach of any federal reserved water right both essential and non-essential military activities on the base today.

Ultimately, the Special Master concluded that reserved water rights attached to lands formerly withdrawn and reserved, namely those lands within the 1881 and 1883 executive orders, as water was necessary to accomplish the purpose of the reservation and without water that purpose would be defeated.²⁶⁸ Reserved water rights did not attach to lands acquired by voluntary conveyance, condemnation, land exchange or lease, as they were not withdrawn and reserved.²⁶⁹ Additionally, reserved water rights did not attach to the 3,993 acres withheld and reserved as part of the East Range, as those reservations lapsed with the termination of the period of national emergency, and as water was not necessary to accomplish the purpose of those reservations.²⁷⁰

The details of Fort Huachuca's history are tedious, but again this illustrates just how difficult it can be for an installation to assert federal reserved water rights, and just how closely state courts will examine such claims. Once again, national defense is not a trump card and, as in the case of Mountain Home AFB, there appears to be little appetite to expand the federal reserved water rights doctrine or consider a broader federal non-reserved, or regulatory, water right. The case also reveals how strictly the military purposes of an installation might be construed, both by reference back to the original purposes of the reservation and by distinguishing uses that are "military" from other uses that might be classified as "convenient" for the quality of life of military personnel and their families residing on post.²⁷¹ Some might justify such a distinction as

²⁶⁵ *Id.* at 73.

²⁶⁶ *Id.* at 72, 78, 79.

²⁶⁷ JOHN B. WELDON, JR. & SCOTT M. DEENY, 6 AZ WATERS AND WATER RIGHTS I (2015).

²⁶⁸ *Id.* at 79.

²⁶⁹ *Id.* at 79.

²⁷⁰ *Id.*

²⁷¹ Ranquist, *supra* note 33, at 685.

perfectly rationale and appropriate—surely federal water use to irrigate a golf course isn't owed the same deference, in the form of preemption of state law, as water used at an ammunition depot. But the picture is more complicated. Modern military installations use water for numerous purposes that might not be considered strictly military or direct military support. For instance, as part of responsible land management, military installations often have wildlife and natural resource management plans. Applying the reasoning behind *United States v. New Mexico*, in which the Supreme Court rejected the United States Forest Service's instream flow claim for fish, wildlife and recreation uses on the grounds that reserved water rights for National Forest lands were limited to an amount of water necessary to satisfy the primary purposes of the Organic Act of 1897, namely conservation of favorable conditions of water flows and the production of timber, military claims to *Winters*-based federal reserved water rights sufficient for ecosystem management would in all likelihood fail.²⁷²

Another potential problem, although not raised in the Mountain Home AFB or Fort Huachuca cases, is the problem of nonuse. Federal reserved water rights are not lost for non-use.²⁷³ But, just as military property might be surplus in one year but necessary in the next, military installation water uses can vary considerably between peacetime operations and periods of war or troop mobilization.²⁷⁴ While unused, that water might be appropriated under state law.²⁷⁵ In the words of one scholar, “[t]he economies of whole cities might be built upon its use.”²⁷⁶ On the one hand, nonuse may be unavoidable and it may be preferable to allow the water to support civilian uses under state law. But the unfairness of subsequently laying claim to that water at a time of military need could ultimately result in a diminution of the federal water right.²⁷⁷

3. Federal Non-Reserved / “Regulatory” Water Rights

An important characteristic of federal reserved water rights is that they are limited to lands reserved or set aside from the public domain, and to an amount of water necessary to fulfill the primary purpose of the reservation as established at the time the land is reserved.²⁷⁸ To fulfill secondary purposes, a federal agency must generally resort to state law.²⁷⁹ The same holds true with

²⁷² 438 U.S. 696 (1978); see also *United States v. Idaho*, 135 Idaho 655; Wilcox, *supra* note 207.

²⁷³ GETCHES, *supra* note 42, at 340.

²⁷⁴ Ranquist, *supra* note 33, at 685.

²⁷⁵ *Id.* at 685.

²⁷⁶ *Id.*

²⁷⁷ *Id.* at 712.

²⁷⁸ *Cappaert v. United States*, 426 U.S. 128 (1976); *United States v. New Mexico*, 438 U.S. 696 (1978); GETCHES, *supra* note 42, at 336.

²⁷⁹ *United States v. New Mexico*, 438 U.S. at 702; Jungreis, *supra* note 32, at 379; Olson memo, *supra* note 31, at 375.

respect to the appropriation of water for federal lands that remain in the public domain and federal lands acquired from private owners that have *not* been set aside for federal purposes. These limitations have led some to look to a new theory of federal water rights: federal “non-reserved” or federal “regulatory” water rights.

Although not without considerable controversy, federal non-reserved water rights have been recognized, at least notionally, as a separate source of federal water rights that can arise independent of state law and without regard to a reservation of land when necessary to carry out federal purposes or programs.²⁸⁰ The legal origins for non-reserved water rights can be traced to a line of cases upholding the rights of the federal government under the Supremacy Clause, when exercising constitutional regulatory authority, to authorize a project or use of federal land requiring appropriation of water as against state law where state law is in direct conflict with the federal authorization and would block or frustrate accomplishment of the federal ends.²⁸¹ This might occur where, for example, a federal project is illegal or unauthorized under state law, state substantive law does not recognize a federal use as “beneficial,” or where the state denies priority for failure to comply with state procedural requirements.²⁸² In the military context, a state may refuse to recognize as “beneficial” water used on the military installation for military training and emergency preparedness.²⁸³ State statutes often do not expressly identify military uses as “beneficial.”²⁸⁴ These cases suggest that state water

²⁸⁰ *Id.* at 386; Blumm, *supra* note 207, at §§ 37.03, 37.06; O’Sullivan et al., *supra* note 40.

²⁸¹ Olson memo, *supra* note 31, at 351, citing *Oklahoma v. Guy F. Atkinson Co.*, 313 U.S. 508 (1941) (holding that Oklahoma could not block construction by the United States of a dam and reservoir for the purpose of improving navigability, notwithstanding the state’s contention that the project interfered with the state’s own program for water development and conservation); *Fed. Power Comm’n v. Oregon*, 349 U.S. at 445 (rejecting state attempt to block construction of federally-licensed hydroelectric project). *But see California v. United States*, 438 U.S. 645, 662 (1978) (holding that a state may impose conditions on control, appropriation, use or distribution of water in a federal reclamation project provided such conditions aren’t inconsistent with congressional provisions authorizing the project in question, and citing approvingly the Court’s 1899 opinion in *United States v. Rio Grande Dam & Irrigation Co.*, 174 U.S. at 703, 709, for the proposition that “except where the reserved rights or navigation servitude of the United States are invoked, the State has total authority over its internal waters”). The Olson memo suggests that the opinion in *California*, read in context, does not preclude non-reserved water rights. Olson memo, *supra* note 31, at 373.

²⁸² *Id.* at 338, citing Trelease, *supra* note 194, at 56-57; *Id.* at 371-372 (“[T]he federal state conflicts that are of primary concern are conflicts between federal uses of water for the management of federal lands and state substantive or procedural law. For example, state law may not recognize certain federal uses as beneficial or in the public interest or may deny a priority date to a federal use because of the failure of the agency to comply with state procedural or permitting requirements”).

²⁸³ See Legal Memorandum, Dep’t of the Army, subject: “Federal Non-Reserved Water Rights” (5 Nov. 1981).

²⁸⁴ Cianci et al., *supra* note 85, at 162.

law cannot control federal uses to the extent state law is inconsistent with congressional directives or frustrates the accomplishment of federal purposes.²⁸⁵

Federal non-reserved water rights arise where Congress has given federal agencies sufficient authority to appropriate water on federal land notwithstanding state law in order to accomplish federal mandates.²⁸⁶ However, the fact that a federal agency is charged with management of lands in the public domain, like the mere fact of reservation of land from the public domain, is not sufficient to create a federal non-reserved water right.²⁸⁷ The relevant consideration is the particular purposes established by Congress in authorizing a federal program, project, or management and use of federal land, and whether there is an explicit or implicit expectation of sufficient water to meet those purposes.²⁸⁸

Federal non-reserved water rights are similar in many respects to federal reserved water rights, but there are also important differences. Like federal reserved water rights, federal non-reserved water rights have been interpreted not to reach secondary purposes (although earlier formulations of the non-reserved water rights theory suggested such rights might be broader than reserved rights in this respect).²⁸⁹ Federal non-reserved water rights are broader than reserved water rights in that they apply with equal force to public domain and acquired lands, as well as to reserved lands. But, federal non-reserved water rights are narrower in that priority is based on the date water is first put to use; reserved rights, in contrast, have priority as of the date of the reservation regardless of whether or when water is put to actual use.²⁹⁰ The measure of federal non-reserved water rights is limited to the water reasonably necessary for the use(s) to which it was put, whereas reserved water rights extend to all water reasonably necessary for current and future uses (within the primary purposes of the reservation).²⁹¹

²⁸⁵ Olson memo, *supra* note 31, at 353.

²⁸⁶ Blumm, *supra* note 207, §§ 37.03, 37.06.

²⁸⁷ Olson memo, *supra* note 31, at 382—383.

²⁸⁸ *Id.*

²⁸⁹ *Id.* at 332, 357, 381; Dep't. of the Int. Solicitor's Opinion No. M-36914, Federal Water Rights of the National Park Service, Fish and Wildlife Service, Bureau of Reclamation and the Bureau of Land Management, 86 Interior Dec. 553 (1979) (Krulitz Op.) (opining that non-reserved water rights extend to any congressionally authorized management use or function, even if incidental or secondary to the federal purposes for the land) [hereinafter Krulitz Op.]

²⁹⁰ Blumm, *supra* note 207, §§ 37.03, 37.06.

²⁹¹ Olson memo, *supra* note 31, at 357.

Notwithstanding lasting disputes over the existence of federal non-reserved water rights as a matter of law,²⁹² the constitutional basis for these water rights is clear. Congress has the constitutional power to assert regulatory jurisdiction over unappropriated water to fulfill federal purposes or programs under the Commerce, Property, or General Welfare Clauses, or under its treaty or defense powers; and, in doing so, can preempt state law to the contrary by operation of the Supremacy Clause.²⁹³ Whatever jurisdiction was granted to the states vis-à-vis unappropriated water on federal lands, the federal government did not thereby cede all of its jurisdiction; the federal government maintains regulatory authority where federal purposes and programs would be frustrated by the exercise of state law.²⁹⁴ The real question, then, is whether Congress has in fact asserted such power; that is, whether Congress intended to authorize the acquisition of water to accomplish certain specified uses of federal land, and to preempt state law.²⁹⁵

If Congress wishes to exercise its power to preempt state law, it must clearly and specifically do so, either expressly or by necessary implication.²⁹⁶ Congress has historically given substantial deference to state water laws, and the effect of that deference is to establish a presumption in favor of the operation of state substantive and procedural law.²⁹⁷ The presumption is also premised on an understanding that states and private parties have expectations and reliance interests in the state's regulatory regime that can be upset by special federal rules; the sudden creation of new federal water rights that take precedence over state-created rights could be quite disruptive.²⁹⁸ Congressional intent to preempt state law might be express in a statute authorizing a federal project or directing certain uses of federal lands.²⁹⁹ Or, preemption can also be inferred where the state law governing the use of water conflicts with the federal authorizing statute, or where the application of state law frustrates a federal agency's ability to fulfill the purposes established by Congress.³⁰⁰

²⁹² No court has explicitly followed or repudiated the Olson Memo. Jungreis, *supra* note 32, at 390. In *Nebraska v. Wyoming*, the Supreme Court was presented with an opportunity to address a broad assertion of federal non-reserved water rights of the sort asserted by Solicitor Krulitz. See *supra* note 289 and *infra* note 618. In the end, the Court expressly reserved decision on this claim. 325 U.S. 589, 615 (1945).

²⁹³ Blumm, *supra* note 207, §§ 37.03, 37.06; O'Sullivan et al., *supra* note 40, at 127, 132; Olson memo, *supra* note 31, at 362, 368-369, 376 ("[T]he constitutional basis for federal water rights, however denominated, is the Supremacy Clause coupled with a proper exercise of federal authority").

²⁹⁴ Blumm, *supra* note 207, §§ 37.03, 37.06; O'Sullivan et al., *supra* note 40, at 132.

²⁹⁵ Olson memo, *supra* note 31, at 362.

²⁹⁶ *Id.* at 383.

²⁹⁷ *Id.* at 375, 377.

²⁹⁸ *Id.* at 379-380.

²⁹⁹ O'Sullivan et al., *supra* note 40, at 132.

³⁰⁰ *Id.*

The scope of federal preemption must also be defined; state law may not be entirely displaced.³⁰¹ Only those aspects of state substantive and procedural law that are incompatible with, or frustrate the primary purposes of, a federal project are subject to preemption.³⁰² Aspects of state law that do not frustrate primary federal purposes, or which place a relatively insubstantial burden on federal programs or policies, or impose conditions only on secondary or incidental aspects of a federal project, are not preempted.³⁰³ Therefore, state requirements that simply inconvenience a federal installation or increase cost, such as a registration or filing requirement or other ministerial acts, are not likely to trigger preemption.³⁰⁴

Determining congressional intent and the scope of any preemption in the absence of express language requires a careful examination of the content and context of the authorizing statute governing the federal agency, project, program, or use of federal land.³⁰⁵ In examining the stated purposes for federal water rights (reserved or non-reserved) that override state law, the language of the authorizing act—whether in the form of a statute or executive order exercising delegated congressional authority—will be narrowly construed, and will not include all possible functions or uses of federal property.³⁰⁶ Other considerations in the preemption calculus include whether the federal program can be or has been adapted to state law, the federal interests (and the risk that federal goals will be frustrated by the application of state law), and the extent to which state and private interests and expectations would be upset.³⁰⁷ The starting presumption must be that Congress did not intend to override the deference it has historically given to states, and that federal agencies must

³⁰¹ Olson memo, *supra* note 31, at 377.

³⁰² *Id.* at 376 (“[W]here application of state law will not frustrate specific federal purposes or interests, where the federal program has been and can be adopted to state law, and where implications of federal rights would substantially disrupt expectations of private individuals based upon an existing comprehensive state regulatory scheme . . . state law may control federal rights and liabilities arising under federal programs”). The former Attorney General for the State of Wyoming, the Honorable Steven F. Freudenthal, said that the non-reserved water right doctrine “creates a nightmare for Western States’ water resource management.” Letter from the Honorable Steven F. Freudenthal, Attorney General, State of Wyoming, to Theodore B. Olson, Assistant Attorney General, Office of Legal Counsel (Apr. 1, 1982), *quoted in* Olson memo, *supra* note 31, at 330.

³⁰³ Olson memo, *supra* note 31, at 376; O’Sullivan et al., *supra* note 40, at 130; GETCHES, *supra* note 42, at 366.

³⁰⁴ Jungreis, *supra* note 32, at 406; GETCHES, *supra* note 42, at 366. This analysis is equally applicable to state requirements in the context of federal reserved water rights. The presumption is that a state may exercise regulatory authority to the extent it does not interfere with federal purposes. Ministerial procedural requirements, such as water rights registration or filing reports, would not be preempted, notwithstanding that the right is substantively federal.

³⁰⁵ *United States v. New Mexico*, 438 U.S. at 700; Olson memo, *supra* note 31, at 333; GETCHES, *supra* note 42, at 344.

³⁰⁶ Olson memo, *supra* note 31, at 381.

³⁰⁷ *Id.*

therefore acquire water rights pursuant to state law, even though the consequence may be some limitations on federal water use.³⁰⁸ If a federal agency cannot acquire sufficient water rights pursuant to state law, or through purchase or condemnation, the agency's recourse is to Congress.³⁰⁹

Congress has begun to sanction federal non-reserved water rights, although not in such a manner as to completely override state systems of priority or procedural requirements. Congress recognized the first non-reserved water right in the Great Sand Dunes National Park and Preserve Act of 2000, which authorized the Secretary of the Interior to appropriate water to maintain groundwater levels, surface water levels, and stream flows on, across, and under the Great Sand Dunes National Park and Preserve in order to accomplish the purposes of the national park and the national preserve and to protect park resources and park uses.³¹⁰ Under the Act, water rights for the national park and national preserve are to be established pursuant to state (Colorado) procedural and substantive law, and no federal reservation of water may be claimed or established.³¹¹ But, the Secretary of the Interior's authority creates an exception to the application of state substantive law.³¹² State procedural requirements and temporal priority apply, but substantively the right is federal in character.³¹³

Similarly, in the 2009 Omnibus Public Lands Management Act, Congress authorized the Secretary of the Interior to exercise a federal instream flow water right in the Dominguez Canyon Wilderness Area under certain conditions.³¹⁴ In that Act, Congress specifically rejected any new federal reserved water rights and directed that water rights within the Wilderness be determined in accordance with state procedural and substantive law.³¹⁵ But, by exception, Congress authorized the Secretary of the Interior to appropriate and seek adjudication of water rights to maintain surface water levels and stream

³⁰⁸ *Id.* at 377 (“Although Congress may in specific instances create federal water rights that do not depend on state law, such rights must be seen as the exception, rather than the rule, particularly as they could substantially disrupt or disturb expectations of private appropriators under existing state systems...[I]n the absence of evidence to the contrary, it will be presumed that Congress did not intend to alter or affect its policy of deference to state water law...[T]herefore, as a general rule, it will be assumed that Congress intended federal agencies to acquire rights in accordance with state law and contemplated that a state could deny some federal uses of water”); *See also United States v. California*, 438 U.S. at 653 (noting the “consistent thread of purposeful and continued deference to state water law by Congress” in the reclamation of arid lands in the West).

³⁰⁹ *Id.* at 383.

³¹⁰ 106 Pub. L. 530, § 9(b)(2)(B), 114 Stat. 2527 (2000); Blumm, *supra* note 207, § 37.06, at n. 909.

³¹¹ *Id.* § 9(b)(2)(A)–(D) (No federal reserved water right may be established, except in conjunction with the Rio Grande National Forest and Great Sand Dunes National Monument).

³¹² *Id.* § 9(b)(2)(B).

³¹³ *Id.* § 9(b)(2)(B).

³¹⁴ Pub. L. No. 111-11, § 2405(h)(2)(B)(ii)(II), 123 Stat. 991.

³¹⁵ *Id.* § 2405(h)(1)(D), (h)(2)(B)(i).

flows on and across the Wilderness to fulfill the purposes of the Wilderness.³¹⁶ The resulting water right, if established, is substantively federal, but subject to the procedural requirements and priority system of state law.³¹⁷

While the non-reserved water rights doctrine has thus far been applied only in the context of instream flows, there is no legal restriction as to the type of water rights asserted, the federal agency asserting such rights, the federal statutory scheme, or the federal lands implicated. Provided that Congress clearly and specifically exercises its power to preempt state law, either expressly or by necessary implication, the doctrine would apply equally, for example, to diversion of a stream and construction of a dam for flood control, improvement of navigation, and production of hydroelectric power.³¹⁸ The doctrine undoubtedly also would reach the use of unappropriated water by the federal government for the national defense.

This article generally refers to federal “non-reserved” and federal “regulatory” water rights as equivalent, namely because the terms have sometimes been used interchangeably to refer to the power of the federal government to preempt state water allocation law to carry out congressionally mandated purposes or programs.³¹⁹ But there is an important distinction between the two concepts.³²⁰ Non-reserved water rights are of a proprietary nature, referring to instances in which the federal government appropriates unappropriated water for its own use, such as for a federal project or program, or to manage federal property.³²¹ These rights operate within the context of, and in relation to, state water allocation regimes. This is the context primarily at issue in examining appropriation of water for use on military installations. Conversely, federal “regulatory” water rights apply where the federal government regulates in a manner that affects private interests in water. The Clean Water Act and Endangered Species Act are examples of the latter. These

³¹⁶ *Id.* § 2405(h)(2)(B)(ii)(II); Blumm, *supra* note 207, § 37.06.

³¹⁷ Blumm, *supra* note 207, § 37.06, at n. 911.

³¹⁸ Olson memo, *supra* note 31, at 331, 333.

³¹⁹ Blumm, *supra* note 207, § 37.06.

³²⁰ See James Cefalo, *Return of the Federal Non-Reserved Water Right*, 10 U. DENV. WATER L. REV. 45, 52 (2006).

³²¹ This is not to suggest that the legal basis for non-reserved rights is the federal government’s title to or ownership interests in unappropriated waters; the ownership rationale has been firmly rejected in favor of analyzing the question as one of competing state and federal regulatory jurisdiction. See Olson, *supra* note 31, at 332, 367. See also Comment, *Federal Nonreserved Water Rights*, 48 U. CHI. L. REV. 758, 772 (1981) (“The state and federal governments share an interest in proper regulation of water. Neither “owns” unappropriated water but each has the power to sue it and to regulate its use . . . The important question is whether state or federal rules of capture apply to the United States. In other words, the issue is whether Congress has established a federal regulatory jurisdiction over federal appropriations, or has recognized the inherent regulatory jurisdiction of the states and adapted federal programs to it.”).

laws might impose minimum stream flow requirements to meet water quality standards or avoid jeopardy to protected species, but the federal government does not assert a property interest in the water. These laws do not on their face upset state authority in water allocation,³²² but nevertheless operate extrinsic to state water allocation regimes and function as a regulatory overlay on state water rights. There is little question as to the regulatory authority of the federal government in this regard, although potential takings issues remain.³²³ The primary point of contention is with respect to proprietary interests in water asserted irrespective of state law.

4. “Federal” Water Rights Under State Law

The federal government can, of course, also acquire water rights pursuant to state law in the same manner as a private party.³²⁴ The federal government might choose to acquire rights under state law to use water for purposes beyond the scope of, or secondary to, a reservation.³²⁵ Likewise, the federal government might seek to acquire rights under state law to meet the purpose of a reservation where the reservation was established after such water was appropriated.³²⁶

In riparian states, the relative ease with which such rights may be acquired, and the worth of those rights once acquired, is largely a function of whether the state retains common law riparianism or has adopted a comprehensive permitting scheme.³²⁷ For military installations, additional considerations are required. During times of shortage, riparian water rights may not be adequate to meet military requirements. Additionally, military uses may not be considered “reasonable uses” under the state’s water laws, or the state may give preference to domestic and irrigation uses over “artificial” military uses.³²⁸ Finally, on large military installations that span watersheds or consist of riparian and non-riparian lands, state law may limit riparian rights to water use on riparian lands and within the same watershed.³²⁹

³²² The Clean Water Act explicitly disclaims any such interference. 33 U.S.C. § 1251(g) (“It is the policy of Congress that the authority of each State to allocate quantities of water within its jurisdiction shall not be superseded, abrogated or otherwise impaired by this chapter. It is the further policy of Congress that nothing in this chapter shall be construed to supersede or abrogate rights to quantities of water which have been established by any State”).

³²³ Blumm, *supra* note 207, § 37.06.

³²⁴ GETCHES, *supra* note 42, at 370.

³²⁵ *Id.*

³²⁶ *Id.*

³²⁷ Jungreis, *supra* note 32, at 392.

³²⁸ *Id.* at 393.

³²⁹ *Id.* at 393 n. 196.

In prior appropriation states, rights so acquired are not given special priority, nor are they subject to substantive or procedural exemptions; the federal government is an appropriator like any other.³³⁰ The military is no exception; independent research revealed only one state water code (Utah) that recognizes, and give special consideration to, water uses for national defense, and it is a limited exception for periods of drought. In Utah, special priority is given to uses of water by military facilities during temporary water shortage emergencies.³³¹ Similarly, prior appropriation states do not recognize military water uses as distinct beneficial uses.³³²

While some commentators have recognized this as an issue “ripe for resolution,” there appears to be very little movement at the state level.³³³ An exception may be found in the State of Nevada.³³⁴ In 1999, in a case noted by the Department of Justice as the first of its kind, the Nevada State Engineer recognized a national defense water right for Nellis Air Force Base (AFB) to the groundwater of the Las Vegas Artesian Basin.³³⁵ The right does not exempt the U.S. Air Force from state law, but rather grants greater flexibility to the base in the operation of its water permits. For example, the water right is not forfeited for non-use.³³⁶ Additionally, the right applies equally to acquired lands and lands in the public domain.³³⁷ The Air Force is required to use its existing surface water claims before turning to groundwater resources, but the new right will ensure Nellis AFB has a stable future supply and is able to call on additional water resources if required by operational demands.³³⁸

While Nevada’s approach in the Las Vegas Artesian Basin offers a way in which military installations might secure water resources within state water law, it is only a narrow victory for the recognition of national defense interests.

³³⁰ GETCHES, *supra* note 42, at 370; Olson memo, *supra* note 31, at 337.

³³¹ Utah Code Ann. § 73 3-21.1. Hawaii, which has its own unique water law, supplies the only other example found of recognizing special priority for military uses. The draft Pearl Harbor Water Shortage Plan establishes a classification system that ranks military use as a lower priority only to domestic and municipal uses. Military use has priority over agricultural and industrial use. See HAWAII DROUGHT PLAN, 2005 UPDATE, <http://state.hi.us/dlnr/drought/preparedness/HDP2b.pdf>.

³³² Olson memo, *supra* note 31, at 337; Cianci et al., *supra* note 85, at 162.

³³³ 1-15 California Water Law and Policy § 15.11 (2013).

³³⁴ Florida has also recognized a hybrid state-based federal water right, of sorts, for the Seminole Indian Tribe, but Nevada’s hybrid approach is the only one premised on national defense. See Jungreis, *supra* note 32, at 394.

³³⁵ U.S. DEP’T OF JUST. *Federal Reserved Water Rights and State Law Claims*, <http://www.justice.gov/enrd/3245.htm>; Cianci et al., *supra* note 85, at 172, citing *In re Determination of Relative Rights in & to waters of the Las Vegas Artesian Basin* (212), Clark County, Nevada District Court, Case No. A382950, Dec. 13, 1999 (District Court decree).

³³⁶ Cianci et al., *supra* note 85, at 172.

³³⁷ *Id.*

³³⁸ *Id.*

The recognition of a national defense water right applies only to a single basin and is the product of mutual agreement between the claimants.³³⁹ Moreover, Nevada may have been willing to pursue this approach not because of special recognition of national defense interests, but rather as a means to avoid an adverse determination that the federal government had federal reserved rights to groundwater.³⁴⁰ In avoiding the ultimate issue, the state could preserve its jurisdiction while providing the federal government many of the advantages of federal reserved water rights.³⁴¹ Still, this approach had its advantages for Nellis AFB as well. As the case studies of Mountain Home AFB and Fort Huachuca have demonstrated, there is no guarantee that a state court would have recognized federal reserved water rights for the installation.³⁴² Whatever may be said about the future of state-based national defense water rights, negotiated settlements like that employed in Nevada are likely to be a recurring feature in the future, as states and private parties elect to settle rights claims rather than undergo costly and lengthy comprehensive stream adjudications to quantify uncertain water rights.³⁴³

Whether states ought to recognize a national defense water right is another question entirely, although the history of the expansion of military installations in the West suggests states bear some responsibility to fashion water codes that acknowledge national defense needs. Military installations generally sprung up in the West shortly before and during the Second World War, often at the strong urging of local communities.³⁴⁴ These communities, perhaps seeing military installations as economic goldmines, leased and sold lands to the War Department for nominal sums.³⁴⁵ In the case of Nellis Air Force Base, local officials bought two wells for installation use in an effort to entice the War Department to build the base.³⁴⁶ Implicitly then, and in some cases explicitly, these states and localities recognized that the military installations they sought to attract would require an adequate supply of water to maintain operations. Moreover, the military's water allotments needed to be flexible, not subject to forfeiture, not dependent on the nature of the land (whether acquired, reserved, or in the public domain), and capable of accommodating a surge in periods of emergency or operational necessity.

³³⁹ *Id.*

³⁴⁰ Jungreis, *supra* note 32, at 394.

³⁴¹ *Id.*

³⁴² *Id.*

³⁴³ Blumm, *supra* note 207, § 37.03.

³⁴⁴ Cianci et al., *supra* note 85, at 162, 173.

³⁴⁵ *Id.* at 173.

³⁴⁶ *Id.*

But the reality is that conditions have changed—drought is a reality in much of the West—and states are less likely to give special consideration to the needs of military installations at the expense of reduced use by the state’s citizenry, notwithstanding any plausible historical responsibility to do so. It is to these changed circumstances that we now turn.

II. Climate Change and Water Scarcity

Every four years, the DoD issues a comprehensive defense strategy document—the Quadrennial Defense Review (QDR)—that outlines the Pentagon’s vision for rebalancing military priorities and force structure to best meet anticipated threats and protect and advance U.S. interests. In 2010, for the first time, the DoD identified climate change as playing a significant role in shaping the future security environment.³⁴⁷

Since then, the likely effects of climate change on the DoD’s activities and capabilities have been a matter of continuing study, and this analysis has driven important conservation and sustainability initiatives. The DoD’s latest assessments have echoed previous warnings, and in some cases have adopted an even stauncher tone.³⁴⁸ The most recent QDR reiterated the warning that climate change might increase the frequency, scale, and complexity of future missions, while also undermining the ability of military installations to provide essential training to military forces.³⁴⁹ Rising sea levels, increasing average global temperatures, changes in precipitation patterns, and greater frequency and intensity of severe weather have the potential to wash away land, devastate homes and infrastructure, intensify water scarcity, and cause food costs to rise dramatically.³⁵⁰

The 2010 and 2014 QDRs cite two distinct sets of climate-related challenges facing the DoD. Firstly, climate change may compound and exacerbate the national security threats that we face, affecting the nature and scope of the DoD’s missions at home and abroad.³⁵¹ Climate change threatens to increase the incidence and magnitude of situations and conditions in which the DoD will be called upon to act to address intra- or international conflict over resources, combat transnational terrorism, or to deliver humanitarian assistance at home or abroad in the wake of a natural disaster.³⁵² The 2014 QDR calls the effects of climate change “threat multipliers” when combined with other

³⁴⁷ DEPARTMENT OF DEFENSE, QUADRENNIAL DEFENSE REVIEW (2010) [hereinafter 2010 QDR].

³⁴⁸ 2014 QDR, *supra* note 24; 2014 CCAR, *supra* note 2.

³⁴⁹ 2014 QDR, *supra* note 24.

³⁵⁰ *Id.* at VI, 8, 25; 2014 CCAR, *supra* note 2.

³⁵¹ 2014 QDR, *supra* note 24, at 85.

³⁵² *Id.* at VI, 8, 25.

stressors and social dynamics, such as population growth, income distribution, labor supply and employment, poverty levels, urbanization, political instability, and social tensions. While climate change doesn't necessarily cause conflict, it can hasten instability and aggravate existing incendiary conditions.³⁵³ Additionally, and relatedly, climate change will complicate the operating environment in which military forces will act.³⁵⁴

Secondly, the DoD will need to adapt to the impacts of climate change on military installations and capabilities.³⁵⁵ Climate change threatens to degrade the DoD's critical mission capabilities—those capabilities that define the DoD's capacity to act—by impacting DoD physical infrastructure (built and natural), plans, operations, training, and equipment and resource acquisition.³⁵⁶ The list of potential hazards and corresponding mission vulnerabilities that may result from climate change phenomena is extensive. To name but a few, rising temperatures, changes in precipitation patterns, more severe weather, rising sea levels, and changes to ocean temperature or composition might lead to infrastructure decay and destruction; degradation or loss of training ranges and testing venues and environments, including both physical loss of land (e.g., inundation, erosion, and flooding damage) and reduced availability (timing windows) and quality of lands needed for operations, such as cold weather venues; energy grid vulnerability and water supply disruptions; operational training and testing restrictions due to equipment limitations or military personnel health and safety; increased installation energy intensity and operating costs (e.g., fluctuations in heating and cooling demand); reduced equipment carrying capacity; elevated fire hazards and consequent reduced live-fire training; reduced flight operations; increased maintenance on roads and runways; greater demand for flood and fire control measures; increased cost of infrastructure modification; and greater impediments to ecosystem and species management.³⁵⁷ In some cases, the future of entire installations, many of which are strategically critical due to their geographic location or other unique features, may be at risk. It is no surprise, then, that the DoD is currently conducting an assessment of all installations “to assess the potential impacts of climate change

³⁵³ *Id.*; 2014 CCAR, *supra* note 2; *see also* INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, CLIMATE CHANGE 2014: MITIGATION OF CLIMATE CHANGE, *Contribution of Working Group III to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change* (O. Edenhofer et al., eds.); INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, CLIMATE CHANGE 2014 SYNTHESIS REPORT, *Fifth Assessment Report of the Intergovernmental Panel on Climate Change* (1 Nov. 2014), at SYR-29 [hereinafter IPCC Fifth Report]; CLIMATE AND SOCIAL STRESS, *supra* note 24, at 3, 5, 19, 75-96.

³⁵⁴ 2010 QDR, *supra* note 347, at 85.

³⁵⁵ *Id.* at 85.

³⁵⁶ 2014 CCAR, *supra* note 2.

³⁵⁷ 2014 QDR, *supra* note 24, at Table 1; 2014 CCAR, *supra* note 2; 2014 SSPP, *supra* note 4, at I-7.

on our missions and operational resiliency, and [to] develop and implements plans to adapt as required.”³⁵⁸

In Parts II and III, this article will unpack this second category of challenges facing the DoD within the context of water scarcity by looking first at how climate change will affect water availability in the United States broadly, and then looking at how to make sense of the water scarcity picture in terms of the risk to DoD installations.

A. Water Consumption in the United States

To start, though, we need a common picture of water use by all users in the United States—how much we are consuming and for what purposes, and how much is used and then returned to its source for future use.³⁵⁹ This baseline should establish the nature of the demand for water in the United States and where that demand is highest. For those high-demand regions located in areas where water supply and quantity are expected to be most affected by climate change, this baseline will preview where nodes of conflict are likely to arise. From there, we can look more narrowly at water use by the DoD.

According to the latest report of the U.S. Geological Survey (USGS) on water use in the United States, Americans used about 355 billion gallons of fresh and saline water per day (Bgal/d) in 2010.³⁶⁰ Of that total, freshwater withdrawals amounted to 306 Bgal/d (86 percent): 230 Bgal/d from surface water sources, and 76 Bgal/d from groundwater sources.³⁶¹ Three water uses accounted for 90 percent of all withdrawals: thermoelectric power generation, irrigation, and public supply, accounting for withdrawals of 161 Bgal/d (45 percent of total withdrawals, and 38 percent of freshwater withdrawals), 115 Bgal/d (32 percent, and 61 percent of freshwater withdrawals excluding thermoelectric power), and 42 Bgal/d (12 percent, and 22 percent of freshwater withdrawals excluding thermoelectric power), respectively.³⁶² Of total irrigation withdrawals, 65.9 Bgal/d (57 percent) were from surface-water sources; the

³⁵⁸ 2014 QDR, *supra* note 24; *See also* 2014 CCAR, *supra* note 2 (“We are almost done with a baseline survey to assess the vulnerability of our military’s more than 7,000 bases, installations, and other facilities.”).

³⁵⁹ This is simply a survey of available data and is intended only to frame the discussion to follow.

³⁶⁰ Molly A. Maupin et al., U.S. Geological Survey Circular 1405, *Estimated use of water in the United States in 2010* (2014), at 1. USGS issues its report of water use in the United States every five years.

³⁶¹ *Id.*

³⁶² *Id.* The U.S. Geological Survey analyzed eight categories of water use: public-supply, domestic, irrigation, livestock, aquaculture, industrial, mining, and thermoelectric power generation. Self-supplied industrial (15.9 Bgal/d, 4%) and aquaculture (9.42 Bgal/d, 3%) are the largest remaining categories of water withdrawals.

remaining 49.5 Bgal/d were from groundwater sources.³⁶³ Approximately 62,400 thousand acres were irrigated in 2010.³⁶⁴

Public-supply withdrawals were down five percent since 2005 despite a four percent increase in the total U.S. population, from 300.7 million people to 313 million people.³⁶⁵ Approximately 86 percent of the total U.S. population in 2010 received potable water from public-supply facilities.³⁶⁶ Self-supplied domestic water withdrawals were 3.60 Bgal/d in 2010, with more than 98 percent from groundwater sources.³⁶⁷

More than 50 percent of all withdrawals in the United States occurred in just 12 states: California, Texas, Idaho, Florida, Illinois, North Carolina, Arkansas, Colorado, Michigan, New York, Alabama, and Ohio.³⁶⁸ And, water withdrawals in only four States—California, Texas, Idaho, and Florida—accounted for more than one-quarter of all fresh and saline water withdrawn.³⁶⁹ California led the way, accounting for 11 percent of the total surface and groundwater withdrawals for all use categories and 10 percent of total freshwater withdrawals for all categories.³⁷⁰ Approximately 76 percent of all fresh surface water withdrawals and 70 percent of all fresh groundwater withdrawals in California were used for irrigation.³⁷¹ Texas followed California, with roughly seven percent of total water withdrawals for all categories, most of which used for thermoelectric power generation, irrigation, and public supply.³⁷² In Idaho, 81 percent of water withdrawn was used for irrigation, while in Florida, thermoelectric power accounted for 61 percent of water withdrawn.³⁷³

By category, more than 44 percent of withdrawals for irrigation occurred in just four states: California, Idaho, Montana, and Texas.³⁷⁴ Not surprisingly, given state populations, California and Texas withdrew the largest amounts of water for public supply.³⁷⁵ Finally, seven states surpass all others in

³⁶³ *Id.*

³⁶⁴ *Id.*

³⁶⁵ *Id.*

³⁶⁶ *Id.*

³⁶⁷ *Id.*

³⁶⁸ *Id.* at 7.

³⁶⁹ *Id.*

³⁷⁰ *Id.*

³⁷¹ *Id.* at Table 3A; Table 4A.

³⁷² *Id.*

³⁷³ *Id.*

³⁷⁴ *Id.* at Table 2A.

³⁷⁵ *Id.* at Table 2A.

terms of water use for thermoelectric power generation: Texas, Illinois, Florida, North Carolina, Michigan, Ohio, and California.³⁷⁶

It's hard to know what to make of this data in isolation. On the one hand, USGS reports a 13 percent reduction in water use for 2010 compared to 2005, notwithstanding a steady uptick in the population, reversing a consistent trend upward since 1985.³⁷⁷ But some of the data are still missing. For example, the USGS does not measure how much water is consumptively used versus returned to the water source for future use.³⁷⁸ Moreover, while water use may be down nationally, use must be measured against available supply at a regional, state, and local level, since the movement of water over long distances is cost-prohibitive. Therefore it's important to look to how climate-related changes to the water cycle will impact regional water systems and affect the quality and quantity of available water resources.

B. Observable and predicted effects of climate change on the water cycle, globally and in the United States, and how changes to the water cycle will impact water systems and affect the quality and quantity of available water resources

In October 2014, the United Nations Intergovernmental Panel on Climate Change (IPCC) released its Fifth Assessment Synthesis Report on the state of scientific knowledge concerning climate change.³⁷⁹ In its most emphatic language to date, the IPCC found, based on existing observational evidence of climate change, that “warming of the climate is unequivocal.”³⁸⁰ In the United States, average temperatures have risen by about two degrees Fahrenheit in the last half-century.³⁸¹ By the end of the century, the average U.S. temperature is expected to increase four to 11 degrees Fahrenheit, depending on various emissions scenarios.³⁸²

This warming is already having profound effects on the global hydrologic cycle, and the scientific projections of near- and long-term effects on

³⁷⁶ *Id.* at Table 2A.

³⁷⁷ *Id.* at 45.

³⁷⁸ “Withdrawal” as used in the USGS report represents the total amount of water removed from the water source for a particular use, regardless of how much of that total is consumptively used or returned to the hydrologic system for future use. The USGS discontinued estimates of return flows and consumptive use after 1995 because of resource and data constraints.

³⁷⁹ IPCC Fifth Report, *supra* note 353.

³⁸⁰ *Id.* at SYR-5, SYR-13; *See also* KARL, *supra* note 28, at 9 (“Observations show that warming of the climate is unequivocal.”).

³⁸¹ KARL, *supra* note 28, at 28.

³⁸² *Id.* at 29.

the water cycle are ominous.³⁸³ The warming climate has altered global precipitation patterns and caused glaciers to shrink and permafrost to thaw.³⁸⁴ The water cycle in the United States, like the water cycle globally, is experiencing significant changes in precipitation patterns and intensity, snow and ice melt, water runoff, evaporation levels, and changes to soil moisture.³⁸⁵ The impacts of changes to the water cycle on water systems and on water availability and quality in the United States vary from region to region; many complex conditions will drive regional and local model predictions. Still, some broad findings and predictions are possible.

Heat waves and drought conditions have become more frequent and protracted in the Southeast and West.³⁸⁶ Drought conditions are predicted to intensify in the region, where droughts will be more severe and widespread.³⁸⁷ Higher temperatures will generally result in more water evaporation.³⁸⁸ Increased water evaporation means drier soil conditions, greater water demand for irrigation, diminished and depleted surface water, and reduced groundwater aquifer recharge.³⁸⁹ Demand will also likely increase as higher temperatures translate into higher water withdrawals for electrical generation cooling.³⁹⁰ In these drier regions, competition will intensify, and water scarcity and water conflicts will become more common.³⁹¹

In terms of water quality, higher air temperatures will likely result in higher surface water temperatures.³⁹² This may result in algae and bacteria growth and lower levels of dissolved oxygen in the water, threatening aquatic life and disturbing the natural ability of rivers to self-purify.³⁹³ Additionally, where streamflows are lower, pollutants may become increasingly concentrated in the lower water volume of remaining surface and groundwaters.³⁹⁴

³⁸³ IPCC Fifth Report, *supra* note 353, at SYR-14, 15, 27. The hydrologic cycle will not be detailed in this article. It should suffice here that the cycle describes the continuous movement of the Earth's water and includes storage of water in ice, snow, glaciers, oceans, groundwater, freshwater, and in the atmosphere; precipitation; snowmelt; surface runoff; infiltration into groundwater aquifers; and surface and groundwater flow.

³⁸⁴ *Id.* at SYR-14.

³⁸⁵ KARL, *supra* note 28, at 41.

³⁸⁶ *Id.* at 27, 29, 42; *See also* IPCC Fifth Report, *supra* note 353, at SYR-15, SYR-21; USACE WATER SUSTAINABILITY ASSESSMENT, *supra* note 21.

³⁸⁷ IPCC Fifth Report, *supra* note 353, at SYR-27; KARL, *supra* note 28, at 33.

³⁸⁸ KARL, *supra* note 28, at 49.

³⁸⁹ USACE WATER SUSTAINABILITY ASSESSMENT, *supra* note 21, at P-6; KARL, *supra* note 28, at 47.

³⁹⁰ KARL, *supra* note 28, at 49.

³⁹¹ IPCC Fifth Report, *supra* note 353, at SYR-27.

³⁹² KARL, *supra* note 28, at 46.

³⁹³ *Id.*; Kathleen A. Miller, *Climate Change and Water Resources: The Challenges Ahead*, 61 J. INT'L AFFAIRS 35 (Spring/Summer 2008), at 41.

³⁹⁴ IPCC Fifth Report, *supra* note 353, at SYR-27; KARL, *supra* note 28, at 46.

In the Northeast and Midwest, conversely, heavy rainfall events are occurring with greater frequency and intensity, and wetter conditions are predicted.³⁹⁵ In these regions, greater numbers of people will be at risk from major surface water flooding and water contamination.³⁹⁶ Specifically, heavy rain may produce elevated sediment and pollutant loading in run-off (albeit potentially diluted where streamflows are higher), and may overflow drainage systems and overwhelm treatment facilities, causing flooding and affecting the quality of water resources downstream.³⁹⁷ The problem is compounded in areas with impervious surfaces, where precipitation is unable to reach existing aquifers and freshwater shortages can still result.³⁹⁸

In the West, snowpack and near-surface permafrost have diminished, and spring snowmelt is occurring earlier in the year.³⁹⁹ A shortened snow season and earlier spring snowmelt and runoff will result in early spring peak flow and reduced late-season water supplies.⁴⁰⁰ The resulting early, and lower, runoff has significant consequence on the water supply in the West, as Western state populations are among more than half of the world's population who rely on snowpack runoff to meet water resource demands.⁴⁰¹

Arctic sea ice is expected to recede year-round; glacier volume is projected to decline anywhere from 15-85% depending on scenarios and modeling, increasing runoff into glacier-fed rivers and changing river discharge patterns.⁴⁰² Finally, while sea-level rise will continue to vary by region, a two-foot rise in global sea level by the end of the century—which is a reasonable possibility—would have dramatic consequences on broad segments of the U.S. shoreline, affecting major cities and critical defense installations.⁴⁰³ Rising sea levels also make it far more likely that saline water will seep into fresh groundwater aquifers.⁴⁰⁴

³⁹⁵ KARL, *supra* note 28, at 9, 33; *See also* IPCC Fifth Report, *supra* note 353, at SYR-15, SYR-22, SYR-27.

³⁹⁶ IPCC Fifth Report, *supra* note 353, at SYR-27.

³⁹⁷ *Id.*

³⁹⁸ USACE WATER SUSTAINABILITY ASSESSMENT, *supra* note 21, at 150.

³⁹⁹ KARL, *supra* note 28, at 33; *See also* IPCC Fifth Report, *supra* note 353, at SYR-22; USACE WATER SUSTAINABILITY ASSESSMENT, *supra* note 21, at P-6.

⁴⁰⁰ IPCC Fifth Report, *supra* note 353, at SYR-22; USACE WATER SUSTAINABILITY ASSESSMENT, *supra* note 21, at P-6; Miller, *supra* note 393, at 41.

⁴⁰¹ KARL, *supra* note 28, at 33, 106.

⁴⁰² IPCC Fifth Report, *supra* note 353.

⁴⁰³ *See supra* note 28.

⁴⁰⁴ USACE WATER SUSTAINABILITY ASSESSMENT, *supra* note 21, at P-6; Miller, *supra* note 393, at 41.

Observed Water-Related Changes During the Last Century		
Observed Change	Direction of Change	Region Affected
One to four week earlier peak streamflow due to earlier warming-driven snowmelt	Earlier	West and Northeast
Proportion of precipitation falling as snow	Decreasing	West and Northeast
Duration and extent of snow cover	Decreasing	Most of the United States
Mountain snow water equivalent	Decreasing	West
Annual precipitation	Increasing	Most of the United States
Annual precipitation	Decreasing	Southwest
Frequency of heavy precipitation events	Increasing	Most of the United States
Runoff and streamflow	Decreasing	Colorado and Columbia River Basins
Streamflow	Increasing	Most of East
Amount of ice in mountain glaciers	Decreasing	U.S. western mountains, Alaska
Water temperature of lakes and streams	Increasing	Most of the United States
Ice cover on lakes and rivers	Decreasing	Great Lakes and Northeast
Periods of drought	Increasing	Parts of West and East
Salinization of surface waters	Increasing	Florida, Louisiana
Widespread thawing of permafrost	Increasing	Alaska

Figure 1: Observed Water-Related Changes During the Last Century⁴⁰⁵

C. How changes to water availability and quality are compounded by other factors, such as population growth, competition among water needs, and infrastructure decay

The problems of reduced supplies of surface and groundwater, as well as increased contamination and salinization of water sources, are further complicated by population growth, water competition, and infrastructure decay, making the water scarcity picture even direr. The U.S. population is expected to reach 350 million people by 2025, and 420 million by 2050, with the largest growth projected in the Southwest and other areas at heightened risk for inadequate supplies of water.⁴⁰⁶ In the last decade, population growth has accelerated much faster in southern and western states (14.3 and 13.8 percent, respectively) compared to midwestern and northeastern states (3.9 percent and 3.2 percent, respectively).⁴⁰⁷ In additionally, in many parts of the country the

⁴⁰⁵ KARL, *supra* note 28, at 43, *citing* INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, CLIMATE CHANGE AND WATER (B.C. Bates et al., eds, 2008).

⁴⁰⁶ KARL, *supra* note 28, at 48.

⁴⁰⁷ U.S. Geological Survey Circular 1405, *supra* note 360, at 44.

water delivery and wastewater removal infrastructure is in decay and disrepair.⁴⁰⁸ In regions where heavier precipitation events are likely, these aging stormwater and sewer systems already prone to overflows will face increasing stress and may be taxed to failure.⁴⁰⁹ Finally, we have yet to fully address existing competing claims to limited water resources among water needs for farming, municipalities, hydropower, recreation, and ecosystems. Climate change only exacerbates these existing water management challenges.⁴¹⁰

D. Increased competition for scarce water resources

Naturally, water scarcity will lead to increased competition over water resources. In the Southwest, in particular, the U.S. Bureau of Reclamation has identified several regions where water supply conflicts are highly likely to occur by 2025 (Figure 2).⁴¹¹

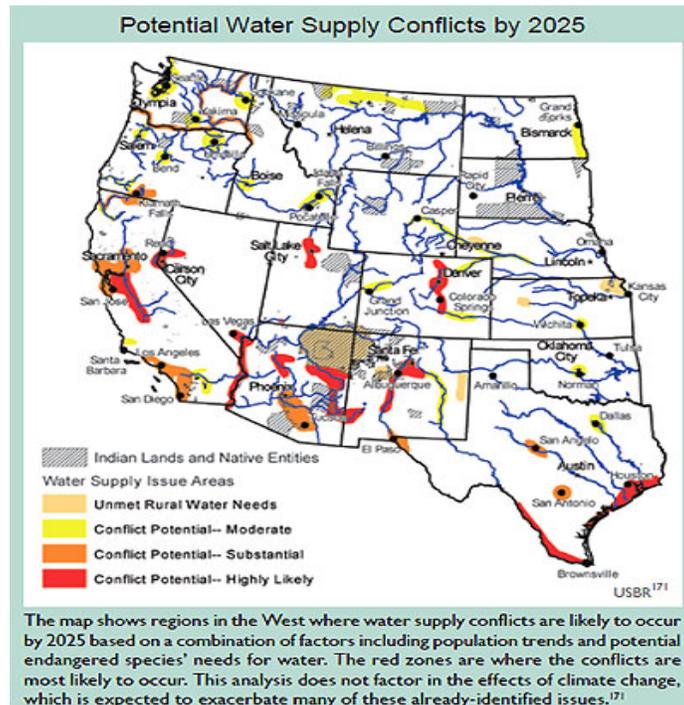


Figure 2: Potential Water Supply Conflicts by 2025 ⁴¹²

⁴⁰⁸ KARL, *supra* note 28, at 48.

⁴⁰⁹ *Id.*

⁴¹⁰ *Id.* at 47.

⁴¹¹ *Id.* at 48, *citing* U.S. BUREAU OF RECLAMATION, WATER 2025: PREVENTING CRISES AND CONFLICT IN THE WEST (2005).

⁴¹² *Id.*

And, in some parts of the United States, water disputes are already a significant problem. As Figure 3 illustrates, interstate and other disputes, including disputes over Indian water rights, have flared all over the country.

Interstate and International Water Disputes	
Apalachicola-Chattahoochee-Flint River System, Alabama-Coosa-Taalapoosa River Basin	Dispute between Georgia, Alabama, and Florida that, among other water uses in conflict, concerns the adequacy of the water supply for the metro-Atlanta area
Rio Grande	International dispute regarding U.S.-Mexico water sharing, and interstate disputes between New Mexico and Texas over violation of the water allocation compact between Texas, New Mexico, and Colorado.
Upper Klamath River Basin	Dispute between Klamath Tribes, farmers, environmentalists, and government agencies over the allocation of Klamath Basin waters
Sacramento-San Joaquin Delta	Conflicts over the use of the Delta, a major potable water supply source for the State of California, and harm to its unique ecosystem
Colorado River Basin	Interstate and international conflicts over the allocation of the Colorado's water, which is depended upon by Wyoming, Utah, Colorado, Nevada, New Mexico, Arizona, and California and which supports major U.S. cities including Denver, Las Vegas, Phoenix and San Diego.

Figure 3: Interstate and International Water Disputes⁴¹³

III. The Effects of Water Scarcity on the Domestic National Defense Infrastructure

A. The missions and functions of domestic military installations

To understand the effects of water scarcity on our domestic national defense infrastructure, it is helpful to first have a basic grasp of the DoD's core mission areas and how defense installations support successful execution of the DoD's mission. Beyond major combat operations, the DoD defines its core missions to include homeland defense and civil support, deterrence operations, irregular warfare, military support to stabilization security, transition and reconstruction operations, and military contribution to cooperative security.⁴¹⁴ The DoD also identifies "core competencies" that link these core missions to the DoD's capabilities. Among them are logistics and force support, including establishing and maintaining a mission-ready military force and capable military installations to support national security requirements.⁴¹⁵ For the DoD, "national security depends on our defense installations and facilities being in the

⁴¹³ *Id.*

⁴¹⁴ DEPARTMENT OF DEFENSE QUADRENNIAL ROLES AND MISSIONS REVIEW REPORT (January 2009), at 5-6 [hereinafter 2009 QRM].

⁴¹⁵ *Id.* at 7.

right place, at the right time, with the right qualities and capacities” to support current and future mission requirements.⁴¹⁶

U.S. military installations and their associated environment serve many purposes. They sustain U.S. military personnel stationed at the installation; concentrate and facilitate forward-deployment of personnel, supplies, and equipment; provide training and test space to ensure personnel are trained and equipped to accomplish the mission; and provide essential quality-of-life support to service members, their families, and the civilian workforce.⁴¹⁷ Fundamentally, our installations are “power projection platforms”; they are nuclei of military life and training and staging areas for humanitarian and homeland defense missions conducted in support of the national security strategy of the United States.⁴¹⁸

B. Water as a key resource to support the domestic national defense infrastructure⁴¹⁹

Successful execution of the DoD’s mission demands considerable energy, land, air, and water resources, not only in terms of continued physical access to land, air, waterways and sea space, although such access is also threatened by climate change, but also in terms of quantity and quality of these resources; these assets must be readily available at the right locations, in the right quantities, and of sufficient quality to maintain military operations.⁴²⁰ For the DoD, “[t]he principal purpose of DOD lands, waters, airspace, and coastal resources is to support mission-related activities.”⁴²¹

Water, and particularly potable freshwater, is a mission-critical resource for military operations, both in the expeditionary environment and at fixed installations.⁴²² An adequate supply of potable water is essential for personal consumption, hygiene, sanitation, food preparation, and medical

⁴¹⁶ U.S. DEPARTMENT OF DEFENSE, 2007 DEFENSE INSTALLATIONS STRATEGIC PLAN, <http://www.acq.osd.mil/ie/index.html>; <http://www.defense.gov/about/#mission> [hereinafter 2007 DISP].

⁴¹⁷ 2007 DISP, *supra* note 416.

⁴¹⁸ 2014 CCAR, *supra* note 2.

⁴¹⁹ The term “key resources” as used by the DoD refers to resources essential to basic operations, but is used herein to refer specifically to water supply, treatment and distribution; wastewater collection, treatment, and disposal; and stormwater systems. *See* JOINT CHIEFS OF STAFF, JOINT PUB. 1-02, DOD DICTIONARY OF MILITARY AND ASSOCIATED TERMS (8 Nov. 2010).

⁴²⁰ 2014 SSPP, *supra* note 4.

⁴²¹ DEPARTMENT OF DEFENSE INSTRUCTION 4715.03, NATURAL RESOURCES CONSERVATION PROGRAM (Mar. 18, 2011).

⁴²² 2014 SSPP, *supra* note 4.

care.⁴²³ Water is equally important for equipment maintenance, energy production, and firefighting.⁴²⁴ Water is also a necessary commodity for suppliers who produce goods and services for the DoD, and for energy processes that supply essential power to DoD installations.⁴²⁵ Without adequate water, the daily operations of DoD installations are impossible; it is as valuable a commodity as any fuel source. Without it, military readiness cannot be sustained, and military installations are unable to serve as “power projection platforms” to support current and future military operations.

Take for example the southwestern United States, a region projected to experience more frequent heat waves and droughts, and relatedly, increasing water supply conflicts in coming decades.⁴²⁶ The Southwest is home to some 967 DoD sites, occupying a vast 17,449,086 acres of land.⁴²⁷ The largest ranges in the region include the Nellis Range Complex (Nevada Test and Training Range) (3,092,317 acres), White Sands Missile Range in New Mexico (2,293,431 acres), and the Barry M. Goldwater Range in Arizona (1,753,512 acres).⁴²⁸ Approximately 698,728 DoD personnel live and work in the Southwest.⁴²⁹ Of that number, 347,964 are on active duty, representing nearly one fourth of all active-duty personnel.⁴³⁰ Personnel are stationed throughout the region, including concentrations at several large installations. The largest Army installation in the Southwest, Fort Hood, Texas is home to 48,141 personnel (only Fort Bragg in North Carolina and Fort Campbell in Kentucky are more populous).⁴³¹

⁴²³ *Id.*

⁴²⁴ *Id.*

⁴²⁵ *Id.* at I-7.

⁴²⁶ IPCC Fifth Report, *supra* note 353, at SYR-27; KARL, *supra* note 28, at 33, 48, *citing* U.S. BUREAU OF RECLAMATION, WATER 2025: PREVENTING CRISES AND CONFLICT IN THE WEST (2005).

⁴²⁷ 2014 BSR, *supra* note 8. For purposes of this article, the Southwest is roughly defined as comprising eight states: California, Nevada, Utah, Arizona, Colorado, New Mexico, Oklahoma, and Texas. Total acreage: California: 3,838,554 (land share: 3.85%); Nevada: 3,532,126 (5.03%); Utah: 1,814,893 (3.45%); Arizona: 3,583,066 (4.93%); Colorado: 240,186 (0.36%); New Mexico: 3,643,513 (4.69%); Oklahoma: 190,359 (0.43%); and Texas: 495,002 (0.30%).

⁴²⁸ *Id.* Other significant training ranges include Yuma Proving Ground in Arizona (1,008,913 acres), the Utah Test and Training Range (North and South) (939,533 acres), and the Dugway Proving Ground (798,214 acres).

⁴²⁹ *Id.*

⁴³⁰ *Id.* Total personnel: California: 234,764 (118,555 active duty); Nevada: 21,022 (11,218 active duty); Utah: 27,940 (4,016 active duty); Arizona: 43,422 (20,500 active duty); Colorado: 64,937 (36,927 active duty); New Mexico: 24,731 (12,956 active duty); Oklahoma: 57,965 (21,576 active duty); and Texas: 223,947 (122,216 active duty).

⁴³¹ *Id.*

Installations (by population)	
Fort Hood (Texas)	48,141
Fort Carson (Colorado)	33,005
Lackland AFB (Texas)	32,116
Fort Bliss (Texas)	31,902
Tinker AFB (Oklahoma)	25,352
Naval Station San Diego (California)	23,293
Fort Sam Houston (Texas)	21,256
Hill AFB (Utah)	16,265
Naval Amphibious Base Coronado (California)	16,188
Fort Sill (Oklahoma)	15,710
Nellis AFB (Nevada)	12,960
Travis AFB (California)	11,690
Marine Corps Air Station Miramar (California)	10,949
Peterson AFB (Colorado)	10,233
North Island Naval Air Station (California)	9,821
Davis-Monthan AFB (Arizona)	9,150
Kirtland AFB (New Mexico)	8,063
Fort Huachuca (Arizona)	7,471
Fort Irwin (California)	5,256
Holloman AFB (New Mexico)	4,748

Figure 4: Installations by Personnel Population (2014)⁴³²

⁴³² *Id.*

Sustained drought and high-heat conditions have already had an impact on daily operations at many of these installations, and future drought conditions may make certain operations or activities impracticable or impossible.

C. Water Use by the Department of Defense

Within the federal government, the DoD is the largest water consumer.⁴³³ In FY13, the DoD consumed over ninety-one billion gallons of potable water, roughly sixty-eight percent of all federal potable water consumption.⁴³⁴ Of course, this is largely a function of scale and mission set. The DoD is the largest federal government agency, employing more than 1.4 million active duty personnel, over 700,000 civilian personnel, and 1.1 million National Guard and Reserve forces.⁴³⁵ The DoD also manages a vast real property portfolio. Worldwide, as of the end of FY13, the DoD managed nearly 24.7 million acres of land, comprised of over 562,000 facilities located on over 4800 sites.⁴³⁶ This property includes 284,458 buildings and 2.2 billion square feet of building space.⁴³⁷ Additionally, unique to the DoD, a large percentage of its personnel live on DoD-managed land. Roughly 37 percent of military families live on base, occupying 379 million square feet of family housing, 257 million square feet of community facilities, and 273 million square feet of housing and mess facilities.⁴³⁸ Consequently, DoD water use data encompasses official agency uses as well as domestic use.⁴³⁹

⁴³³ U.S. DEP'T OF ENERGY, ANNUAL REPORT ON FEDERAL GOVERNMENT ENERGY MANAGEMENT AND CONSERVATION PROGRAMS, FISCAL YEAR 2011 (Mar. 2014).

⁴³⁴ 2013 AEMR, *supra* note 8.

⁴³⁵ U.S. DEPARTMENT OF DEFENSE, ABOUT THE DEPARTMENT OF DEFENSE, <http://www.defense.gov/about>; CURTIS W. COPELAND, THE FEDERAL WORKFORCE: CHARACTERISTICS AND TRENDS, CONGRESSIONAL RESEARCH SERVICE (Apr. 19, 2011), http://assets.opencrs.com/rpts/RL34685_20110419.pdf.

⁴³⁶ 2014 BSR, *supra* note 8. The vast majority of sites, 4,279, are in the United States or U.S. territories.

⁴³⁷ *Id.*

⁴³⁸ THE WHITE HOUSE, *Strengthening Our Military Families: Meeting America's Commitment* (Jan. 2011), http://www.defense.gov/home/features/2011/0111_initiative/strengthening_our_military_january_2011.pdf; 2014 BSR, *supra* note 8. This includes buildings that are privatized or operated by private entities.

⁴³⁹ 2014 BSR, *supra* note 8. Although this is true in general terms, in some instances in which family housing is privatized, water use associated with family housing may not be reported to the DoD as water consumed by the military department. See, e.g., 2013 ARMY NET ZERO, *supra* note 21.

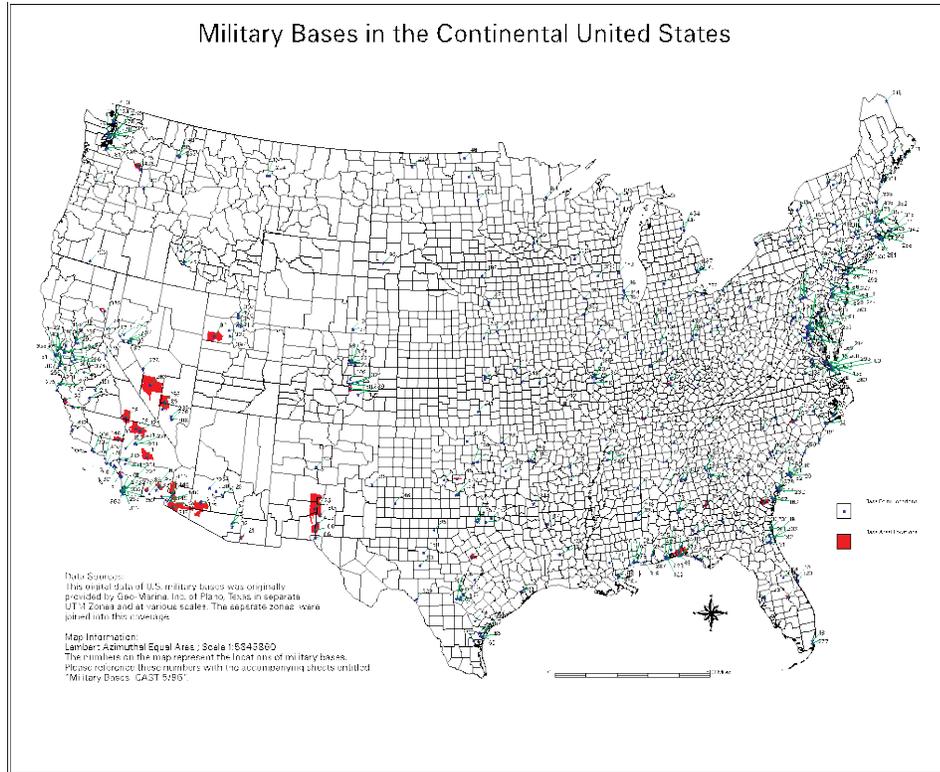


Figure 5: Military Bases in the Continental United States⁴⁴⁰

When one examines the DoD’s water consumption as a function of the gross square feet (GSF) managed, the DoD uses 47.8 gallons/GSF.⁴⁴¹ DoD use is actually eclipsed by five other federal agencies: the Departments of Justice (139.1 gallons/GSF), Health and Human Services (60.2 gallons/GSF), Energy (54.1 gallons/GSF), Interior (54 gallons/GSF), and NASA (51.5 gallons/GSF).⁴⁴² Additionally, the DoD’s potable water consumption is down

⁴⁴⁰ DEP’T OF THE INT., NAT. PARK SERV., <http://www.nps.gov/nagpra/documents/BASES.PDF>.

⁴⁴¹ U.S. DEP’T OF ENERGY, COMPREHENSIVE ANNUAL ENERGY DATA AND SUSTAINABILITY PERFORMANCE, FEDERAL AGENCY POTABLE WATER USE PER GROSS SQUARE FOOT, FY 2007 AND FY 2013, <http://ctsedweb.ee.doe.gov/Annual/Report/FederalAgencyPotableWaterUsePerGrossSquareFootComparedToFY2007.aspx> [hereinafter DOE Annual Energy Data].

⁴⁴² *Id.*

19.8% from FY07 – a significant differential when assessing progress in meeting water sustainability goals.⁴⁴³

In addition to potable water consumption, the DoD used 15.7 billion gallons of industrial, landscaping and agricultural (ILA) water, or roughly thirteen percent of all federal ILA use.⁴⁴⁴ Although the DoD's ILA water use is far exceeded by the Tennessee Valley Authority and other federal agencies, trended use is on the rise, up thirty-three percent between FY10 and FY13.⁴⁴⁵

D. Complicating Factors

Conceptually, then, it is not difficult to imagine how water scarcity might impact our domestic national defense critical infrastructure and, therefore, pose considerable risk to our ability to maintain the effectiveness and operational readiness of our armed forces, preserve the nation's physical integrity and territory, and project national power. Water scarcity can lead to reduced operations, increased capital and operating costs, relocation of missions, undue dependence on outside sources and reliance on multijurisdictional interests, conflicts with other regional water use in other economic sectors (agriculture, industry, energy production), and dependence on regional land development and use, particularly upstream and above aquifers.

But water scarcity is not an abstract projection. Water issues, including adequate supply, cost, and quality, are already impacting installations throughout the United States.⁴⁴⁶ Installations in arid portions of the West have already begun to implement aggressive water conservation and reuse measures.⁴⁴⁷

The picture is complex, and that complexity needs to be understood in order to determine the effectiveness of a strategy that involves securing state and federal water rights, or potentially calling for a broader federal water right for national defense. A recent study by the U.S. Army Corps of Engineers (USACE) on water sustainability at ten Army installations provides a helpful survey of water sustainability conditions across the United States.⁴⁴⁸ For each of the ten installations studied, USACE assessed the size and primary mission of the installation, the regional characterization, demographic trends in the region,

⁴⁴³ *Id.*

⁴⁴⁴ *Id.*

⁴⁴⁵ *Id.*

⁴⁴⁶ 2014 CCAR, *supra* note 2; USACE WATER SUSTAINABILITY ASSESSMENT, *supra* note 21.

⁴⁴⁷ 2014 CCAR, *supra* note 2.

⁴⁴⁸ USACE WATER SUSTAINABILITY ASSESSMENT, *supra* note 21.

the water source(s) on which the installation depends, areas of conflict, regional topography and geology, land use, historical demand, the projected thirty-year regional and installation demand for water, and vulnerability of the region and installation to water scarcity.⁴⁴⁹ A second study, conducted by Pacific Northwest National Laboratory for the U.S. Army, looked at predominant water uses on Army installations participating in the Army's "Net Zero" water use pilot program, and assessed their vulnerability vis-à-vis the regional water supply.

Several general observations from these studies and other recent reports are important here. These observations are not particularly surprising, but they do highlight the complexity of the challenges facing the DoD and the need for regional and installation-specific solutions.

1. Installations vary considerably in available water sources

Some installations use on-site surface or groundwater; others rely on water procured from third parties, including government entities and utilities; still others use alternative sources, including rainwater, sump pump, greywater, air cooling condensate, reject water from purification systems, and water reclaimed on site. For example, one of the largest and most populous military installations, Fort Benning, Georgia, depends entirely on the Chattahoochee River for its water supply, a resource shared with the Fort's neighboring communities.⁴⁵⁰ Thus, the amount and quality of the water available to the Fort is impacted by the upstream withdrawals and returns of the seven counties in the region.⁴⁵¹ Additionally, the Chattahoochee River is part of the Apalachicola–Chattahoochee–Flint River system, which, as discussed in Part II, is the subject of a continuing dispute between Georgia, Alabama, and Florida.⁴⁵²

Conversely, Fort Hood (Texas) draws exclusively from Belton Lake, a USACE flood-control reservoir on the Leon River.⁴⁵³ Fort Irwin, California, in comparison, is supported entirely by groundwater pumped from basins located within or connected to the Fort's boundaries.⁴⁵⁴ Fort Irwin's groundwater supply is geologically disconnected from basins from which the surrounding community draws its water, but if the Fort requires a future water source, it will likely face competition from growing communities in the region.⁴⁵⁵ Fort Riley,

⁴⁴⁹ *Id.*

⁴⁵⁰ *Id.* at 15.

⁴⁵¹ *Id.* at 24, 28.

⁴⁵² *Id.* at 20.

⁴⁵³ *Id.* at 95, 108.

⁴⁵⁴ *Id.* at 110.

⁴⁵⁵ *Id.* at 112, 113.

Kansas, likewise draws on groundwater, relying on alluvial aquifers along the Republican River, a river subject to an ongoing dispute between Kansas, Nebraska, and Colorado.⁴⁵⁶ Camp Shelby, Mississippi relies entirely on groundwater drawn from layers of sand under the Camp.⁴⁵⁷ Finally, Fort Carson, Colorado, purchases all of its water from the municipal water company, Colorado Springs Utilities.⁴⁵⁸

2. Water sources have varying characteristics

Groundwater and surface water systems can be interconnected, such that changes to surface water volume or quality will have parallel effects in groundwater, and water can move naturally between watersheds.⁴⁵⁹ Additionally, the size, depth, and quality of rivers and aquifers vary.⁴⁶⁰ Finally, some aquifers recharge naturally, while others do not, and aquifer recharge can be inhibited by surface conditions.⁴⁶¹ Joint Base Lewis-McChord (JBLM), Washington, is illustrative. JBLM draws water from eleven groundwater wells and a spring source, and the aquifers are shared with other local users.⁴⁶² Although the joint base is located in a region where precipitation is expected to increase due to climate change, this increase in precipitation will not result in aquifer recharge due to impervious surfaces in the region.⁴⁶³ Instead, the expected precipitation is predicted to cause storm sewers to flood, possibly causing further contamination of usable water supplies.⁴⁶⁴

3. Particularly for installations that rely on groundwater, the quantity of available water in a given aquifer may be unknown

In such circumstances, the “safe yield”—the amount of water an aquifer can yield without being depleted—is uncertain.⁴⁶⁵ For example, in the case of Fort Riley, discussed above, the Fort and the surrounding region already overdraw water from the alluvial aquifers. If overdrawing continues, water scarcity will result.⁴⁶⁶ But the total amount of water contained within the aquifers is unknown, so “it is unclear how severe the current water recharge

⁴⁵⁶ See *Kansas v. Nebraska and Colorado*, No. 22O126 ORG (docketed May 26, 1998)

⁴⁵⁷ USACE WATER SUSTAINABILITY ASSESSMENT, *supra* note 21, at 183.

⁴⁵⁸ *Id.* at 67.

⁴⁵⁹ ARMY WATER SECURITY STRATEGY, *supra* note 9, at 11; KARL, *supra* note 28, at 47.

⁴⁶⁰ ARMY WATER SECURITY STRATEGY, *supra* note 9, at 11; GETCHES, *supra* note 42, at 260.

⁴⁶¹ ARMY WATER SECURITY STRATEGY, *supra* note 9, at 11.

⁴⁶² USACE WATER SUSTAINABILITY ASSESSMENT, *supra* note 21, at 141.

⁴⁶³ *Id.* at 150.

⁴⁶⁴ *Id.* at 152.

⁴⁶⁵ GETCHES, *supra* note 42, at 260.

⁴⁶⁶ USACE WATER SUSTAINABILITY ASSESSMENT, *supra* note 21, at 178-179.

deficit is.”⁴⁶⁷ Similarly, the JBLM region discussed above is already drawing water faster than the current rate of aquifer recharge, and the amount of water available in the Puget Sound regional aquifer system is unknown.⁴⁶⁸ In cases such as these where the scope of the threat of water scarcity is not fully known, it may not be possible to reasonably anticipate whether water scarcity will require the installation to reduce or relocate operations, or will increase capital and operating costs for water.

4. The DoD is one user among many in the same watershed, and the behavior of others can directly affect the quantity and quality of water available

As mentioned, Fort Benning, Georgia, depends entirely on the Chattahoochee River for its water supply, and, Georgia being a regulated riparian jurisdiction, the supply and quality of water available to the Fort is impacted by the upstream withdrawals and returns of the Fort’s neighboring communities.⁴⁶⁹ Fort Benning’s water security, therefore, depends largely on outside actors. Reliance on the Chattahoochee River, additionally, means that the Fort’s water availability is subject to ongoing interstate disputes.⁴⁷⁰ Similarly, unilateral action by individual military installations to secure water resources can have a significant effect on water sustainability in the watershed, impairing or impeding other important water uses off the installation.⁴⁷¹

5. Installations and ranges are sometimes vast, crossing jurisdictional lines and watersheds, and are therefore potentially subject to jurisdictional or other limitations on water use throughout the installation

Fort Bliss and its adjoining anti-aircraft artillery ranges span 1,117,531 acres, or 1746 square miles, in Texas and New Mexico.⁴⁷² Nellis Air Force Base, Nevada, is approximately 14,160 acres in size, but the nearby Nevada Test and Training Range comprises 3,092,317 acres, or 4832 square miles.⁴⁷³ Naval Air Weapons Station China Lake, California, comprises 1,100,000 acres – 1719 square miles, an area larger than the State of Rhode Island.⁴⁷⁴ Similarly, Fort

⁴⁶⁷ *Id.* at 178-179.

⁴⁶⁸ *Id.* at 150.

⁴⁶⁹ *Id.* at 15.

⁴⁷⁰ *Id.* at 20.

⁴⁷¹ ARMY WATER SECURITY STRATEGY, *supra* note 9, at 12.

⁴⁷² 2014 BSR, *supra* note 8.

⁴⁷³ *Id.*

⁴⁷⁴ *Id.*; DEPARTMENT OF THE NAVY, NAVAL AIR WARFARE CENTER WEAPONS DIVISION, <http://www.navair.navy.mil/nawc wd>.

Irwin and Twentynine Palms Marine Corps Air Ground Combat Center, both in California, each occupy nearly 1000 square miles in the Mojave Desert.⁴⁷⁵ Setting aside the major training ranges, installations are often vast complexes. Fort Hood, Texas, covers 335 square miles, and Edwards Air Force Base, California, stretches for roughly 482 square miles.⁴⁷⁶

Relatedly, state boundaries also do not correspond neatly with the boundaries of water sources.⁴⁷⁷ These interstate waters implicate multiple jurisdictions, increasing the complexity of rights determinations and water management.⁴⁷⁸ For example, courts in some states decline to adjudicate claims involving water use in another state.⁴⁷⁹ Where courts do consider such claims, they can be complicated by source of law issues, such as variations in state water rights laws between riparian and appropriative states.⁴⁸⁰ This issue is further complicated in general stream adjudications, which require all affected users on a stream be joined, including the United States.⁴⁸¹ Enforcement problems can also arise, and are often exacerbated, in interstate water disputes.⁴⁸² As a result of these complications, allocation of interstate waters might have to be accomplished through a private suit brought by a State on behalf of its citizens, through adjudication between States, or through an interstate compact.⁴⁸³

6. In many cases, the DoD does not own or fully control the land on which an installation sits, and just as importantly, DoD installations are in some cases a “checkerboard” of acquired lands, reserved lands, and even leased lands⁴⁸⁴

The DoD exercises control over approximately 24.7 million acres of land worldwide, ninety-eight percent of which is located in the United States.⁴⁸⁵ According to the latest DoD Base Structure Report, 14.5 million acres (fifty-

⁴⁷⁵ *Id.*

⁴⁷⁶ Even smaller installations are not insignificant. Kirtland Air Force Base (New Mexico) and Holloman Air Force Base (New Mexico) cover 68 and 84 square miles respectively, Lackland Air Force Base (Texas) covers 50 square miles, Naval Air Station Lemoore (California) covers 45 square miles, and Hill Air Force Base (Utah) comprises 25 square miles. 2014 BSR, *supra* note 8; DEP'T OF THE AIR FORCE, AIR FORCE TEST CENTER FACT SHEET, <http://www.edwards.af.mil/library/factsheets/factsheet.asp?id=6573>.

⁴⁷⁷ GETCHES, *supra* note 42, at 428.

⁴⁷⁸ *Id.* at 428-429.

⁴⁷⁹ *Id.*

⁴⁸⁰ *Id.* at 430.

⁴⁸¹ *Id.*

⁴⁸² *Id.* at 432.

⁴⁸³ *Id.* at 428-443.

⁴⁸⁴ The Mountain Home AFB and Fort Huachuca examples are illustrative.

⁴⁸⁵ 2014 BSR, *supra* note 8.

nine percent) are fee-owned lands.⁴⁸⁶ An additional one percent is leased property, and the remaining forty percent, 9.9 million acres, is classified as “other”— a classification that includes lands otherwise possessed by the DoD, including withheld public land.⁴⁸⁷ Notwithstanding these figures, which have some variability from year to year, the oft-cited total public land withdrawn for military purposes is approximately sixteen million acres.⁴⁸⁸ This is important for a few reasons. First, many DoD installations, training areas, and ranges that are critical to military readiness are situated wholly or partially on withdrawn public lands.⁴⁸⁹ For example, Naval Air Station Fallon, Nevada, comprises 234,124 acres, of which 204,953 are withdrawn public lands.⁴⁹⁰ Likewise, most of the 2.4 million acres that comprise Fort Bliss and White Sands Missile Range are withdrawn public lands.⁴⁹¹ In some locations fee-owned lands and withdrawn lands are interspersed.⁴⁹² Second, and relatedly, when lands are withdrawn for military purposes, the withdrawal may not always establish a reservation with respect to any water or water right on the withdrawn land. For example, the Military Land Withdrawals Act of 2013, enacted as part of the FY14 National Defense Authorization Act, provides that nothing in the Act “establishes a reservation in favor of the United States with respect to any water or water right on the land withdrawn and reserved by this title.”⁴⁹³

⁴⁸⁶ *Id.*

⁴⁸⁷ 2014 BSR, *supra* note 8. By law, Congress must authorize military land withdrawals of 5,000 acres or more for any one defense project or facility. See Engle Act, Pub. L. No. 85-337 (1958).

⁴⁸⁸ S. Rep. No. 113-159, at 5 (2014); *Hearing on S. 753, Boundary Solutions at White Sands Missile Range and Fort Bliss, S. 1169, Limestone Hills Training Area Withdrawal Act, and S. 1309, Military Land Withdrawals Act Before the Subcomm. on Public Lands, Forests and Mining* (statement of Ned Farquhar, Deputy Assistant Secretary, Land and Minerals Management, Department of the Interior), July 30, 2013; *Hearing on H.R. 4253, Bureau of Land Management Withdrawn Military Lands Efficiency and Savings Act Before the Subcomm. on Public Lands & Environmental Regulation* (statement of Ned Farquhar, Deputy Assistant Secretary, Land and Minerals Management, Department of the Interior) (Mar. 25, 2014).

⁴⁸⁹ Statement of Ned Farquhar, *supra* note 488.

⁴⁹⁰ *Id.*

⁴⁹¹ *Id.* citing Public Land Order (PLO) 833 and Pub. L. No. 106-65.

⁴⁹² MEMORANDUM OF UNDERSTANDING BETWEEN THE DEPARTMENT OF DEFENSE AND THE DEPARTMENT OF THE INTERIOR ON RENEWABLE ENERGY AND A RENEWABLE ENERGY PARTNERSHIP PLAN, July 20, 2012.

⁴⁹³ Nat. Def. Auth. Act for Fiscal Year 2014, Pub. L. No. 113-66, § 2917 (2014).

7. The functions of each installation are diverse and mutable, the water needs of the installation can vary in quantity and importance, and water usage can therefore fluctuate, so anticipated long-term water requirements can be hard to quantify⁴⁹⁴

Indeed, we may not even be accurately accounting for water needs now. Since 1996, the DoD has increasingly privatized on-base housing, and that has resulted in water demand for household use not being counted as part of the installation's total water demand.⁴⁹⁵ And, water use by the roughly sixty percent of personnel and their families who live off-base isn't calculated in the DoD's water demand estimates either. That's problematic, in that the overall water needs of the installation—the water the base needs to maintain its operations—needs to account for water required to support the population brought into the region to accomplish the military mission. An “inside-the-fence line” approach is simply inadequate. One retired officer, addressing the effects of climate-related flooding in Norfolk, commented that “[t]o save the base, you have to save the region.”⁴⁹⁶ That same principle certainly holds true in addressing water demand. It is not DoD water consumption in a pure sense, but it is certainly part of the DoD's water security picture, and no state or federal water rights held by the DoD are likely to address this private consumption.

8. Critical water infrastructure may also be outside of the DoD's ownership or control

Beginning in 1997, the DoD began efforts to privatize all on-base utility systems, including water and wastewater removal, to allow installation commanders to focus on core defense missions and functions.⁴⁹⁷ Returning to

⁴⁹⁴ Cianci et al., *supra* note 85, at 162.

⁴⁹⁵ The Military Housing Privatization Initiative adopted by Congress in 1996 authorizes the military departments to enter into agreements with private housing developers to provide housing for service members. As a result, a growing number of military housing units are under private sector management and control. While the military departments can exercise some authority via contract, the developer assumes responsibility for management and maintenance of these properties. In just a few examples, privatized housing units have been constructed at Fort Bliss (3,227 units), Fort Hood (5,912 units), Naval Air Station Fallon (3,532 units), Camp Pendleton (10,975 units), Naval Complex San Diego (14,265 units), Marine Corps Air Station Yuma (10,375 units), and White Sands Missile Range (3,408 units). Nat'l Def. Auth. Act for Fiscal Year 1996, Pub. L. No. 104-106 (1996), 110 Stat. 186, § 2801 et. seq.; OFFICE OF THE DEPUTY UNDER SECRETARY OF DEFENSE FOR INSTALLATIONS AND ENVIRONMENT, DEPARTMENT OF DEFENSE, MILITARY HOUSING PRIVATIZATION, <http://www.acq.osd.mil/housing/projmap.htm>.

⁴⁹⁶ Goodell, *supra* note 28 (quoting Captain Joe Bouchard, former Commander, Naval Station Norfolk).

⁴⁹⁷ OFFICE OF THE DEPUTY SECRETARY OF DEFENSE, DEPARTMENT OF DEFENSE, DEFENSE REFORM INITIATIVE DIRECTIVE (DRID) NO. 9 (Dec. 1997); OFFICE OF THE DEPUTY SECRETARY OF DEFENSE,

the Fort Benning example, the local water utility—Columbus Water Works—acquired the Fort Benning water and wastewater facilities in 2004.⁴⁹⁸ Where key water resources are not owned or fully controlled by the DoD, such as where water is purchased from local utilities or the installation relies on off-installation facilities for water delivery or wastewater removal, installations are particularly vulnerable to state, regional, and local management, regional demand fluctuations, infrastructure decay, and poor water management off-installation.

9. Water is a necessary commodity for suppliers who produce goods and services for the DoD, and for energy processes that supply essential power to DoD installations

This also has to be part of the DoD's water security picture. Even if the DoD has an adequate supply of water to meet on-base functions, it must rely on the continued operation of plants and suppliers for an installation to remain viable. Water shortages can impact the supplies, including food resources, and equipment the DoD buys, where and from whom they are bought, how they are transported and distributed, and how and where they are stored.⁴⁹⁹ To save the base, you have to save the region.

10. While water scarcity will be a problem nationwide, certain regions and installations appear to be at far greater risk both in terms of geography and in terms of other aggravating factors, such as population growth, regional migration, regional water demands, infrastructure decay, poor water management off-installation, and so forth

Each installation must conduct its own tailored analysis.⁵⁰⁰ That said, at the installation level, there are significant forecast problems. Water conditions are far from static, and social aggregators can vary markedly as well. This makes accurate installation planning very difficult.⁵⁰¹

11. Not all installation water uses are equivalent in importance to day-to-day operations

DEPARTMENT OF DEFENSE, DRID NO. 49 (Dec. 1998); 10 U.S.C. § 2688, *Utility Systems, conveyance authority*; DEPARTMENT OF DEFENSE, GUIDANCE FOR PRIVATIZING DEFENSE UTILITY SYSTEMS, <http://www.acq.osd.mil/ie/energy/library/guidance.pdf>.

⁴⁹⁸ <http://www.cwwga.org/plaintext/fortbenning/fortbenning.aspx>.

⁴⁹⁹ 2014 CCAR, *supra* note 2, at 7.

⁵⁰⁰ ARMY WATER SECURITY STRATEGY, *supra* note 9, at 11.

⁵⁰¹ KARL, *supra* note 28, at 47. *See also supra* notes 405-410.

In some cases, the predominant uses of water on an installation are irrigation, landscaping and domestic use (on-base family housing). On these installations, water use could be reduced considerably without impeding the primary mission of the installation. The DoD is committed to implementing adaptive and mitigative measures to conserve water and improve water efficiency, and should be able to do so effectively for these types of uses. In other circumstances, water uses are critical to mission success, and reductions in use may not be possible beyond certain thresholds.

12. Military installations may be located in strategically important locations or, relatedly, certain military activities may require particular environments

Accordingly, it is not always possible to relocate missions to other installations or facilities without degrading military readiness. For example, Fort Irwin National Training Center (NTC) in California is one of the only bases both large and isolated enough to support large-scale tank warfare exercises and urban operations training. Fort Irwin is the only place in the United States where military forces can train using all of the equipment they will later use in theater, including electromagnetic jamming equipment and live ordnances.⁵⁰² The NTC obtains all of its potable water supply from groundwater basins within the base boundaries.⁵⁰³ But groundwater pumping, elevated water demand from additional training activities, and the drought in California have resulted in water-level declines that raise concerns about the long-term water supply.⁵⁰⁴ At the same time, the base has experienced extreme rain events that have caused millions of dollars in damage.⁵⁰⁵ Even so, relocation is not an option. There is no remotely similar venue that would allow military forces to effectively train for the current operating environments in the Middle East and central Asia.

⁵⁰² Geoff Manaugh & Nicola Twilley, *It's Artificial Afghanistan: A Simulated Battlefield in the Mojave Desert*, THE ATLANTIC (May 18, 2013).

⁵⁰³ USGS, *Water-resources study of Fort Irwin National Training Center*, <http://ca.water.usgs.gov/projects/2010-18.html>.

⁵⁰⁴ Manaugh, *supra* note 502; USGS, *Water-resources study of Fort Irwin National Training Center*, <http://ca.water.usgs.gov/projects/2010-18.html>.

⁵⁰⁵ Manaugh, *supra* note 502 (noting that in August 2013, a year's worth of rain fell in 80 minutes, resulting in \$64 million in damages on the base).

E. Fort Carson, Colorado

A more in depth consideration of a military installation may help to illustrate the observations explored in subpart D above. Fort Carson is a United States Army installation located just outside Colorado Springs, Colorado. The installation is home to the 4th Infantry Division, as well as a number of other units and tenant organizations.⁵⁰⁶ Fort Carson comprises 137,000 acres; an additional 236,000 acres make up the Pinon Canyon Maneuver Site, a training site for Fort Carson and other local military bases.⁵⁰⁷ The base is home to 26,000 active-duty soldiers, 42,000 family members, and 6300 civilian personnel.⁵⁰⁸

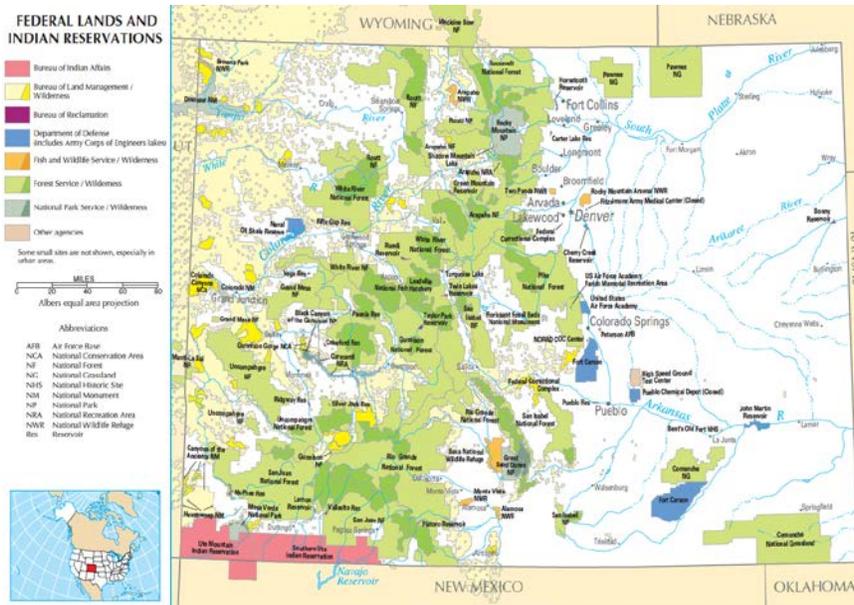


Figure 3: Fort Carson, Colorado⁵⁰⁹

In FY12, Fort Carson used 700Mgal of potable water, or sixty-six gallons per person per day, which is down from an annual average of 853Mgal

⁵⁰⁶ DEPARTMENT OF THE ARMY, <http://www.carson.army.mil/index.html>.
⁵⁰⁷ DEPARTMENT OF THE ARMY, <http://www.carson.army.mil/index.html>.
⁵⁰⁸ *Id.*
⁵⁰⁹ DEPARTMENT OF THE INTERIOR, BUREAU OF LAND MANAGEMENT, <http://www.nationalmap.gov>.

between FY08 and FY11.⁵¹⁰ The predominant potable water uses were for on-base irrigation (fifty-six percent) and domestic plumbing (twenty-seven percent).⁵¹¹ On-base plumbing, including laundry and kitchen, and family housing irrigation make up the remaining top uses.⁵¹² Fort Carson does not consume ILA water.⁵¹³ Peak water demand occurs between May and September, when use averages between 91 and 134 Mgal per month, primarily due to landscape irrigation.⁵¹⁴ Fort Carson's family housing is privatized. As a result, domestic on-base water use is not included in the total water use the installation reports to the Army.⁵¹⁵

Fort Carson's wastewater is treated on site and discharged from the treatment facility to be reclaimed for irrigation.⁵¹⁶ Between FY08 and FY11, Fort Carson reclaimed an annual average of 80Mgal for irrigation.⁵¹⁷

Fort Carson purchases all of its water from the municipal water company, Colorado Springs Utilities (CSU).⁵¹⁸ CSU currently holds rights to 114,500 acre-feet per year from a number of basins and developed water sources, and an additional 46,500 acre-feet per year of undeveloped water sources.⁵¹⁹ Most of CSU's portfolio is surface water.⁵²⁰

Colorado allocates surface water rights using a system of prior appropriation.⁵²¹ Water rights are administered by the Division of Water Resources, Department of Natural Resources, and adjudicated by water courts.⁵²² Water rights are private property and may be sold and purchased, leased, and otherwise transferred between parties, subject to state law.⁵²³ According to the USACE and Bureau of Reclamation, in many instances surface water basins in the state are over-appropriated; in times of water shortage, a senior right holder may place a "priority call" on a stream to obtain a full supply, denying all junior right holders.⁵²⁴ The USACE describes Colorado's water allocation system as "exceedingly complex to the point that water planners talk

⁵¹⁰ 2013 ARMY NET ZERO, *supra* note 21, at xii.

⁵¹¹ *Id.* at xii.

⁵¹² *Id.* at 23.

⁵¹³ *Id.*

⁵¹⁴ *Id.*

⁵¹⁵ *Id.*

⁵¹⁶ *Id.*

⁵¹⁷ *Id.*

⁵¹⁸ *Id.*; USACE WATER SUSTAINABILITY ASSESSMENT, *supra* note 21, at 66.

⁵¹⁹ USACE WATER SUSTAINABILITY ASSESSMENT, *supra* note 21, at 67.

⁵²⁰ *Id.*

⁵²¹ *Id.*

⁵²² *Id.*

⁵²³ *Id.* at 68.

⁵²⁴ *Id.*

in terms of water ‘portfolios,’ which conjures imagery of the complicated trades and market monitoring of a large securities firm.”⁵²⁵ As a result, the USACE encourages water resources staff at Fort Carson “to allocate time for engagement in [] regional planning processes, because the installation is part of the region and shares the resource.”⁵²⁶

Fort Carson has been assessed as having a highly vulnerable regional water supply for several reasons.⁵²⁷ First, Fort Carson is in a region likely to experience water scarcity, particularly during summer months, and severe wildfires.⁵²⁸ Second, the Colorado Springs area has a growing regional population that will put additional pressures on CSU water supplies. The most rapidly growing area of the country is the Mountain West.⁵²⁹ Additionally, overuse of rivers and streams is already common in the area because of high demand for irrigating agriculture.⁵³⁰ Third, Fort Carson relies entirely on water purchased from CSU, and is therefore vulnerable to the resources available to CSU.⁵³¹

However, significant progress to reduce water use is possible and has been demonstrated. Due to regional drought, Fort Carson implemented irrigation watering restrictions on-base, resulting in a massive thirty-four percent decrease in potable water use from April to August 2013.⁵³²

IV. Meeting National Defense Water Requirements: Challenges and Predictions

With this legal and factual backdrop in place, we return to the DoD policy memorandum directing the military departments to locate and retain existing documentation of water resources and rights, be prepared to assert and preserve water rights under federal and state law as necessary to meet mission requirements, and to identify additional water quantities required to meet reasonably foreseeable mission requirements.⁵³³ The memo is an important step toward ensuring that the military departments are engaging in effective water management planning. The memo directs military departments to compile a permanent record establishing water rights, quantify use in those jurisdictions

⁵²⁵ *Id.* at 86.

⁵²⁶ *Id.* at 87.

⁵²⁷ 2013 ARMY NET ZERO, *supra* note 21, at xii.

⁵²⁸ KARL, *supra* note 28, at 100.

⁵²⁹ *Id.*

⁵³⁰ *Id.*

⁵³¹ 2013 ARMY NET ZERO, *supra* note 21, at 23.

⁵³² *Id.*

⁵³³ OUSD(AT&L) memo, *supra* note 13.

where water is allocated by legal authority,⁵³⁴ identify available water resources, identify the processes and procedures to resolve conflicts between availability and demand, identify the processes and procedures to prioritize water uses in periods of scarcity, and project water demand and resource availability in the future.⁵³⁵ These are undoubtedly positive measures that will give the DoD a more comprehensive understanding of the water picture across all military installations, and may also force unresolved water rights issues to the fore.

However, the memo fails to identify preferred processes and procedures to resolve conflicts or prioritize water uses. Likewise, the memo gives installations no guidance on strategies to employ in asserting water rights, whether and to what extent to pursue federal water rights over state-based water rights and, if the latter, whether and to what extent to comply with state regulatory requirements for legal or policy reasons, or whether to seek to quantify such rights through a court decree or through memoranda of agreement with state and local authorities and other water rights holders. There is likewise no guidance for installations whose territories cross state lines, or whose water resources are already subject to ongoing intra- or inter-state disputes. Even where the legal questions are relatively straightforward, the corresponding policy questions are not resolved nearly as readily. Certainly, the intention is that the military departments will provide implementing guidance, and further that installation commanders will seek legal advice from their judge advocates and general counsel attorneys.⁵³⁶ As this article has hopefully suggested, however, the broader policy and strategic decisions ought to be made with the greater interests of the DoD in mind, and not simply the local and immediate needs of each installation or region. Notwithstanding the traditional role of the military departments to organize, train, and equip military forces, neither individual installations nor the military departments can set the strategic priorities of the DoD in terms of how it will respond to the problem of climate-related water scarcity, nor the broader strategic priorities of the DoD in ensuring adequate capacity and capability to respond to increasing demands on DoD

⁵³⁴ The memo only requires installations to determine the amount of water used “in those jurisdictions where water is officially allocated by a legal authority.” This appears to have been interpreted to mean that water use should not be quantified where water is not subject to allocation by law. *See, e.g.*, Memo, Office of the Assistant Secretary of the Navy (Energy, Installations and Environment) (4 June 14). How many installations are excluded from quantification is unknown and may be few, perhaps only those installations that rely exclusively on groundwater in jurisdictions without rules governing groundwater withdrawals. But, this limitation suggests the focus of the OUSD(AT&L) memo is on securing water rights first, and only secondarily on water resource management.

⁵³⁵ OUSD(AT&L) memo, *supra* note 13.

⁵³⁶ *See, e.g.*, U.S. DEP’T OF ARMY, DIR. 2014-08, *supra* note 22 (“The complexity and diversity of water rights means that installation commanders must consult with their Staff Judge Advocates to determine what legal rights and limitations apply at their specific installation to ensure continued access to a sufficient water supply to carry out the Army’s missions.”).

resources. And, the decisions made by individual installations—even the decision to comply with state procedural requirements—can affect the uses to which an installation may be put in the future and the resources available to support mission accomplishment.⁵³⁷

The lack of DoD guidance on the assertion of water rights is one aspect of a larger problem, namely, the lack of comprehensive water security policy, guidance, and oversight. A recent study commissioned by the Army to study its water security found “significant gaps” in policy with respect to protecting off-base water resources, collaborating with external water suppliers to ensure continued water availability, coordinating future mission siting decisions with installations’ water supplies and water program funding, and defending water rights. The study also found an “inside-the-fence line” focus that neglected to address the protection of watersheds and aquifers, regional demand for limited water resources, collaboration with regional and state water planning organizations, legal challenges to water rights, and state regulatory restrictions on water withdrawals.⁵³⁸ The same criticisms can be levied against the DoD as a whole. While some aspects of water security ought to be left to the military departments to manage, the lack of Departmental strategic direction is alarming.

In the absence of strategic guidance from the DoD, the remainder of this article will examine some of the complications that caution against a rights-based strategy generally, particularly one that seeks to expand the reach of federal water rights. Certainly, the water demands and water availability at each installation are unique and proper analysis requires individualized modeling. Likewise, the legal playing field is installation-specific and fact-dependent. For instance, whatever general legal framework applies, the legal analysis is further complicated by many of the factors already identified in Part III, including the land on which the installation sits, the water sources on which the installation relies, the main water uses on the installation, prior history of compliance, and so forth. The goal is not to identify best practices or offer a roadmap, but only to highlight how important it is that the DoD takes on that work with appropriate haste.

This Part begins by examining the complications of compliance with state law and the limitations of the federal water rights doctrine in addressing the needs of military installations. It is these complications and limitations that might lead some to call for a broader federal water right for national defense, so

⁵³⁷ See *supra* note 245 (noting that the installation’s previous deference to, and compliance with, state law was considered probative evidence that the installation’s water rights must be perfected under state law).

⁵³⁸ ARMY WATER SECURITY STRATEGY, *supra* note 9, at 37.

this Part will in turn examine what such a right might look like and why it does not offer the security its proponents seek. Finally, this Part will look at broader policy implications that call for an approach that seeks to reduce water use through conservation and efficiency measures.

A. State Regimes

At the outset, in the absence of a comprehensive study it is difficult to draw any general conclusions as to whether and to what extent the needs of military installations are or are not being met under state water law, and then, where a deficiency is identified, to determine what aspects of state law present the most likely obstacles. It can be challenging to assess whether a particular state legal regime is more advantageous on the whole (i.e., to the majority of water users), even when reduced to its most basic doctrinal formulations, putting aside state legal and administrative variations, much less whether military installations in particular fare better in some jurisdictions and worse in others. Similarly, state regimes are bound to vary in their philosophies vis-à-vis water rights and in the influence of other dynamics, including political, economic, environmental, and social factors. This makes it difficult to say whether installations can reasonably rely on state-based water rights.

But some conjecture is possible. Rather than attempt to list all of the possible metrics to measure relative success across state jurisdictions, I hope to identify some challenges military installations might face attempting to meet water requirements through state law. First, certain substantive and procedural features of each legal regime hint at how well military installations may fare. As Part I outlined, military installations may face doctrinal and statutory definitional hurdles that preclude the recognition and perfection of water rights or limit their utility. For instance, state laws were not developed with military uses in mind, and as such there may be no express recognition of military uses as reasonable or beneficial. Similarly, there may be restrictions on where water may be put to use, or how military uses stack up against other uses. It might also be the case that the more complicated the legal regime as a general matter, the more likely it is that the regime does not provide enough flexibility to address the changing demands of military installations. On the other hand, more complex permitting regimes might offer military installations greater certainty and predictability, which is an important part of effective water management planning. In addition, where formal legal expectations are met, water rights are presumably more readily transferrable, and therefore subject to acquisition in the event installation demands exceed existing water rights.

Second, military installations face structural complications in the form of state administration. This includes compliance with procedural permitting

requirements and fees, and subjugation to the state's enforcement regime, which might include inspections, monitoring, and fines or penalties in the event of non-compliance. It may be inappropriate to subject the federal government to the state's normal administrative and enforcement mechanisms, for example where it leads to an impermissible waiver of sovereign immunity, thus requiring the military installation to negotiate with the state on permit terms.⁵³⁹ The need to negotiate special terms presents greater opportunity for state biases to yield an unfavorable result, leaving installations with a difficult choice: agree to the permit as is, seek administrative appeal, or forego compliance with state procedures, continue to withdraw water, and wait for the state to act.⁵⁴⁰

Third, state water rights are frequently not fully settled until adjudicated, increasingly through extensive general stream adjudications,⁵⁴¹ and in many cases that process has not yet begun or is incomplete. Stream adjudications are long, expensive, and may not resolve all claims. Additionally, rights in an interstate watershed cannot be fully adjudicated except by the Supreme Court or pursuant to an interstate compact.⁵⁴² As a result, state-based water rights may not provide military installations with adequate certainty and predictability.⁵⁴³

Fourth, there is always a risk that water rights obtained in accordance with state law, even if adjudicated, will be insufficient in quantity or seniority to meet current and future military needs, and there can be no expectation that defense interests will have priority in periods of water shortage.⁵⁴⁴ In such circumstances, an installation may be forced to consider whether to continue to withdraw water notwithstanding state law in order to accomplish its mission.

Fifth, installations may be forced to confront a fragmented system with overlapping and inconsistent incentive structures.⁵⁴⁵ Water allocation and use issues are multi-jurisdictional in nature; the decision to use water in a particular way and for a particular purpose can widely impact human health and safety, economic interests, agricultural production, energy supply and use, ecological sustainability, and recreation. And where water resources are scarcer, water allocation and use decisions have even greater consequence. With so many

⁵³⁹ Jungreis, *supra* note 32, at 413.

⁵⁴⁰ Jungreis, *supra* note 32, at 413.

⁵⁴¹ Beck, *supra* note 30, § 16.01

⁵⁴² Ranquist, *supra* note 33, at 717.

⁵⁴³ Of course, federal water rights must also be adjudicated and quantified. But an installation that can assert federal water rights can arguably shift more of the uncertainty to state water rights holders.

⁵⁴⁴ ARMY WATER SECURITY STRATEGY, *supra* note 9, at 26 (noting that only a few states – Utah and Hawaii – have established priorities concerning defense requirements for water during times of drought).

⁵⁴⁵ U.S. DEP'T OF ENERGY, THE WATER-ENERGY NEXUS: CHALLENGES AND OPPORTUNITIES (2014)

potential parties at the table, reliance on state-based water rights can be an exercise in trusting national defense needs to the whims of interest groups and fickle policymakers.

Finally, state legal regimes are not static but evolve to address changing circumstances, and further doctrinal shifts are likely as states attempt to deal with the challenges of climate-related water scarcity. The evolution of the prior appropriation doctrine, for example, is evidenced by limitations on water rights based on conceptions of the public trust and the public interest, and redefinitions of what constitutes beneficial use.⁵⁴⁶ As discussed in Part I, there has been so much change that some scholars have pronounced the doctrine dead or, short of that, essentially irrelevant.⁵⁴⁷ Accordingly, installation water rights, even if perfected under state law, are not immune from modification or even, potentially, elimination. It may become more and more difficult to predict an installation's future water security as states confront the challenge of global warming and legal systems are increasingly in flux. It is also important to consider that the federal government's efforts to confront the realities of global climate change, and in particular water conservation and sustainable water management practices, may place additional pressures on state regimes to change the existing legal order.

Notwithstanding the challenges military installations might face attempting to meet water requirements through state law, some have argued that the best course of action is for federal installations to comply with state law, except where such compliance conflicts with federal law or impedes the accomplishment of the mission of the installation.⁵⁴⁸ There are several good reasons for this approach. The most important of which may be simply that this is the approach adopted by Congress and the courts. State substantive and procedural laws are presumed to apply. To overcome this presumption, an installation must demonstrate either that state water law has been expressly preempted, or that, based on actual application of state water allocation laws, state law directly conflicts with federal law or significantly interferes with the accomplishment of the DoD's statutory mission. Needless to say, this is not an easy burden to meet. State laws that merely inconvenience a military installation or increase costs are unlikely to support a finding of preemption.⁵⁴⁹

⁵⁴⁶ See, e.g., Holly Doremus & A. Dan Tarlock, *Can the Clean Water Act Succeed as an Ecosystem Protection Law?*, GEO. WASH. J. ENERGY & ENVTL. L. (Summer 2013) 46 (noting the authority of the California State Water Rights Board to modify water rights, including those held by the federal government, in order to achieve water quality objectives).

⁵⁴⁷ See *supra* note 122.

⁵⁴⁸ Jungreis, *supra* note 32, at 405.

⁵⁴⁹ Jungreis, *supra* note 32, at 406.

Compliance with state law has its precautionary benefits as well. For example, state law rights may be impaired if the federal government fails to perfect them.⁵⁵⁰ Additionally, state law is a sword as well as a shield; where an installation's rights are perfected in accordance with state law, the installation is then able to protect its rights against other parties by availing itself of state administrative bodies and courts.⁵⁵¹ Finally, where permits are obtained under state law, an installation is immunized to some degree from federal takings challenges.⁵⁵² Still, despite these benefits, the case of Mountain Home AFB offers a cautionary tale, warning that an installation's historical compliance with state law can also preclude the subsequent assertion of federal water rights, compliance serving as indicia to support a presumption of state law applicability.

It has also been argued that compliance with state law is advantageous in that “[f]ederal water rights exist at the pleasure of Congress. They can be wiped out with the stroke of a pen.”⁵⁵³ This is certainly true, but it's not altogether clear that state rights are any more secure from the actions of state legislatures (albeit subject to compensation), nor that the threat of Congressional action—at least in the context of military installations—is realistic.

Finally, comity recognizes that states are simply doing their best to manage competing demands on a finite resource, and private parties have expectations and reliance interests in the state's regulatory regime that can be upset by special federal rules. All users are impacted where water is overdrawn, and it does not benefit the federal government to deny the states the ability to effectively manage their water resources.⁵⁵⁴ Noncompliance with state law is potentially very disruptive and harmful to the overall relationship of the federal government to the various states.⁵⁵⁵

B. Federal Reserved Water Rights

Military installations on reserved lands will be inclined to pursue the full reach of their federal reserved water rights. As Part II explained, federal reserved water rights are superior to state-based rights in several ways. Military installations relying on federal water rights need not comply with state procedural requirements. The right applies equally to surface and groundwater. Moreover, at least where rights have not been quantified, the amount of water can change over time, allowing fluctuation to accommodate installation

⁵⁵⁰ *Id.* at 407.

⁵⁵¹ *Id.* at 408.

⁵⁵² *Id.* at 407.

⁵⁵³ *Id.*

⁵⁵⁴ *Id.*

⁵⁵⁵ *Id.*

expansion or incorporation of new missions. Relatedly, the right is not lost for non-use, an important consideration given the changing needs of military installations, particularly in times of war or national emergency. And, while the right is limited to the primary purposes of the reservation, numerous water uses might fall within the umbrella of “military purposes.” It is no surprise, then, that federal entities generally turn to federal water rights first in state water adjudication proceedings, and military installations would be inclined to do the same.⁵⁵⁶

But the case studies of Mountain Home AFB and Fort Huachuca reveal just how challenging it can be to secure water rights under this doctrine. Federal reserved water rights apply only to federally reserved or set aside lands, but many military installations are comprised of lands to which the doctrine does not extend, and these lands may be interspersed with reserved lands. And, when lands are withdrawn for military purposes, Congress has in some cases expressly rejected the application of a federal reserved water right.⁵⁵⁷ Additionally, federal reserved water rights will only be implied where the primary purpose of the reservation would be defeated without a reserved water right, and in some cases this can prove to be a difficult showing. Furthermore, even where federal reserved water rights are recognized, they attach only for the benefit of reserved lands and cannot be used on non-reserved lands, no matter how those lands are situated within an installation. Likewise, federal reserved water rights only reach unappropriated waters, with priority in appropriative jurisdictions dating to the time of the reservation. Finally, the right extends to the amount of water necessary to accomplish the purposes of the reservation, but a narrow interpretation of the primary purpose of a military installation can limit the scope of the right. Even where the installation’s primary purpose is not in dispute, the right would not reach off-installation water demands, such as might arise where particular military activities require a significant military population in the surrounding region.

Aside from these challenges, the exercise of federal reserved water rights has policy implications as well. As discussed in Part III, military installation water uses can vary considerably. Unused water that is subject to an unadjudicated federal reserved water right might be appropriated under state law. To the extent state and private parties have developed reliance interests based on that nonuse—that is, to the extent water is appropriated with the expectation that it will be available notwithstanding an existing federal right—there is considerable unfairness in subsequently laying claim to that previously unused water at a time of military need. Relatedly, where federal water rights are not

⁵⁵⁶ Cianci et al., *supra* note 85, at 162.

⁵⁵⁷ *See supra* note 493.

quantified, water use can change provided the use remains necessary to fulfill the primary purpose of the reservation. These changes in use can potentially be very disruptive, both to state water rights holders and to the state's ability to manage its water resources, and harmful to the overall relationship between the federal government and the states. As a result, states may be more likely to scrutinize claims to federal water rights, perhaps leveraging the "sensitivity" doctrine,⁵⁵⁸ and to seek quantification to limit the potentially disruptive effects.

C. Championing a New National Defense Water Right

There will be some inside and outside the DoD who see the exercise of state water rights compliance as unnecessarily obstructive to national defense interests notwithstanding the federal government's historical deference to state water law, and who see existing federal water rights as too narrow to accomplish national defense objectives. The argument is not without appeal. As an Army general eloquently stated: "[F]or us to make these arrangements at the Washington level with the various states, let us say 48 states, with 48 varieties of methods to follow, we would find ourselves in an administrative morass out of which we would never fight our way, we would never win the war."⁵⁵⁹ Certainly, the argument follows, neither Congress in deferring to the historical role of the states in water allocation, nor the courts in defining the reach of the federal water rights doctrine, had national security implications in mind, and we simply cannot allow the interests of individual states or localities to disrupt military activities essential to the national defense. It does not hurt that the argument plays into the popular cultural narrative that national defense is sacrosanct; a narrative that occasionally demands that competing interests yield without the benefit of careful and informed decision-making.

There is an obvious legal basis for the establishment of a national defense federal water right. Federal recognition of such a right to unappropriated water would be a constitutional exercise of the power to provide for the common defense and to declare war; to include the power to raise and support armies, provide and maintain a Navy, exercise exclusive jurisdiction over forts, magazines, and arsenals, and to protect every state against invasion.⁵⁶⁰ Although this has rarely been the primary basis on which federal jurisdiction has been exercised over water resources, that authority is no less valid.

⁵⁵⁸ See discussion *supra* note 206.

⁵⁵⁹ General Edmond C. R. Lasher, Assistant Chief of Transportation, United States Army, cited in *PUC of Cal. V. United States*, 355 U.S. 534, 546 (1958).

⁵⁶⁰ U.S. CONST., art. I, § 8, cls. 1, 11, 12, 13, 15, 17.

The legal authority for a federal national defense water right is the same as that of a federal non-reserved or regulatory water right; the only difference may be the specific constitutional authority under which Congress acts.⁵⁶¹ Congress has the constitutional power to assert water rights over unappropriated water to fulfill federal purposes or programs under its defense powers, and, in doing so, can preempt state law to the contrary by operation of the Supremacy Clause.⁵⁶² Additionally, the federal government maintains regulatory authority where federal purposes and programs would be frustrated by the exercise of state law.⁵⁶³

However, Congress must assert such power. The courts are not likely to infer a national defense water right based solely on the statutory establishment of a military installation or specific programmatic authorization, unless it can be demonstrated that Congress intended to authorize the acquisition of water *and* to preempt state law. And that fact alone, at least for now, sounds the death knell for this proposal. The *Winters* decision provoked strong reaction amongst the states when it was announced, as did the subsequent assertion of federal non-reserved or regulatory water rights, and any expansion of federal water rights is not likely to garner adequate support in Congress, despite Congressional fondness for all things military. And in the instances where Congress has recognized federal water rights independent of land reservations, it has done so very narrowly. The question for the DoD is whether such a right is worth advocating for nonetheless.

To the author's knowledge there are not, as yet, any active proposals under consideration within the DoD to seek expanded federal water rights for military installations premised on national defense requirements. But, as the wars of this generation extend well into their second decade, the DoD's role in the world expands, and water becomes an increasingly scarce and valuable commodity, the voices of proponents of expanded water rights within the DoD will grow louder and more defiant. Still, even the most vociferous cries are unlikely to prompt broad national policy in the face of foreseeable opposition, particularly from Western states who so effectively curtailed the impact of the *Winters* decision. But local water conflicts might present opportunities to test such a proposal's viability as a matter of policy and, where the conditions are right, to elevate the issue to the attention of Congress as a unique circumstance

⁵⁶¹ Olson memo, *supra* note 31, at 362, 368-369, 376 (“[T]he constitutional basis for federal water rights, however denominated, is the Supremacy Clause coupled with a proper exercise of federal authority.”).

⁵⁶² Blumm, *supra* note 207, §§ 37.03, 37.06; O’Sullivan et al., *supra* note 40, at 132; Olson memo, *supra* note 31, at 362, 368-369, 376.

⁵⁶³ Blumm, *supra* note 207, §§ 37.03, 37.06; O’Sullivan et al., *supra* note 40, at 132.

warranting special legislation. In other words, a national defense water right will develop only by exception.

Proponents of a national defense water right will need to confront very real practical limitations to the proposal, even beyond the political obstacles in Congress. For one, even if a national defense water right were recognized, it would presumably apply only to unappropriated waters, and in appropriative jurisdictions the right would be junior to all prior appropriators on the stream. In the West, and increasingly also in the East, there is very little water available for appropriation; most waterways are already fully- or over appropriated.⁵⁶⁴ The only way to obtain additional water rights may be through water transfers or condemnation.⁵⁶⁵ Such an approach is impractical, as state laws often constrain market transfers of water (by sale, lease, or exchange), and such transfers likely offer little advantage if the federal government must compensate existing rights holders or if the priority of the right does not survive the transfer as a result of state law.⁵⁶⁶

Additionally, any new federal water right would necessarily require adjudication, likely by state courts, and the contours of the right may not give the DoD the type of flexibility it needs. For example, even assuming Congress were to recognize a national defense non-reserved water right, most likely applicable only to a specific installation or military activity, it is foreseeable that state courts would interpret the authorizing statute and the scope of the right narrowly. The right as so interpreted would not likely reach all possible functions or uses of military property, and any ambiguity as to the validity of state substantive and procedural law could be expected to be interpreted in favor of the state. Some water uses on the installation would likely fall outside the scope of the right, including, for example, ecosystem and species management programs designed to reduce or repair the environmental effects of installation activities.⁵⁶⁷ Although not directly attributable to a military uses, without that water supply some military activities could be halted to ensure preservation of ecological integrity and ecosystem viability in accordance with federal law. Finally, a national defense water right adjudicated primarily in state court does

⁵⁶⁴ A. DAN TARLOCK ET AL., *WATER RESOURCE MANAGEMENT* (Seventh Ed., 2002); *See also* WESTERN GOVERNORS' ASS'N AND WESTERN STATES WATER COUNCIL, *WATER TRANSFERS IN THE WEST: PROJECTS, TRENDS, AND LEADING PRACTICES IN VOLUNTARY WATER TRADING* 18 (Dec. 2012) (noting that water is fully allocated in many basins and/or during certain times of the year—and supply uncertainty is growing due to climate change—and as a result many states see no alternative to water transfers as a source of “new” water supplies and as a means to alleviate the effects of variable supplies).

⁵⁶⁵ *Id.*

⁵⁶⁶ Jungreis, *supra* note 32, at 406; CONGRESSIONAL BUDGET OFFICE, *HOW FEDERAL POLICIES AFFECT THE ALLOCATION OF WATER*, Pub. No. 2589 (Aug. 2006).

⁵⁶⁷ *See supra* note 272.

not provide a solution to the problem of interstate water sources, address water uses by installations whose territories straddle state lines, or solve the problem of ensuring adequate supplies of water to support military populations living in communities surrounding an installation.

It is possible that national defense water rights could develop as a regulatory overlay—like the Clean Water Act or Endangered Species Act—and not as an independent property-based water right, avoiding some of the issues just raised. In other words, a national defense water right would be just a form of the federal regulatory water rights doctrine tied specifically to programs and activities of the federal government related to the national defense. Insofar as a regulatory overlay overrides state water allocations, this approach might free up more water for national defense; the regulatory requirement is not limited to unappropriated water and applies even at the expense of senior water rights holders. Takings challenges would likely remain, however; and this approach could generate significant confusion regarding the interplay between federal and state law and thereby upset water rights expectations.⁵⁶⁸

Aside from the practical impediments to a national defense federal water right, the policy consequences also warrant careful consideration. While the effects of the *Winters* doctrine have been largely tempered by its doctrinal limitations and limited adjudication, there is continued resistance to federal water rights, whether reserved or non-reserved, both in theory and in application. Important considerations for federal agencies include the scope of the rights they elect to assert, how such rights are exercised and by whom, including the choice of fora and procedures to adjudicate those rights, and issues of quantification that can depend on lengthy comprehensive stream adjudications.⁵⁶⁹ More fundamentally, there is real concern that any new federal government claims to water—particularly if undefined or inconsistent—will produce uncertainty and confusion in the states, complicate water management planning, and exacerbate existing state hostilities toward the federal government.⁵⁷⁰ New federal water rights could have a tremendously disruptive effect, particularly to the extent they inevitably upset expectations built on state law.⁵⁷¹

Even a uniform and sufficiently defined federal policy establishing national defense water rights, while preferable to an ad hoc approach in terms of doctrinal clarity, could suffer in application. Because legal regimes, water

⁵⁶⁸ For a discussion on how the poor fit between state property regimes and federal regulatory power, see Holly Doremus & A. Dan Tarlock, *Fish, Farms and the Clash of Cultures in the Klamath Basin*, 30 *ECOLOGY L.Q.* 279, 305-306, 340 (2003).

⁵⁶⁹ Olson memo, *supra* note 31, at 330.

⁵⁷⁰ *Id.*

⁵⁷¹ *Id.* at 379-380.

management policies, and practical and political realities on the ground vary from state to state, a policy that works well in one state may be wholly unworkable in another state.⁵⁷² It may not be feasible or appropriate to assert the full measure of a national defense water right in a community suffering from extreme or exceptional drought conditions, for example. The reality is that approaches to water management must often be flexible and adaptive, and appropriately tailored, to be optimally effective and to avoid harm. The DoD's policies with respect to the management of installations support tailored installation-by-installation approaches. Installation commanding officers are primarily responsible for installation management and have authority to adjust standards to meet morale, local quality of life, and work environment needs.⁵⁷³ But water rights operate to allocate risk and tend not to incentivize flexibility and adaptation, and a new national defense water right will be no exception.

Additionally, the assertion of a new national defense water right is shortsighted to the extent little consideration is given to how the exercise of such a right might advance or inhibit both the DoD's water security and the achievement of other federal policies encouraging water conservation, efficient use of water resources, ecological sustainment and endangered species protection, and other competing federal, state, and local interests. In some respects, a new national defense water right may be counterproductive to long-term federal goals. Particularly in the area of ecological sustainment, the federal government and the states have made significant gains in recent decades in preserving in-stream flows. But environmental uses of water are most at risk due to the changing climate, since these uses are often junior in fact and in law. Recognition of any new federal water right has the potential to set back the clock on environmental progress even further, exacerbating the harm caused by global climate change. Recognition of a new national defense water right could have other negative environmental repercussions as well. For example, the development of a new national defense water right arguably continues a trend toward securing water reserves for future use—water supply augmentation—at the expense of water conservation and efficiency. Where water augmentation is conflated with water conservation, water suppliers may race to acquire reserves to the detriment of social and environmental uses, and may not be forced to find alternatives to meet demand.⁵⁷⁴

Even more fundamentally, water rights regimes tend to reward, rather than to punish, exploitation of resources. The focus of water rights is on private entitlements and expectations, often without any corresponding duties of

⁵⁷² Jungreis, *supra* note 32, at 410.

⁵⁷³ U.S. DEP'T OF DEF., INSTR. 4001.01, INSTALLATION SUPPORT (10 Jan. 2008), paras. 4.7, 5.10.3.

⁵⁷⁴ A. Dan Tarlock, *Western Water Law, Global Warming, and Growth Limitations*, 24 LOY L. A. L. REV. 979, 1009 (1991).

efficiency or conservation, except perhaps in relation to other rights holders. Indeed, water efficiency and conservation can threaten existing entitlements by making them vulnerable to claims of abandonment and forfeiture. Hence, there may be few incentives to explore alternatives to gain efficiencies. Within the DoD, one example of this reality can be found in an Air Force instruction governing water systems. The instruction encourages base civil engineers to implement water reuse, but directs them to “consider water rights implications before implementing water reuse of any kind.”⁵⁷⁵ In so doing, the Air Force instruction probably serves to deter water reuse. Base civil engineers may, in effect, be incentivized to use water in less efficient ways (i.e., not to reuse) in order to rebut potential claims that water is no longer needed at historical quantities to support military operations. This bias in favor of resource exploitation and the status quo emphasis on private entitlements is only exacerbated by the creation of new water rights.

Beyond the incentives created by water rights regimes generally, certain characteristics of bureaucratic functioning also inform how the pursuit of a new national defense water right might sidetrack the DoD from water use efficiency and conservation efforts. Bureaucratic agencies like the DoD are often plagued by tendencies toward risk avoidance, resistance to change, defense of the status quo, and inflexibility. Faced with a choice between uncertain and risky conservation efforts that foreseeably will require major changes in how the DoD conducts its daily business and that ultimately cannot ensure an adequate water supply, and a rights regime that ostensibly promises to secure the DoD’s current and future water needs with limited behavioral modifications, the agency as a whole, and individual military installations, will undoubtedly pursue the latter.

Finally, to the extent that a new national defense water right is seen as a workable solution to the problem of water scarcity for military installations, it must be judged against what has come before. The *Winters* doctrine was predicted to be significantly disruptive as well, but the doctrine’s scope has been effectively contained. Similarly, there has been very little development or practical application of the theory of non-reserved water rights since it was first announced in 1979. In the same way, notwithstanding the discussion above, it is possible that the advantages of a national defense water right to the DoD might be tempered in order to blunt its disruptive effects, reducing its effectiveness as a water security strategy.

⁵⁷⁵ U.S. DEP’T OF AIR FORCE, INSTR. 32-1067, WATER AND FUEL SYSTEMS (4 Feb. 2015), para. 2.7.10.

D. The Need for a Long-term Comprehensive National Defense Water Security Strategy

Without question, water rights are a necessary component of the DoD's water security. Aside from purchasing water from third parties, the perfection of water rights under federal and state law is the means through which the DoD can secure water supplies to meet mission requirements. Thus, a baseline determination of the water rights status at all military installations is an essential first step. But, as this article has suggested water rights are at best an incomplete solution. The DoD must pursue a comprehensive water security strategy that seeks to reduce rather than to accommodate demand. The security of water rights is a false security. Put simply, there isn't enough water to accommodate all interests; hard choices must be made. In the face of global climate change, the DoD cannot tenably fall back on its water rights and assume the superiority of national security interests, without thinking seriously about efficiency and conservation. Moreover, there appears to be little appetite for expanding the reach of existing legal doctrines to facilitate the water needs of military installations. The trend is toward qualified and conditional rights, and military installations are not likely to be the exception.

At the same time, conservation and water efficiency are not solutions in themselves either. Conservation and water efficiency measures can help reduce the cost of supplying water and sustain the regional water supply, but these efforts alone will not necessarily increase water security.⁵⁷⁶ Neither conservation nor water efficiency can solve the problem of decreasing supply due to drought, or over-consumption off the installation, or contamination of the available water supply.⁵⁷⁷

What does this suggest? At minimum, it suggests that DoD water security cannot be accomplished through internal efforts alone. DoD water security will require a robust, comprehensive, and collaborative approach that includes partnerships with installation neighbors and federal, state, regional, and local public and private stakeholders. In other words, DoD water security necessarily must look outside the fence line; the DoD's actions are intrinsically linked to its neighboring communities.⁵⁷⁸ There is no way to effectively manage DoD water requirements without situational awareness of off-installation trends in water demand, supply and quality, and associated vulnerabilities, and an effective engagement strategy to protect freshwater resources and to address other water issues arising beyond the installation

⁵⁷⁶ ARMY WATER SECURITY STRATEGY, *supra* note 9, at 12.

⁵⁷⁷ *Id.* at 2.

⁵⁷⁸ 2014 CCAR, *supra* note 2, at 12.

perimeter that can impede the ability of the installation to perform its mission.⁵⁷⁹ Water security is appropriately recognized as an encroachment issue⁵⁸⁰ and, in that context, cooperation is an imperative. This includes constructive and ongoing engagement with local, regional, and state officials, state environmental and water planning agencies, public water supply authorities, conservation groups, and other stakeholders to develop shared goals and strategies for water source protection and sustainable demand management, to influence water management decisions to ensure the military mission is given appropriate consideration, to keep decision-makers informed of current and future water uses, and to prevent misunderstandings concerning military water uses.⁵⁸¹

DoD water security will require participation from throughout the Department as well. Development and implementation of an effective water security strategy cannot be relegated to water managers or the environmental divisions of the military departments. Water security implicates all levels of the military chain of command, from day-to-day installation activities to base siting decisions, military training siting, personnel assignment policies that account for regional population growth, infrastructure construction and placement, and so forth. Water security is, at its root, an exercise in best management practices—better management of existing supplies, shifts toward more valued uses, and finding alternative ways of meeting demands such as water reuse.⁵⁸² With shared responsibility across the enterprise, it is critical that the DoD take the lead in establishing an overarching water strategy, defining roles and responsibilities throughout the Department, and setting expectations for coordination at the watershed, regional, and state levels, as well as participation in regional integrated watershed resources planning efforts.⁵⁸³

Among the essential elements of an effective water security strategy, the DoD and the military departments must attempt to define, at an installation level, the natural limitations imposed by the environment,⁵⁸⁴ including forecast analysis that reasonably anticipates climate-related impacts to the quality and quantity of available water. Relatedly, each installation needs to assess its water footprint for different types of installation activities, develop a long-term

⁵⁷⁹ ARMY WATER SECURITY STRATEGY, *supra* note 9, at 14.

⁵⁸⁰ *Id.* at 37, A-2. Encroachment refers to activities outside of an installation that inhibit, curtail, or threaten to impede the performance of military activities. Encroachment issues include population growth and private land development adjacent to an installation, airborne noise, competition for use of air, land and sea space, and competition for scarce resources, such as potable water, oil, and ocean access. *See, e.g.*, CHIEF OF NAVAL OPERATIONS, INSTR. 11010.40, ENCROACHMENT MANAGEMENT PROGRAM (27 Mar. 2007).

⁵⁸¹ *Id.*

⁵⁸² A. Dan Tarlock, *supra* note 574, at 981.

⁵⁸³ ARMY WATER SECURITY STRATEGY, *supra* note 9, at 37, A-2.

⁵⁸⁴ Tarlock, *supra* note 574, at 1000.

forecast model of water requirements for those activities that incorporates analysis of regional water supply and demand, and establish the extent of, and rights to, available water supplies.⁵⁸⁵ This necessarily includes cooperation with state and local officials to monitor the quantity and quality of available water sources, as well as consideration of regional population growth, water demands from various industry sectors, ecosystem protection, and opportunities for water reuse.⁵⁸⁶ Additional relevant considerations include the infrastructure capacity and cost to deliver, treat, and dispose of water.⁵⁸⁷ This information will allow the DoD and the military departments to set growth and activity limitations at realistically sustainable levels for each installation,⁵⁸⁸ and use those limitations to manage water demand and make more efficient use of existing supplies. Additionally, this baseline information will permit effective coordination of future mission siting decisions with installation water supplies and water program funding, and facilitate construction of new storage and distribution facilities.⁵⁸⁹ Finally, a better water supply picture might allow for more strategic water use decisions and greater conjunctive use of ground- and surfacewater resources.

The Army's recently commissioned study of water security management provides a useful starting point for the DoD.⁵⁹⁰ The study was intended to assist the Army in identifying how water affects mission accomplishment and in developing a strategy to ensure adequate potable and non-potable water of suitable quality to support the Army's current and future missions.⁵⁹¹ The study is commendable for its depth, and is a useful strategic complement to the recent Army Net Zero Water Balance and Roadmap Programmatic Summary⁵⁹² and the U.S. Army Corps of Engineers Water Sustainability Assessment for Ten Army Installations, which illustrate water security vulnerabilities and conservation and efficiency strategies at select installations throughout the United States.⁵⁹³ Together, these studies begin to fill in the knowledge gaps necessary for effective water management at the installation level.

There is little utility in repeating each of the study's conclusions and recommendations here, but a few points are worthy of mention. First, the Army's proposed water security strategy identifies water resource sustainability

⁵⁸⁵ ARMY WATER SECURITY STRATEGY, *supra* note 9, at 37, A-2.

⁵⁸⁶ *Id.* at A-12.

⁵⁸⁷ *Id.*

⁵⁸⁸ Tarlock, *supra* note 574, at 1000.

⁵⁸⁹ ARMY WATER SECURITY STRATEGY, *supra* note 9, at 37, A-2.

⁵⁹⁰ *Id.*

⁵⁹¹ *Id.*

⁵⁹² USACE WATER SUSTAINABILITY ASSESSMENT, *supra* note 21.

⁵⁹³ 2013 ARMY NET ZERO, *supra* note 21.

and strategic infrastructure investment as key water security goals. Water resource sustainability has two elements: (1) preservation of water resources and protection of water rights; and (2) demand-management.⁵⁹⁴ To preserve water resources and protect water rights, the study recommends that the Army work to anticipate long-term water requirements, integrate water assessments into strategic decision-making, influence long-term water management outside the fence line, and provide comprehensive water security guidance for military installations. In terms of demand management, the study recommends the Army reduce water withdrawal and consumption, minimizing the net effect of water use on local water resources, match water quality to water use (where feasible, replace potable water with lower quality rain water, groundwater, or gray water, such as for irrigation and toilet flushing), sustain a culture of efficiency and conservation, tailor expectations to differences among installations, and mitigate adverse consequences of aggressive conservation through adaptive infrastructure design and operation to ensure substantially reduced flows do not pose health hazards.⁵⁹⁵ With respect to infrastructure investment, the study further recommends investment tied to maintenance of infrastructure integrity and security.⁵⁹⁶

The Army's water security strategy is an excellent foundation for a DoD-wide water security strategy, but it also fails in at least one key respect. Principally, it fails to provide guidance to installations on what it means to "protect" water rights, and as a result it does not adequately integrate water rights into the comprehensive water security strategy. Instead, the strategy document simply punts, recommending the development of a "proactive policy to identify and protect ... water rights nationwide."⁵⁹⁷ The strategy document notes that water rights encompass a variety of complex issues, mentioning almost in passing the existence of federal reserved water rights, as well as the "benefits and consequences of participating in state permitting programs, and opportunities for banking and monetizing water rights."⁵⁹⁸ The strategy document provides a legal summary in Appendix V, but the summary is of little or no practical utility, even to installation judge advocates and general counsel who are not given any constructive guidance as to how to approach water rights issues, what role water rights play in the larger water security strategy, or how actions taken with respect to water rights can impact other aspects of water security. This is clearly inadequate and demonstrates a lack of legal sophistication that cannot persist if the DoD and the military departments are to succeed in achieving water security. Although this article has suggested that the

⁵⁹⁴ ARMY WATER SECURITY STRATEGY, *supra* note 9.

⁵⁹⁵ *Id.*

⁵⁹⁶ *Id.*

⁵⁹⁷ *Id.* at 25.

⁵⁹⁸ *Id.*

DoD's current focus on water rights is myopic and necessarily incomplete, it is equally shortsighted to develop a water security strategy that fails to think critically about the role of water rights and how water rights are interwoven with demand management, and to fail to provide essential guidance to installations charged with protecting water rights. Very little guidance of this sort appears in formal military issuances, and the guidance that does exist isn't fully integrated into a broader water security strategy.

Fortunately, some preliminary work has already been done. In 1995, the Army issued a policy guidance memorandum to its major command activities on the documentation of water rights information and protection of water rights at Army installations in the United States.⁵⁹⁹ The policy memo is no longer in effect; a directive issued by the Secretary of the Army in May 2014 supersedes it.⁶⁰⁰ But, the Secretary of the Army directive is a general statement of policy that will be followed by more specific implementing guidance.⁶⁰¹ Since that implementing guidance has yet to be issued, the 1995 memo still remains the most comprehensive guidance available, and it is examined here in that context.

The 1995 policy guidance cites a 1988 study by the Army Science Board that found a lack of clear policy guidance, inadequate lines of legal authority and responsibility, and insufficient expertise in water law at Army installations. The memo proceeds to lay out policies and instructions applicable to all Army installations in the United States, with specific guidance for installations in prior appropriation, riparian, and hybrid jurisdictions, and for those installations made up in whole or in part of reserved lands.⁶⁰² The memo applies to surface and groundwater on, under, or appurtenant to land owned by the United States and administered, controlled, or used by the Department of the Army, as well as water diverted from sources off the installation and conveyed for use on the installation.⁶⁰³

The policy memo first outlines general guidance applicable to all Army installations. The memo directs all installations to assert federal reserved water rights for all reserved lands where the use is necessary for the primary purposes of the reservation.⁶⁰⁴ In asserting federal reserved water rights, installation commanders are directed to determine the amount of water being diverted and the uses being made of such water, and whether and in what amounts additional

⁵⁹⁹ OASA (IL&E) memo, *supra* note 22; *See also* Wilcox, *supra* note 207.

⁶⁰⁰ U.S. DEP'T OF ARMY, DIR. 2014-08, *supra* note 22.

⁶⁰¹ *Id.* at 2.

⁶⁰² OASA (IL&E) memo, *supra* note 22.

⁶⁰³ *Id.* at 3.

⁶⁰⁴ *Id.* at B-1.

diversions are necessary to supply water for uses to fulfill the primary purposes of the reservation.⁶⁰⁵ This includes water needed to support troop mobilization, base realignment and closure, or in case of drought conditions or when water is necessary to compensate for interruption in existing supplies.⁶⁰⁶ Installation commanders are to assert reserved rights as necessary to accomplish the broad statutory mission of the Army, which includes organizing, training, and equipping land forces.⁶⁰⁷ Such uses “include all ‘municipal and industrial’ uses of water necessary for a self-contained community, including morale and welfare needs of the Army community.”⁶⁰⁸ In other words, installation commanders are to assert federal reserved water rights to the broadest extent possible and to change the scope of those rights as necessary to accommodate installation needs. That said, federal water rights are not to be asserted for water necessary for fish and wildlife and endangered species programs (secondary purposes), given the limitations of federal reserved water rights doctrine; instead, installation commanders are to seek water rights for these purposes under state law.⁶⁰⁹ Unfortunately, the memo does not address circumstances in which state rejection of water rights for such programs indirectly results in the cessation of certain military activities in order to comply with other federal law, such as the Endangered Species Act.

Installations are nonetheless directed to cooperate with state water administrators in the exercise of federal reserved water rights as a matter of comity, for example by applying for well permits.⁶¹⁰ Similarly, when new uses are contemplated on reserved land, the memo directs installations to notify state water administrators of the exercise of a reserved right and supply all information that would normally support an application for water rights under state law.⁶¹¹ To the extent reserved rights have been quantified by a court decree, the memo advises that new uses may need to be offset by retiring or reducing existing uses.⁶¹² Alternatively, the installation can apply for new water rights under state law.⁶¹³ The memo likewise directs installations to notify state administrators when a change is made to existing reserved rights, including a

⁶⁰⁵ *Id.* at C-7.

⁶⁰⁶ *Id.* at C-7. U.S. DEP’T OF ARMY, DIR. 2014-08, *supra* note 22, at Enclosure 1, notes that “[f]ederal reserved rights may...change over time, depending on the installation’s future needs.”

⁶⁰⁷ *Id.* at C-7, citing 10 U.S.C. § 3062.

⁶⁰⁸ *Id.* at C-7 *see also* U.S. DEP’T OF ARMY, DIR. 2014-08, *supra* note 22, at Enclosure 1.

⁶⁰⁹ *Id.*

⁶¹⁰ *Id.* at B-4. Applications for well permits are subject to a legal caveat that the well permit application is submitted as a matter of comity and “is not to be construed as a waiver of the Federal reserved water right.”

⁶¹¹ *Id.* at B-2.

⁶¹² *Id.*

⁶¹³ *Id.*

change in the point of diversion or place of use, and to provide all information that would normally be required for a change of a water right under state law.⁶¹⁴

For all other lands, including land acquired by purchase or condemnation, Army installations are directed comply with applicable state laws in the appropriation and use of water “to the extent they are consistent with Federal law and the needs of national defense.”⁶¹⁵ Where the application of state law will prevent or adversely affect the Army’s ability to accomplish its statutory missions, or where a state declines to recognize existing water uses or applies state law in a manner that results in rights inferior to those the Army would otherwise be entitled to because the Army failed to comply with state procedural regulations, the Army reserves the option to “assert federal preemption” on a case-by-case basis.⁶¹⁶ “Federal preemption rights” in this context are synonymous with federal non-reserved water rights – a finding of implied preemption of state law borne out of the Army’s statutory mission, apart from any reservation of land.⁶¹⁷ That being said, it’s hard to reconcile this kind of unilateral agency-level assertion of “federal preemption” with federal non-reserved water rights doctrine. The policy asserts the supremacy of federal law where state law would block or frustrate federal ends, but disregards the starting presumption that state law is not displaced except where Congress clearly and specifically intended to authorize the acquisition of water to accomplish certain federal purposes *and* to preempt state law.⁶¹⁸ The Army’s statutory mission, as

⁶¹⁴ *Id.* at C-5.

⁶¹⁵ *Id.* at B-1.

⁶¹⁶ *Id.*

⁶¹⁷ U.S. DEP’T OF ARMY, DIR. 2014-08, *supra* note 22, at Enclosure 1, defines federal preemption rights as rights obtained “[w]hen Congress has clearly and specifically preempted State water law, either expressly or by necessary implication, on lands that are not reserved...” This language mirrors the Olson memo, *supra* note 31, at 383.

⁶¹⁸ See discussion *supra* note 296. This article has not examined in detail the development of the theory of non-reserved water rights. For context here, the Army’s approach in the 1995 memo appears consistent with earlier interpretations of the non-reserved water right theory that were subsequently rejected by the 1982 Olson memo. In 1979, Department of the Interior Solicitor Leo Krulitz first articulated his theory of non-reserved water rights. Krulitz concluded that the United States retained non-reserved water rights over unappropriated waters on federal lands and could exercise control over those water resources without regard to state law as necessary to carry out congressionally authorized purposes, unless there was a clear congressional mandate providing for state control. Krulitz Op., *supra* note 289, at 563, 616. In short, the intent to displace control over state law in the appropriation of unappropriated water could be inferred from Congressional authorization to federal agencies to manage federal lands; no express intent to displace state law needed to be shown. Olson memo, *supra* note 31, at 357; O’Sullivan et al., *supra* note 40, at 128. Moreover, because the federal government retained such rights, in the absence of an explicit congressional directive to the contrary, they could be asserted at any level, including by federal agencies within the Department of the Interior. Olson memo, *supra* note 31, at 331; see also Cefalo, *supra* note 320, at 55. In a supplemental opinion issued by Secretary Clyde Martz in 1981, in part to quell the states’ frenzied displeasure with the Krulitz opinion, Martz affirmed Krulitz’s analysis of the theory of non-reserved water rights but concluded that, in application, non-reserved water rights

an expression of Congressional ends, may well imply a requirement for water, but it is arguably not legally sufficient to overcome the presumption in favor of the application of state law, just as the assignment of land management functions to a federal agency has been found not to meet that threshold.⁶¹⁹ Moreover, before a federal agency can assert a non-reserved water right on behalf of the federal government, Congress must explicitly exercise its preemptive power and authorize or direct the agency to do so.⁶²⁰ Perhaps with this in mind, the memo requires higher echelon legal approval and coordination with the Department of Justice to assert federal preemption rights; the decision cannot be made at an installation level.⁶²¹

The memo's general policy guidance also addresses "military contingencies." In the event that there is an insufficient supply of water to meet specific military needs, such as during a period of troop mobilization, a national emergency, or "other military contingency," the memo directs installation commanders to first consider whether it is feasible to make new appropriations or exercise reserved rights.⁶²² If these are not feasible options, installations may consider two other possible, though not necessarily exclusive, measures to supplement the installation's water supply: purchase or lease agreements or, alternatively, condemnation of water rights, although the latter is to be avoided "in favor of thorough prior planning."⁶²³

For installations located in states following the prior appropriation doctrine or a hybrid thereof, and installations that consist in whole or in part of reserved land, the memo provides additional guidance.⁶²⁴ Importantly, the memo directs installation commanders to identify all water rights on the installation and determine, assemble, and regularly and permanently maintain

were not created by the particular land management statutes at issue (the Federal Land Policy and Management Act and the Taylor Grazing Act). Martz also noted the Department of Interior's policy requiring agencies to receive case-by-case approval before asserting non-reserved water rights. Martz Supplemental, *supra* note 40, at 254. Assistant Attorney General Theodore Olson later flipped Krulitz's interpretation on its head, rejecting the presumption that the federal government need not comply with state water law in its acquisition and use for federal purposes on federal lands because it failed to give adequate consideration to the pattern of congressional deference to state water law. Olson concluded instead that the opposite presumption was more in keeping with the history of federal-state relations: states are presumed to retain control over the allocation of unappropriated water unless federal authority to preempt state law is clearly and specifically exercised, either expressly or by necessary implication, and further that federal non-reserved water rights are not created by the assignment of land management functions to a federal agency. Olson memo, *supra* note 31, at 383.

⁶¹⁹ Olson memo, *supra* note 31, at 383.

⁶²⁰ *Id.* at 362.

⁶²¹ OASA (IL&E) memo, *supra* note 22, at B-1.

⁶²² *Id.* at B-3.

⁶²³ *Id.* at B-3.

⁶²⁴ *Id.* at Appendix C.

data and records on each right, including the history of use (the times the right is used, the amount and duration of use, the purpose for which water was used, and the place of use).⁶²⁵ Commanders are warned that the failure to adequately document, assert and preserve water rights can lead to the loss of those rights or depletion of the value of those rights if transferred or sold.⁶²⁶ The memo also directs installation commanders to treat water rights as an encroachment issue, delineating a “zone of potential impact” from surface and groundwater diversions and monitoring activities and rights applications within that zone that may adversely affect the installation’s water rights.⁶²⁷

A consistent theme throughout the memo is cooperation with state water administrators. Even where compliance is not required as a matter of law, the memo directs certain compliance measures as a matter of comity. Installations are directed to provide state water administrators with a compilation of all of the installations’ water rights, reserved and non-reserved, including priority dates, amount, type of diversion, point of diversion, uses, points of use, water sources, and so forth.⁶²⁸ Changes to appropriative rights are to be requested in accordance with state law; for changes to federal reserved water rights, installation commanders are advised to notify state water administrators of the change and reason for the change, and provide the same information that would otherwise be required for a change requested under state law.⁶²⁹ And, in general, installations are directed to honor requests or orders from state officials in charge of administration of water rights to cease or curtail diversion, except where inconsistent with federal reserved water rights.⁶³⁰

In addition to military contingencies, the guidance applicable to prior appropriation jurisdictions also addresses with more specificity the problem of water shortages.⁶³¹ Here, the memo gets closest to beginning to incorporate water rights into a larger water security discussion. Installation commanders are directed to conduct an analysis of the capability of the installation’s water rights to provide the installation the water it will need to continue essential activities in drought or water shortage conditions, or upon increased demand due to troop mobilization, increases in installation population, or increases in installation activities.⁶³² In conducting this analysis, installations are to consider the available water supply, including hydrology, relative seniority of water rights,

⁶²⁵ *Id.* at C-1, C-2, C-3.

⁶²⁶ *Id.* at C-1, C-2. *See also* U.S. DEP’T OF ARMY, DIR. 2014-08, *supra* note 22, at Enclosure 1.

⁶²⁷ *Id.* at C-3.

⁶²⁸ *Id.* at C-4.

⁶²⁹ *Id.* at C-5.

⁶³⁰ *Id.* at C-7.

⁶³¹ *Id.* at C-6.

⁶³² *Id.* at C-6. *See also* U.S. DEP’T OF ARMY, DIR. 2014-08, *supra* note 22, at Enclosure 2.

and whether the state water administrators recognize the installation's rights as valid.⁶³³ Upon completing this analysis, installation commanders must prepare a contingency plan that includes measures to ensure adequate supplies of water to support installation activities, including acquiring a replacement supply through purchase or condemnation, litigation to force recognition of installation water rights, or increased diversions from reserved lands.⁶³⁴

Whatever may be said about the value of this guidance, it is better than no guidance at all. The water shortage provisions, in particular, seem to recognize that water rights are only one component of water security. The next step will be to incorporate this water rights guidance into a broader water security strategy that seeks to reduce water through demand management—including water conservation and more efficient use of water resources—and strategic infrastructure investment.

As mentioned, a Secretary of the Army directive issued last year supersedes the 1995 memo.⁶³⁵ The truncated directive reiterates Army policy to acquire and maintain water rights consistent with mission requirements; to identify, assert, and preserve water rights to the maximum extent possible to sustain mission capability; and to locate, record, and retain documentation related to water rights.⁶³⁶ The directive is largely unremarkable; it will be important to see how far the implementation guidance goes. There is reason to be hopeful that the implementation guidance will begin to address water rights more comprehensively—such as by addressing the effect of privatization of water systems on water rights⁶³⁷—but as yet there are unfortunately no signs that water rights guidance will be integrated into a broader water security strategy.

Conclusion

Water has long been considered the most vital resource in the arid western states, but the climate science warns of a future—indeed a present—in which water resources are increasingly scarce across the nation and worldwide, and conflicts over water resources abound. Climate change threatens to compound and exacerbate the national security threats that we face as a nation, affecting the nature and scope of the DoD's missions at home and abroad, and complicating the operating environment in which military forces will act.

⁶³³ *Id.* at C-6.

⁶³⁴ *Id.* at C-6, C-7.

⁶³⁵ U.S. DEP'T OF ARMY, DIR. 2014-08, *supra* note 22.

⁶³⁶ *Id.* at 1.

⁶³⁷ U.S. DEP'T OF ARMY, DIR. 2014-08, *supra* note 22; *See also* DEP'T OF THE AIR FORCE, INSTR. 32-1067, para. 3.3.1.

Relatedly, climate change threatens to degrade the DoD's critical mission capabilities by impacting DoD physical infrastructure (built and natural), plans, operations, training, and equipment and resource acquisition. In this regard, climate change tests the DoD's operational resiliency; that is, the DoD's capability to meet current mission requirements and have excess capacity to surge to meet expected demands.

So, DoD's efforts to think critically about the effects of climate change on national security, and the initial steps the DoD has taken to ensure adequate water supplies to meet mission requirements, are commendable. The DoD's water rights and water resource management policy memo is an important first step in ensuring the military departments are engaging in effective water management planning. But, on the whole, there is a noticeable lack of nuance and integration. Notably, the memo fails to identify preferred processes and procedures to resolve conflicts or prioritize water uses and offers no guidance on strategies to employ in asserting water rights. Questions left unanswered include whether and to what extent to pursue federal water rights over state-based water rights and, if the latter, whether and to what extent to comply with state regulatory requirements for legal or policy reasons, or whether to seek to quantify such rights through a court decree or through memoranda of agreement with state and local authorities and other water rights holders. There is similarly no guidance for installations whose territories cross state lines, or whose water resources are already subject to ongoing intra- or interstate disputes.

Presently, there is scant additional guidance available to military installations or to the military departments more generally on the exercise of water rights. The guidance that does exist, such as the Army's 1995 policy guidance memorandum, is at best incomplete and lacks strategy. The DoD and the military departments must do far better in terms of the water rights guidance that is provided to military installations in the United States. This guidance must strategically address the assertion of water rights, the choice of fora and procedures to adjudicate those rights, compliance obligations, issues of quantification and changing circumstances, interstate water conflicts, and legal expectations and adaptive water rights strategies in dealing with climate change-related water scarcity. Importantly, this guidance must also address novel cooperative approaches—like the Nellis AFB model—to water security. These kinds of negotiated settlements within the contours of existing state law are likely to be the way of the future and must therefore be a key component of the DoD's water rights strategy.

Additionally, the DoD and the military departments must dispense with the notion of expanded federal water rights. While a national defense water right has obvious abstract appeal, the establishment of such rights is not the

panacea to the DoD's water ills, it does nothing to counter the underlying problem of water scarcity (it simply shifts the burden to other water users), it would be enormously disruptive to existing water rights administration, and it could ultimately frustrate other federal and DoD policies encouraging water conservation and the efficient use of water resources.

But most importantly, the DoD and the military departments need to move with appropriate haste toward a comprehensive approach to water security that recognizes water security as an exercise of best water management practices, that seeks to reduce rather than to accommodate demand, and that recognizes water rights decisions as one measure of risk allocation that is integral to, but not sufficient for, water security. The lack of a unified, comprehensive water security strategy, and the continuing ill-conceived policy divide between water rights and water use management, represent a critical failure of planning. There is an urgent need for clear, reliable, and sound policies to avoid conflicts and uncertainty in relations with the states and to facilitate future planning for the use of water resources.

The DoD must take the lead in establishing an overarching water strategy, defining roles and responsibilities throughout the Department to ensure appropriate participation at all levels, and setting expectations for robust, comprehensive and collaborative outside-the-fence line coordination with installation neighbors and federal, state, regional, watershed, and local public and private stakeholders, as well as participation in regional integrated watershed resources planning efforts.

Finally, the DoD's water security strategy must integrate water rights strategy and water use management as interrelated and complementary components of water security, recognizing that the security of water rights is a false security, and further that water rights, if not appropriately exercised, can be very disruptive and harmful to the overall relationship of the federal government to the various states, and can frustrate other federal policies and goals promoting water conservation and efficient use of water resources. Properly conceived, DoD's water security strategy will bond water rights and water demand management into a flexible adaptation approach, such that the policy guidance and procedural mandates for the exercise of water rights and for the implementation of conservation and efficiency measures align in accordance with the DoD's strategic water security priorities.

With that strategic framework in place, the DoD must then incorporate its water security strategy into the full scope of agency decision-making and long-term planning, including installation missions and activities determinations, personnel assignment policies, infrastructure construction and placement, and

future mission siting decisions. The DoD and military departments can then set activity and growth limits at realistically sustainable levels and consider appropriate water rights approaches for each installation, taking into account the natural limits imposed by the environment, regional population growth, installation water supplies and available water resources, water program funding, storage and distribution facilities, and other appropriate considerations. If the DoD is able to develop a unified, comprehensive water security strategy as envisioned in this article, the DoD will be well positioned to sustain its operational resiliency and preserve its capacity to successfully execute its mission in support of the national security strategy of the United States, even as we face an uncertain water future wrought by global climate change.

BOOK REVIEW

Commander I.C. Lemoyne, JAGC, USN*

***THE GUNS AT LAST LIGHT: THE WAR IN WESTERN EUROPE, 1944 - 1945*¹**

*You will enter the continent of Europe and, in conjunction with the other united nations, undertake operations aimed at the heart of Germany and the destruction of her armed forces.*²

I. Introduction

I wanted to dislike this book. Asked to read another historical account of the Allied victory in WWII centered exclusively on the ground war in Western Europe, yet another paean to “the Greatest Generation” focused entirely on the United States Army, filling more than 600 pages of text with copious notes was not exciting to me. The contrarian in me, my own venal service pride, a sense that I had been over this ground enough already; I truly expected to dislike this book.

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¹ RICK ATKINSON, *THE GUNS AT LAST LIGHT: THE WAR IN WESTERN EUROPE, 1944 – 1945* (2012).

² Quote from the order of the Combined Chiefs of Staff to Commander, Supreme Headquarters Allied Expeditionary Force, General Dwight D. Eisenhower prior to the invasion in June 1944. ATKINSON, *supra* note 1 at 12.

Guns at Last Light, the final installment of Rick Atkinson's *Liberation Trilogy*,³ is a masterpiece of contemporary narrative history. Mr. Atkinson, already an award winning journalist and historian⁴, has crafted a seminal work that is important reading for all military officers and civilian policy makers in military affairs.

This review addresses Mr. Atkinson's purpose in writing *Guns at Last Light* and identifies his central thesis. The review goes into his background as a journalist and how it informs his approach to this topic and extensive use of sources. Next discussed is the organization and style of *Guns at Last Light* and the applicability of the book today. Finally, this review notes criticisms of the work and describes Mr. Atkinson's own summation.

II. Purpose and Thesis

The clearest statement of Mr. Atkinson's purpose with all the works in the *Liberation Trilogy* appears in the Prologue to the first book, *An Army at Dawn: The War in North Africa, 1942 – 1943*. He states that his purpose is more than to set out “the choreography of the armies” for our understanding or to explain why in battle “topography is fate.” His purpose is to provide “intimate detail” of individuals through “their diaries and letters, their official reports and unofficial chronicles” and their memories “even as we swiftly move toward the day when not a single participant remains alive to tell his tale” And his task as a historian is “to authenticate: to warrant that history and memory give integrity to the story, to aver that all this really happened.”⁵

The scope of *Guns at Last Light* is contained in the quote at the beginning of this review, but it is best understood by reference again to the Prologue to *An Army at Dawn*.⁶ There Mr. Atkinson explains his view that the “liberation of western Europe is a triptych” with *Guns at Last Light* as the final panel covering “the invasion of Normandy and the subsequent campaigns across France, the Low Countries, and Germany.” Although this scope makes clear that his focus is on the campaigns in Western Europe, Mr. Atkinson is careful to

³ RICK ATKINSON, THE LIBERATION TRILOGY consists of three books, AN ARMY AT DAWN: THE WAR IN NORTH AFRICA, 1942 – 1943 (2002), THE DAY OF BATTLE: THE WAR IN SICILY AND ITALY, 1943 – 1944 (2007), and GUNS AT LAST LIGHT: THE WAR IN WESTERN EUROPE, 1944 – 1945 (2012), <http://liberationtrilogy.com>, (last visited Sept. 11, 2013).

⁴ Notably, 1982 Pulitzer Prize for National Journalism, 2003 Pulitzer Prize for History, <http://www.pulitzer.org/1999> and <http://www.pulitzer.org/2003> (last visited Sept. 7, 2013). Additional awards may be found at <http://www.liberationtrilogy.com> (last visited Sept. 7, 2013).

⁵ Atkinson, AN ARMY AT DAWN, *supra* note 3 at 2.

⁶ *Id.*

point out the importance of Adolph Hitler's decision to attack the Soviet Union at enormous cost in energy, blood, and treasure of both Germany and the Soviet Union.

Mr. Atkinson's thesis is not set out clearly in the opening of *Guns at Last Light*, but is referred to in its Epilogue. Viewed in conjunction with his Prologue to *An Army at Dawn*, his main point is that the Allied Powers in WWII prevailed largely because of the "prodigious weight of American industrial might" provided to the "Allied arsenal." Mr. Atkinson further argues that this "brute strength" had to be coupled with "generalship and audacity, guile and celerity, initiative and tenacity" to bring the combat power produced by the American "economic juggernaut" to bear on the enemy in order for the Allies to succeed.⁷

III. Professional Background and Sources

Mr. Atkinson started his professional life as a journalist, most notably for the Washington Post. His personal biography lists numerous awards during his years as a reporter.⁸ He subsequently expanded his endeavors to include writing historical books. Again, he was nationally recognized for the quality of his work.⁹ As will be discussed in greater detail below, his background as a reporter is clearly evident in the style and organization of *Guns at Last Light*. His background as a journalist also informs his approach to his audience. This is a book that can be read, understood, and enjoyed with little or no specialized knowledge of the campaigns in Western Europe, the strategic and political issues motivating significant parties to the conflict, or much knowledge of large army confrontations at all.

Mr. Atkinson frequently explains the macro aspects of his story by involving the reader in small, relatable elements of that story. He does not assume that the reader is an expert in the subjects he chooses for inclusion in the story. Mr. Atkinson provides background information where he believes it will be important to explaining the significance of an event or decision by a participant, and he has done his homework. The Prologue of *Guns at Last Light* contains 136 separate citations, many referring to multiple works supporting his assertions. The substantive portion of the Notes section contains 164 pages alone. His Selected Sources include primary source materials, first-hand accounts, and the work of other historians and commentators. This extensive

⁷ *Id.*

⁸ ABOUT RICK ATKINSON, <http://www.liberationtrilogy.com/trick-atkinson/> (last visited Sept. 7, 2013).

⁹ *Id.*

bibliography includes periodicals, newspapers, papers, letters, collections, personal narratives, diaries, interviews, questionnaires, oral history transcripts, and other assorted miscellany to support his work. And books, more than 781 separate books are listed there as well.¹⁰

IV. Organization, Style, and Usefulness

Mr. Atkinson turns his substantial journalistic skills on crafting a work of history for the 21st century. The structural style is impressionistic rather than completely linear, with many carefully placed details that can overwhelm a reader who focuses too intently on one then the next. Mr. Atkinson's work is best understood when taken as a composite whole, with almost microscopic details that slowly pile up with mesmerizing effect. Reading them, you might wish for an interactive, multimedia accompaniment to enhance comprehension.¹¹

Guns at Last Light begins with an extensive Prologue detailing the preparations and political maneuvering leading up to Operation OVERLORD.¹² The first portion of this Prologue is largely expository and provides much of the necessary strategic, political, and operational background to provide context for the importance of the struggle that is the main focus of the text.¹³ The Prologue then transitions into "pointillism history,"¹⁴ the predominant style of the rest of the work; a careful compilation of enormous amounts of minute details woven into a comprehensive tapestry with effective narrative impact. The final pages of the Prologue hurtle from detail to detail aiding the author's obvious attempt to convey the roiling emotions that wracked the invasion force like the angry sea they were then crossing.¹⁵ This style helps Mr. Atkinson create genuine drama as he deftly incorporates a wealth of detailed information into a compelling narrative, even though we all know how the story ends.

Interspersed throughout *Guns at Last Light* are personalized details of pathos and tragedy, sparingly covered in a few lines.

Officers ordered men in landing craft approaching the shore to keep their heads down, as one lieutenant explained, "so they

¹⁰ Atkinson, *supra*, note 1, at 647-847.

¹¹ And one is helpfully provided at <http://www.liberationtrilogy.com> (last visited Sept. 7, 2013).

¹² Atkinson, *supra* note 1, at 1-40.

¹³ *Id.* at 1-6.

¹⁴ "[A]ssembling the small dots of color into a vivid, tumbling narrative." Ben Macintyre, *The Price of Victory*, N. Y. Times, May 23, 2013, <http://www.nytimes.com/2013/05/26/books/review/the-guns-at-last-light-by-rick-atkinson.html>.

¹⁵ Atkinson, *supra* note 1, at 25-40.

wouldn't see it and lose heart." . . . Without firing a shot, Company A was reportedly "inert and leaderless" in ten minutes; after half an hour, two-thirds of the company had been destroyed, including Sergeant Frank Draper, Jr., killed when an antitank round tore away his left shoulder to expose a heart that beat until he bled to death. Among twenty-two men from tiny Bedford, Virginia, who would die in Normandy, Draper, "didn't get to kill anybody," his sister lamented.¹⁶

In addition to piles of facts leavened by these personalized details, Mr. Atkinson employs narrative arcs regarding relatively unknown or underappreciated contributors. These narrative arcs are welcome additions, knitting together the complex story and providing a human face to the enormous amount of information being presented.

One of the most poignant examples of this device involves Brigadier General Theodore Roosevelt, Jr., who is introduced in the Prologue.¹⁷ Brigadier General Roosevelt appears repeatedly in the portion of *Guns at Last Light* dealing with the battle in Normandy and is first mentioned while leading American troops at Utah Beach in the early hours of the invasion.¹⁸ Already decorated for valor in previous campaigns, he is described as bearing the pain of his war wounds, the weight of his father's reputation, and ominous "chest pains gnawing beneath his service ribbons" into battle in Normandy.¹⁹ The day after the beach assault, Brigadier General Roosevelt arrived at the 82d Airborne command post, "helmet pushed back and waving his cane from *Rough Rider* 'as if the bullet that could kill him had not been made,' one witness reported. 'Fellows' Roosevelt bellowed upon his arrival, 'where's the picnic?'"²⁰ He accompanied the 4th Division in its assault on the town of Cherbourg and subsequently served as the region's military governor.²¹ Previously judged "too softhearted to take a division" by General Omar Bradley,²² General Bradley later chose Roosevelt for division command after D-Day, and Roosevelt was nominated for the Congressional Medal of Honor for his exploits at Utah Beach.²³ After having dinner with his son in mid-July 1944, Roosevelt died of a heart attack, never knowing of his division command; the Congressional Medal of Honor was awarded posthumously.²⁴

¹⁶ *Id.* at 69.

¹⁷ *Id.* at 27.

¹⁸ *Id.* at 59-63.

¹⁹ *Id.* at 60.

²⁰ *Id.* at 91.

²¹ *Id.* at 126.

²² *Id.* at 126.

²³ *Id.* at 126.

²⁴ *Id.* at 127.

Another passage from the Epilogue of *Guns at Last Light* displays Mr. Atkinson's detail rich style in direct support of his thesis. He relates how America produced and delivered "18 million tons of war stuff to Europe, equivalent to the cargo of 3,600 Liberty ships or 181,000 rail cars." This prodigious output ranged from "800,000 military vehicles" to shoes "in sizes 2A to 22EEE." It included "40 billion rounds of small arms ammunition and 56 million grenades." During the final campaigns from June 1944 to May 1945, American troops expended "500 million machine-gun bullets and 23 million artillery rounds." Ever the journalist, Mr. Atkinson employs three distinct sources, quoting Churchill describing America as a "prodigy of organization," an artillery gunner, "I'm letting the American taxpayer take this hill," and a German prisoner, "Warfare like yours is easy," to frame and support his point.²⁵

To be clear, Mr. Atkinson does not aver that the American way of war was actually easy. The quotes provide context for the details from the perspective of the participants, and the piling up of these details supports what I found to be the central message of *Guns at Last Light* mentioned previously. Victory in Western Europe was due in significant part to the staggering material superiority the Western Allies brought to the struggle, coupled with their ability to marshal it into battle effectively and relentlessly. It is this central message that I believe warrants understanding by military officers and civilian policy makers alike.

For other potential readers somewhere along the spectrum from a WWII expert to someone casually interested in the history of WWII in Western Europe, *Guns at Last Light* is an excellent addition to the historical canon. It provides an illuminating narration of the final push to victory in Europe in WWII, and a solid foundation for understanding the state of international relations surrounding the subsequent Cold War.

V. Criticisms

Mr. Atkinson ambitiously takes as his subject all of the Western Allied forces, their leaders, and an array of subordinates. He throws in the major political figures of the era²⁶ and the geopolitical fears driving their decisions.²⁷

²⁵ *Id.* at 633.

²⁶ President Franklin D. Roosevelt receives 31 separate references, British Prime Minister Winston Churchill, 72 separate entries, and Russian Marshal Joseph Stalin, 10 separate entries. *Supra*, note 1 at 870, 855, and 872.

²⁷ For example, quoting a War Department report from late 1944, "The defeat of Germany will leave Russia in a position of assured military dominance in Eastern Europe . . . [bringing] a world

Even when coupled with the personalized facts and narrative arcs described above, the wealth of information provided by Mr. Atkinson can at times be dizzying. This treatment, however, helps convey the very nature of the war, “clear in hindsight, but bewildering and chaotic to those caught up in it.”²⁸

Additionally, as has been noted elsewhere, his descriptions of actual battle occasionally drift into “overheated prose,” and are less convincing than many other portions of *Guns at Last Light*.²⁹ Mr. Atkinson’s weakness in this area may be excused as a credible attempt of a writer accustomed to direct observation or at least first-hand sourcing of information having to rely on second- and third-hand accounts of an experience he has had the good fortune to avoid. Some critics have also noted that he ignores the contributions of other nations and focuses too intently on the American part of the story.³⁰

VI. Final Argument

Guns at Last Light ends with an economy made all the more effective considering it resolves a story that comprises three separate books. Perhaps an inspiration for this economy is the message dictated by Eisenhower himself to the Combined Chiefs of Staff regarding the surrender ceremony just transpired, “The mission of this Allied force was fulfilled at 0241, local time, May 7, 1945. Eisenhower.” *Guns at Last Light* contains four main parts comprised of twelve numbered sections and forty-six separately titled chapters in its 640 pages of text. Yet the book presents the factual elements of final victory in only eight pages. The Epilogue adds an additional thirteen pages of detailed aftermath tallying the enormous human tragedy WWII encompassed. It also briefly discusses how the conclusion of hostilities set the stage for the next conflict, the Cold War. Mr. Atkinson’s style shines as he effectively sums up the achievement and impact of the events just laid out without waxing unnecessarily eloquent. True to his opening statements, Mr. Atkinson’s work in *Guns at Last Light* supports his position that the true facts taken together comprise a much more satisfying and complete story.³¹

profoundly changed in respect to relative military strengths The British Empire will emerge from the war having lost ground both economically and militarily.” Atkinson, *supra* note 1 at 381.

²⁸ Macintyre, *supra* note 14.

²⁹ *Id.*

³⁰ <http://www.telegraph.co.uk/culture/books/historybookreviews/10144098/The-Guns-at-Last-Light-by-Rick-Atkinson-review.html>.

³¹ Atkinson, *AN ARMY AT DAWN*, *supra* note 3 at 2.

VII. Conclusion

I hefted this book with trepidation. Having made my way through its wealth of information conveyed by an author of substantial gifts and obvious command of his subject, I read the following quote from General George C. Marshall, United States Army Chief of Staff, to General Eisenhower. “You have completed your mission with the greatest victory in the history of warfare You have made history, great history for the good of all mankind, and you have stood for all we hope and admire in an officer in the United States Army.”³² I now set down *Guns at Last Light* disappointed only by my out-of-order introduction to Mr. Atkinson’s *Liberation Trilogy*. This naval officer has already ordered the first installment, *An Army at Dawn*.

³² Atkinson, *supra*, note 1 at 647-847.