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Articles

THE FIRST UNIFORMED JUDGE ADVOCATE GENERAL OF THE NAVY: A DISTINGUISHED MARINE FELLED BY MENTAL ILLNESS

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Colonel William B. Remey, United States Marine Corps

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I. INTRODUCTION

Forty-two days after commissioning George Washington as the Continental Army's Commander in Chief, the Continental Congress appointed a "Judge Advocate of the army."[1] Named to that position was 25-year-old William Tudor, a Harvard College graduate who had furthered his education as a pupil in John Adams's law office.[2] A year later, in August 1776, the Continental Congress referred to him as the "judge advocate general" and gave him "the rank of lieutenant colonel in the army of the United States."[3] Yet more than a century would pass before Congress saw the need for a uniformed naval judge advocate general.[4] When finally created in 1880, that position was filled by Captain William B. Remey, United States Marine Corps.[5] For almost a dozen years, he served with distinction as the judge advocate general of the Navy before a debilitating mental illness compelled his retirement.[6]

Remey is an essential figure in naval judge advocates' heritage. For almost 14 years, he served as judge advocate general in either an acting or official capacity.[7] His biography is also the Office of the Judge Advocate General of the Navy's birth story. As the first uniformed naval judge advocate general, his actions established precedents for his successors.

Despite Remey's historical significance, little has been written about him—and much of what has been written is wrong.[8] Even the portrait that typically accompanies modern sources' references to him is misleading; it offers an idealized, noticeably thinned version of its subject.[9] This article seeks to fill

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[1] 2 J. CONT'L CONG. 96, 221 (1775), https://bit.ly/44yU4mg.
[2] *Id*.; QUINQUENNIAL CATALOGUE OF THE OFFICERS AND GRADUATES OF HARV. UNIV. 1639–1890, at 87 (Cambridge, Harvard University 1890), https://bit.ly/3puYVpU; 3 JOHN ADAMS, THE WORKS OF JOHN ADAMS, SECOND PRESIDENT OF THE U.S. 86 (Bos., Charles C. Little & James Brown 1851), https://bit.ly/3NMKKoc.
[3] 5 J. CONT'L CONG. 645 (1776), https://bit.ly/3JMme5i. William Tudor served as judge advocate general of the Army until 11 April 1777, when he resigned and was replaced by John Laurance. 18 J. CONT'L CONG. 1036 (1780), https://bit.ly/3POQ2C5.
[4] During the Civil War, Congress created a civil office of "solicitor and naval judge advocate-general of the Navy Department." *See infra* notes 208–239 and accompanying text.
[5] *See infra* notes 297–299 and accompanying text.
[6] *See infra* notes 304–457 and accompanying text.
[7] When Remey began performing his judge advocate general duties on 1 July 1878, his title was "acting judge advocate"; the Secretary of the Navy changed his title to "acting judge advocate general" on 12 February 1879. *See infra* notes 270, 277 and accompanying text.
[8] *See, e.g.*, *infra* note 142.
[9] *Compare* photographs of Remey at UNITED SERV., Aug. 1891, front piece [hereinafter UNITED SERV. Front Piece], and Naval History and Heritage Command, *NH 171, Colonel William B. Remey, U.S. Marine Corps*, https://bit.ly/44zv0vC [hereinafter NH 171], *with* drawing of Remey at, *e.g.*, Richard A. Long, *Col William B. Remey—First Judge Advocate General of the Navy*, FORTITUDINE,

the historical gap by providing as full a biography of the first uniformed judge advocate general of the Navy as the available sources permit.

II. REMEY'S EARLY MILITARY CAREER

Remey hailed from a prominent family in Burlington, Iowa.[10] His father, after whom he was named, was a successful businessman who also held local office and helped found Iowa's first Episcopal church.[11] His mother was a direct descendent of two *Mayflower* passengers: John Howland—a signer of the Mayflower Compact—and his wife, Elizabeth Tilley Howland.[12] Remey's older brother, George, and younger brother Edward received appointments to the Naval

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Spring 1980, at 18; CAPTAIN JAY M. SIEGEL, ORIGINS OF THE NAVY JUDGE ADVOCATE GENERAL'S CORPS: A HISTORY OF LEGAL ADMINISTRATION IN THE UNITED STATES NAVY, 1775 TO 1967, at 175 (1997), https://bit.ly/44kHeZm; LIEUTENANT COLONEL GARY D. SOLIS, MARINES AND MILITARY LAW IN VIETNAM: TRIAL BY FIRE 4 (1989), https://bit.ly/44cg2LX; Fred L. Borch, *Lore of the Corps: Marine Was First Navy Judge Advocate General*, 2015 ARMY LAW. 1, 1 (Aug. 2015), https://bit.ly/3O248i7; CHARLES MASON REMEY, REMINISCENT OF COLONEL WILLIAM BUTLER REMEY, UNITED STATES MARINE CORPS, 1842–1894 AND LIEUTENANT EDWARD WALLACE REMEY, UNITED STATES NAVY unnumbered page after page 4 (1955) [hereinafter REMEY].

[10] While sources conflict as to William Butler Remey's birthdate, it was probably 18 November 1843. It is uncontroverted that he was born in Burlington, Iowa. According to his nephew Charles Mason Remey, he was born on 18 October 1842. REMEY, *supra* note 9, at unnumbered page following page 28. His actual birthday was probably 18 November. *See, e.g.*, *Personal Items*, ARMY & NAVY J., Nov. 22, 1890, https://bit.ly/3PzjQ3U, at 203; *Personal Items*, ARMY & NAVY J., Dec. 12, 1891, https://bit.ly/43cXj1O, at 268. Remey was probably born in 1843—two years after the birth of his older brother, George, whose birthdate is reliably recorded as 10 August 1841. CHARLES MASON REMEY, THE REMEY FAMILY OF THE UNITED STATES OF AMERICA 1654–1957, at 56 (1957); *Admiral G. C. Remey Dies at 86 Years*, N.Y. TIMES, Feb. 12, 1928, at 30. *See, e.g.*, 1880 Census, Washington, D.C., Page 200D, Roll 123, T9, Record Group 29, National Archives, Washington, D.C. (recording William B. Remey's age as of last birthday before 1 June 1880 as 36); William B. Remey Death Certificate, City Clerk, City of Somerville, Mass. (age 51 upon William B. Remey's death on 20 January 1895) [hereinafter Remey Death Certificate]. Some historical records, however, suggest 1842 as his birth year. *E.g.*, 1860 Census, Burlington, Iowa, Page 115, Roll 319, M653, National Archives, Washington, D.C. (listing age as of 20 June 1860 enumeration as 17); 1850 Census, Burlington, Iowa, Page 472a, Roll 183, M432, National Archives, Washington, D.C. (listing age as of 5 November 1850 enumeration as 7). The discrepancy between the older and newer census data could be explained by rounding to the nearest birthday on the older census returns.

[11] THE HISTORY OF DES MOINES COUNTY, IOWA 407, 487–88, 498–99, 543, 565 (Chicago, Western Hist. Co. 1879), https://bit.ly/3PMUcdU.

[12] GEORGE ERNEST BOWMAN, THE MAYFLOWER COMPACT AND ITS SIGNERS 12–13 (1920), https://bit.ly/3O4iP3l; ANNIE RUSSELL MARBLE, THE WOMEN WHO CAME IN THE MAYFLOWER 85–88 (1920), https://bit.ly/3NMWkzL; Robert F. Huber, *Admiral George Remey: A Man Hailed for his 'Good Judgment,'* HOWLAND Q., Dec. 1994, at 4–5, https://bit.ly/3D5lsg1.

Academy and became Navy officers.[13] His third brother, John, became a bank president in his hometown.[14] His only sister, Eliza, died in early adolescence.[15]

The Remey children attended a mixture of Burlington public and private schools.[16] Corporal punishment was common.[17] Will's older brother recounted one incident when a teacher attempted to discipline Will by hitting his hand with a ruler.[18] The future Marine colonel pulled his hand aside at the last moment, resulting in the teacher striking and breaking his own kneecap.[19] Like his brothers, Will attended the Burlington Collegiate Institute, a Baptist secondary school.[20]

The Civil War's outbreak created dozens of Marine Corps officer vacancies.[21] Almost a third of the Marine Corps' 63 officers left the United States' service to accept commissions in the Confederate States Marine Corps.[22] A 25 July 1861 statute increasing the number of Marine Corps officer billets by 30 created still more openings.[23] Competition for the resulting second lieutenant commissions was intense, with an estimated 500 to 2,000 applicants vying for the spots.[24] One of those coveted positions went to Will Remey, who reported for duty at Marine Corps Barracks, Washington, D.C., on 4 September 1861 and was commissioned as a second lieutenant the following day.[25] Republican Senator

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[13] LEWIS R. HAMERSLY, THE RECORDS OF LIVING OFFICERS OF THE U.S. NAVY AND MARINE CORPS 159, 243–44 (3d ed. Phila., J.B. Lippincott & Co. 1878) [hereinafter HAMERSLY 1878], https://bit.ly/44yRpcn.
[14] *56 Years Banker, Retires*, SIOUX CITY J., Jan. 4, 1919, at 4.
[15] 1 George C. Remey, Life and Letters of Rear Admiral George Collier Remey, United States Navy [hereinafter George C. Remey Life and Letters], pt. 1, at 7 (undated, unpublished typescript), in Box 1, Papers of the Charles Mason Remey Family, Library of Congress Manuscript Division, Washington, D.C. [hereinafter Remey Family Papers].
[16] *Id*. at 11.
[17] *Id*.
[18] *Id*.
[19] *Id*.
[20] ALONZO ABERNETHY, A HISTORY OF IOWA BAPTIST SCHOOLS 70, 74–75 (1907), https://bit.ly/44iqG3X.
[21] *See infra* notes 22–23 and accompanying text.
[22] WILLIAM S. DUDLEY, GOING SOUTH: U.S. NAVY OFFICER RESIGNATIONS & DISMISSALS ON THE EVE OF THE CIVIL WAR 18–19 (1981), https://bit.ly/3reGGp3.
[23] *Compare* An Act for the Better Organization of the Marine Corps, ch. 19, 12 Stat. 275 (1861) [hereinafter USMC Organization Act 1861], https://bit.ly/44hKhkW, *with* An Act for the Better Organization of the United States' "Marine Corps," ch. 132, 4 Stat. 712 (1834).
[24] *See* JACK SHULIMSON, THE MARINE CORPS' SEARCH FOR A MISSION, 1880–1898, at 13 (1993).
[25] Record of Colonel William B. Remey, U.S.M.C., Headquarters U.S. Marine Corps, Adjutant & Inspector's Office (May 6, 1893), 1 [hereinafter Remey Service Record], in Record at 8–10, *Remey v. United States*, 33 Ct. Cl. 218 (1898) (Departmental, No. 48), "Oversized Enclosures to Departmental Jurisdiction Case Files, 1883–1893," National Archives Identifier 2734746, Entry PI-58 25, Record Group 123, National Archives, Washington, D.C. [hereinafter *Remey v. United States* Record]; Marine Corps Muster Roll, Marine Barracks, Washington, D.C. (Sept. 1–30, 1861), Roll 47, T1118, U.S. Marine Corps Muster Rolls, 1798–1892, National Archives, Washington, D.C. The

James W. Grimes of Iowa helped him secure his commission.[26] Senator Grimes—who sat on the Naval Affairs Committee[27]—was a powerful advocate. His constituent was selected despite failing to meet the statutory minimum age of 20,[28] though it appears that Remey's birth year was backdated to 1840 in official Marine Corps records.[29]

Remey's career began poorly. After initial training at the Washington Marine Barracks, the young lieutenant reported aboard USS *Sabine*—a wooden sailing frigate then at anchor in New York—on 10 December 1861.[30] He assumed command of the ship's 49-member Marine guard.[31] Less than two months later, he was rebuked by the Colonel Commandant of the Marine Corps.[32] Colonel John Harris, a stodgy veteran of the War of 1812,[33] wrote to Remey:

> I must inform you, I heard from a reliable source, that the Guard on the Sabine had fallen off in appearance, in discipline and in efficiency, since you took charge of it, which I am sorry for, not only on account of the Service, but of your reputation as an officer. You were young in the Service when ordered to that Ship, and it was not expected you could put a Guard in good condition, but you found it in that State and we expect that you would keep it so. Its falling off must proceed from want of knowledge of your profession, or of attention to your duty. In either case it is in your power to remedy it. You may be assured

act that established the new Marine Corps officer positions provided that the President "may, during the recess of the Senate, first by promotions, and then by selections, appoint the officers hereby authorized, which appointments shall be submitted to the Senate, at their next session, for their advice and consent." USMC Organization Act 1861, *supra* note 23, § 2. President Lincoln transmitted a slate of nominees for Marine Corps officer promotions and commissioning, including Remey's nomination to be a second lieutenant with a date of rank of 26 November 1861, on 7 March 1862. 12 S. EXEC. JOURNAL, 37th Cong., 2d Sess. 168 (1862), https://bit.ly/44EJYAv. The Senate confirmed Remey's nomination on 31 March 1862. *Id*. at 197.

[26] *Will Have to Fight*, MINNEAPOLIS TRIB., May 16, 1891, at 1; *Col. Remey Was an Iowan*, SIOUX CITY J., Jan. 27, 1895, at 12.

[27] CONG. GLOBE, 37th Cong., 1st Sess. 17 (1861).

[28] USMC Organization Act 1861, *supra* note 23, § 3.

[29] *See Birthdays in the Services*, ARMY & NAVY J., Nov. 19, 1887, at 324 (listing Remey's date of birth as 18 November 1840). Regardless of whether Remey was born in 1842 or 1843, he was below the statutory minimum age when he was commissioned. *See supra* note 10.

[30] Marine Corps Muster Roll, USS *Sabine* (Dec. 1–31, 1861), Roll 48, T1118, U.S. Marine Corps Muster Rolls, 1798–1892, National Archives, Washington, D.C.; 6 NAVAL HIST. DIV., DEP'T OF THE NAVY, DICTIONARY OF AMERICAN NAVAL FIGHTING SHIPS 215–16 (1976) [hereinafter 6 DANFS], https://bit.ly/44iqXUx.

[31] Marine Corps Muster Roll, *supra* note 30.

[32] *See infra* note 34 and accompanying text.

[33] *See generally* Col. Joseph H. Alexander, USMC (Ret.), *John Harris, 1859–1864*, COMMANDANTS OF THE MARINE CORPS 74, 76 (Allan R. Millett & Jack Shulimson eds., 2004).

> that knowledge of your duty, and the discipline of your men, can be accomplished only by study, and close attention to duty, which I hope you will persevere in, and when you return from sea again, that your Guard will be in a better condition than it was when you took charge of it.[34]

In September 1862, Captain Charles Heywood reported aboard *Sabine*, supplanting Remey as commanding officer of the Marine guard.[35] More than six feet tall with broad shoulders, Heywood had risen rapidly since being commissioned in 1858.[36] A year before joining *Sabine*, he commanded a Marine company that helped capture two Confederate forts on North Carolina's Outer Banks.[37] While stationed aboard USS *Cumberland*, Heywood won plaudits for his bravery during the ship's engagement with the Confederate ironclad *Virginia* (formerly USS *Merrimac*).[38] He fired the last shot from *Cumberland* before the wooden frigate sank with her colors still flying.[39] He would go on to become a highly successful Commandant of the Marine Corps during a turbulent period when the service's very survival was in jeopardy.[40] Remey stayed aboard *Sabine* as Heywood's lieutenant, no doubt a valuable learning experience for the young Marine officer.[41]

Aside from being chastised by the Colonel Commandant, Remey's 16 months aboard *Sabine* were largely uneventful. A rare moment of excitement came in March 1862 when the frigate provided relief to USS *Vermont*, an aged 74-gun warship seriously damaged in a ferocious gale off Cape Cod.[42] Eight months later, *Sabine* sailed from New London, Connecticut, to the Azores and then Cape Verde on a fruitless 10,000-mile hunt for the notorious Confederate cruiser *Alabama*.[43] Remey detached from *Sabine* after that cruise and, following a month's leave, reported to the large Marine barracks at the Norfolk Navy Yard

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[34] Jno. Harris, Col. Comdt. to Lieut. Wm. B. Remey (Feb. 4, 1862), 19 Letters Sent, Aug. 1798–June 1801; Mar. 1804–Feb. 1884, Entry 4, Record Group 127, National Archives, Washington, D.C.
[35] Marine Corps Muster Roll, USS *Sabine* (Sept. 1862), Roll 51, T1118, National Archives, Washington, D.C.
[36] Jack Shulimson, *Charles Heywood, 1891–1903*, COMMANDANTS OF THE MARINE CORPS, *supra* note 33, at 115; *see* LEWIS RANDOLPH HAMERSLY, THE RECORDS OF LIVING OFFICERS OF THE U.S. NAVY AND MARINE CORPS 470 (7th ed. 1902) [hereinafter HAMERSLY 1902], https://bit.ly/3rkfVzD.
[37] *See* HAMERSLY 1902, *supra* note 36, at 470; GLENN M. HARNED, MARINE CORPS GENERALS, 1899–1936: A BIOGRAPHICAL ENCYCLOPEDIA 10 (2015).
[38] HAMERSLY 1902, *supra* note 36, at 470; Harned, *supra* note 37, at 10.
[39] HARNED, *supra* note 37, at 10.
[40] *See generally* SHULIMSON, *supra* note 24, at 79–201.
[41] Remey Service Record, *supra* note 25, at 1; Marine Corps Muster Roll, *supra* note 35.
[42] *Arrival of the Frigate Sabine*, N.Y. HERALD, Apr. 16, 1862, at 4; 7 NAVAL HIST. CTR., DEP'T OF THE NAVY, DICTIONARY OF AMERICAN NAVAL FIGHTING SHIPS 486 (James L. Mooney, ed., 1981) [hereinafter 7 DANFS], https://bit.ly/3O6ff9W.
[43] *The Cruise for the Privateers*, N.Y. HERALD, Feb. 12, 1863, at 1.

in June 1863.[44] Three months later, a botched amphibious assault at the site where the Civil War began would profoundly affect the Remey family.

On the night of 8 to 9 September 1863, Remey's older brother, then-Lieutenant George C. Remey, U.S. Navy, participated in an attack on Fort Sumter.[45] Poorly planned and abysmally executed, the assault ended in disaster. Most of the landing boats were repulsed, and all the roughly 115 U.S. officers, sailors, and Marines who reached shore were either killed or captured.[46] Among the prisoners was George Remey.[47] Badly outnumbered and under a grenade attack from the fort's Confederate garrison, Remey and two other Navy lieutenants surrendered their portion of the landing force.[48] After capitulating, Remey came across U.S. Marine Corps 1st Lieutenant C. H. Bradford, whose thigh was seriously wounded.[49] Remey beseeched the fort's Confederate commander, Major Stephen Elliott Jr., to assist Bradford.[50] Elliott arranged medical care for the Marine lieutenant, who nevertheless died in a Charleston hospital about three weeks later.[51] George Remey would remain in captivity for more than 14 months, most of that time spent in a Columbia, South Carolina, jailhouse.[52] The experience had a lasting impact on him. Decades later, as a rear admiral, he served as commander-in-chief of the U.S. Naval Force, Asiatic Station.[53] When reviewing court-martial records, he regularly mitigated the

[44] Remey Service Record, *supra* note 25, at 1.
[45] 1 George C. Remey Life and Letters, *supra* note 15, pt. 2, at 107–11, in Box 1, Remey Family Papers.
[46] *Id*. at 112; Report of Lieutenant Commander E. P. Williams (Sept. 27, 1864), *reprinted in* REPORT OF THE SECRETARY OF THE NAVY 236–38 (Wash., Gov't Printing Off. 1864); John A. Dahlgren, *Additional Report of Rear-Admiral Dahlgren* (Sept. 11, 1863), *reprinted in* 3 MESSAGE OF THE PRESIDENT OF THE UNITED STATES, AND ACCOMPANYING DOCUMENTS, TO THE TWO HOUSES OF CONGRESS, AT THE COMMENCEMENT OF THE FIRST SESSION OF THE THIRTY-EIGHTH CONGRESS, H.R. EXEC. DOC. NO. 38-1, at 265 (Wash., Gov't Printing Off. 1863); Thomas H. Stevens, *The Boat Attack on Sumter*, 4 BATTLES AND LEADERS OF THE CIVIL WAR 47–51 (N.Y.C., The Century Co. 1888).
[47] 1 George C. Remey Life and Letters, *supra* note 15, pt. 2, at 110, in Box 1, Remey Family Papers.
[48] *Id*.
[49] *Id*. at 111; *Death of Lieutenant Bradford*, BALT. AM., Nov. 16, 1863, at 1.
[50] 1 George C. Remey Life and Letters, *supra* note 15, pt. 2, at 111, in Box 1, Remey Family Papers.
[51] *Id*. at 111–12; *Death of Lieutenant Bradford*, *supra* note 49.
[52] 1 George C. Remey Life and Letters, *supra* note 15, pt. 2, at 118–46, in Box 1, Remey Family Papers. George Remey summarized: "I was a prisoner of war for 14 months and one week—confined for a few days in the jail, Charleston, S.C., and 13 months lacking one day in the Columbia, S.C., jail, and two or three days in Libby prison." "Reminiscences George Collier Remey" at 2, in 2 George C. Remey Life and Letters, *supra* note 15, at pt. 2, in Box 2, Remey Family Papers.
[53] REGISTER OF THE COMMISSIONED AND WARRANT OFFICERS OF THE NAVY OF THE UNITED STATES AND OF THE MARINE CORPS TO JANUARY 1, 1900, at 156 (1900).

adjudged sentence, often substantially.[54] He once remarked, "If officers knew what prison was like, they would not be so free with long sentences."[55]

In May 1864, President Abraham Lincoln nominated George Remey's younger brother Will to fill the Marine Corps first lieutenant vacancy created by the death of C. H. Bradford, the officer for whom George obtained medical assistance at Fort Sumter.[56] Nineteen days after receiving the nomination, the Senate confirmed Remey's promotion.[57]

1st Lieutenant Will Remey spent most of the remainder of the Civil War stationed on the receiving ship *North Carolina* at the New York Navy Yard.[58] During that assignment, he had a joyful reunion with his brother George, who was paroled from his prisoner-of-war status in November 1864.[59]

Nineteen days before General Robert E. Lee's surrender at Appomattox Court House, 1st Lieutenant Remey assumed command of the Marine guard aboard USS *Vanderbilt*.[60] The vessel was a wooden sidewheel steamer that the eponymous shipping magnate Cornelius Vanderbilt donated to the U.S. Navy in 1862 to do battle with the ironclad CSS *Virginia*.[61] Remey remained on *Vanderbilt* for 20 months as the ship circumnavigated South America and made a special voyage to transport Hawaii's Queen Emma from San Francisco to Honolulu.[62]

III. REMEY'S FREQUENT DUTY AS GENERAL COURT-MARTIAL JUDGE ADVOCATE

While assigned to *Vanderbilt*, Remey served as judge advocate for several general courts-martial. An 1867 treatise on naval justice explained that the judge advocate "appears at a court-martial in three distinct characters: *First*, as an

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[54] Rear Admiral Reginald R. Belknap, Introduction to the Life and Letters of Rear Admiral George Collier Remey, United States Navy at 22, Box 1, Remey Family Papers, *supra* note 15.
[55] *Id*.
[56] 13 S. EXEC. JOURNAL, 38th Cong., 1st Sess. 533–34 (1864), https://bit.ly/46DM5WZ.
[57] *See id*. at 564–65.
[58] *See* Remey Service Record, *supra* note 25, at 1; 5 NAVAL HIST. DIV., OFF. OF THE CHIEF OF NAVAL OPERATIONS, NAVY DEP'T, DICTIONARY OF AMERICAN NAVAL FIGHTING SHIPS 107 (1970), https://bit.ly/3POXJbn.
[59] 1 George C. Remey Life and Letters, *supra* note 15, pt. 2, at 159, in Box 1, Remey Family Papers.
[60] USS *Vanderbilt* Logbook, 3/14/1864–8/13/1865 (Mar. 21, 1865), Entry 118, Record Group 24, National Archives, Washington, D.C. [hereinafter NARA 118/24]; Marine Corps Muster Roll, USS *Vanderbilt* (April 1–30, 1865), Roll 065, T1118, National Archives, Washington, D.C.; Remey Service Record, *supra* note 25, at 1.
[61] 7 DANFS, *supra* note 42, at 463–64; T.J. STILES, THE FIRST TYCOON: THE EPIC LIFE OF CORNELIUS VANDERBILT 346–48 (2009). *Virginia* declined to venture out to do battle with *Vanderbilt. Id*. at 348.
[62] Remey Service Record, *supra* note 25, at 1; 7 DANFS, *supra* note 42, at 464–65.

officer of the court, for the purpose of recording its proceedings and administering the requisite oath to the members. *Secondly*, as the adviser of the court in matters of form and law. *Thirdly*, as public prosecutor."[63] Before becoming the judge advocate general of the Navy in 1880, Remey performed those functions more than 130 times.[64]

In November 1866, Remey served as judge advocate at a contested general court-martial held aboard *Vanderbilt*. The accused was a sailor charged with cutting a shipmate with a clasp knife while on liberty in Honolulu.[65] In January 1867, Remey tried at least five general courts-martial.[66] In February, he prosecuted a Marine private charged with assaulting an orderly sergeant with a bayonet before shooting him in the thigh with his musket.[67] Following a contested trial, the private was found guilty by exceptions and substitutions and sentenced to three years' confinement in the California State Prison, partial loss of pay, and a discharge.[68] Just two months after the court-martial, however, the unexpired portions of the sentence were remitted and the private was restored to duty.[69] Later

[63] A. A. HARWOOD, THE LAW AND PRACTICE OF UNITED STATES NAVAL COURTS-MARTIAL 180 (N.Y.C., D. Van Nostrand, 192 Broadway 1867). *See also* U.S. DEP'T OF NAVY, REGS. FOR THE GOV'T OF THE UNITED STATES NAVY, 1865, ¶¶ 1218–46 (Wash., Gov't Printing Off. 1865), https://bit.ly/3NRdkoy (prescribing general court-martial procedures).

[64] *See infra* notes 65–67, 70–71, 77, 79–80, 83, 86–87, 89, 91, 93, 96, 98, 109–117, 119–120, 122, 145–148, 152–153, 164–165, 167–169, 177–178, 180, 191, 195 and accompanying text.

[65] General Court-Martial in the Case of Second Class Fireman Michael Moran, Case No. 4492, Entry 27, Record Group 125, National Archives, Washington, D.C. [hereinafter NARA 27/125] (charged with assaulting another person in the Navy). When asked to enter his plea, the accused "stood mute." A contested trial ensued. The accused was found guilty by exceptions and substitutions. The court-martial sentenced the accused to confinement for two years at hard labor and a bad conduct discharge. The convening authority mitigated the sentence to confinement for one year at hard labor and a bad conduct discharge.

[66] General Court-Martial in the Case of Chief Engineer J. F. Lamdin, Case No. 4557, NARA 27/125, *supra* note 65 (charged with drunkenness and scandalous conduct tending to the destruction of good morals); General Court-Martial in the Case of Private James Murphy, Case No. 4586, NARA 27/125, *supra* note 65 (charged with drunkenness and being disrespectful in language and deportment to his superior officer while in the execution of his office); General Court-Martial in the Case of Landsman Francis Johnson, Case No. 4587, NARA 27/125, *supra* note 65 (charged with desertion); General Court-Martial in the Case of Landsman Charles M. Schmidt, Case No. 4589, NARA 27/125, *supra* note 65 (charged with attempted desertion); General Court-Martial in the Case of Private George Fisher, Case No. 4553, NARA 27/125, *supra* note 65 (charged with sleeping upon his post, threatening to assault his superior officer while in the execution of the duties of his office, and using disrespectful language to his superior officer while in the execution of the duties of his office).

[67] General Court-Martial in the Case of Private C. R. Collins, Case No. 4585, NARA 27/125, *supra* note 65.

[68] *Id.* The convening authority approved the findings and sentence as adjudged.

[69] Case No. 4585, 3 Register of General Courts-Martial, 1, Entry 28, Record Group 125, National Archives, Washington, D.C.

that month, after serving as the judge advocate in at least three more cases,[70] Remey tried two related contested general courts-martial at the Mare Island Navy Yard's chapel. Two sailors faced charges of committing sodomy with each other in a water closet at a San Francisco hotel.[71] Both cases resulted in convictions and identical sentences of confinement for three years in the California State Prison, loss of all pay, and a dishonorable discharge.[72] In both cases, however, the sentence to imprisonment in a penitentiary was deemed illegal, leading to the sailors' release and execution of their dishonorable discharges.[73] In March 1867, Remey served as the judge advocate of a general court-martial held aboard USS *Saranac* off of San Francisco, trying a coal heaver for desertion and attempted desertion.[74]

Remey detached from *Vanderbilt* when she was placed in ordinary at the Mare Island Navy Yard on 24 May 1867.[75] His next duty station was Washington, D.C.[76] During that assignment, in addition to performing other duties, he continued to serve as judge advocate in general court-martial cases.[77]

In November 1867, Remey transferred to the receiving ship *New Hampshire*, located at Norfolk's Gosport Navy Yard.[78] The day after Christmas,

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[70] General Court-Martial in the Case of 1st Class Boy Michael Collins, Case No. 4562, NARA 27/125, *supra* note 65; General Court-Martial in the Case of Private John Walsh, Case No. 4588, NARA 27/125, *supra* note 65; General Court-Martial in the Case of Landsman James Robbins, Case No. 4560, NARA 27/125, *supra* note 65.

[71] General Court-Martial in the Case of Landsman Greenburgh Rayburne, Case No. 4592, NARA 27/125, *supra* note 65; General Court-Martial in the Case of Quarter Gunner Simon Brown, Case No. 4591, NARA 27/125, *supra* note 65.

[72] The convening authority, Rear Admiral Henry Knox Thatcher, Commanding the North Pacific Squadron, approved the findings and sentence of both courts-martial as adjudged.

[73] Case Nos. 4591, 4592, 3 Register of General Courts-Martial, *supra* note 69, 3–4.

[74] General Court-Martial in the Case of Coal Heaver George Daniels, U.S. Navy, Case No. 4595, NARA 27/125, *supra* note 65.

[75] USS *Vanderbilt* Logbook, 3/11/1867–5/24/1867 (May 24, 1867), NARA 118/24, *supra* note 60; 7 DANFS, *supra* note 42, at 464–65.

[76] Remey Service Record, *supra* note 25, at 1.

[77] General Court-Martial in the Case of Private James McFarland, Case No. 4678, NARA 27/125, *supra* note 65 (charged with treating with contempt his superior officer and using provoking language towards him and scandalous conduct tending to the destruction of good morals); General Court-Martial in the Case of Private Joseph Geary, Case No. 4677, NARA 27/125, *supra* note 65 (charged with desertion); General Court-Martial in the Case of Private Frederick W. Hemmings, Case No. 4679, NARA 27/125, *supra* note 65 (charged with leaving his post before being regularly relieved and desertion); General Court-Martial in the Case of Private Robert S. Brown, Case No. 4680, NARA 27/125, *supra* note 65 (charged with insubordinate conduct tending to the destruction of discipline and good morals, disrespect to his superior officers, and scandalous conduct).

[78] Remey Service Record, *supra* note 25, at 1; *Gosport Navy-Yard—Its New Commandant*, NORFOLK VIRGINIAN, Aug. 16, 1867, at 3.

he tried a Marine private charged with two specifications of disobeying orders.[79] In May 1868, he prosecuted two sailors at Norfolk, one for desertion and the other for attempted desertion.[80] He then tried several court-martial cases in Washington, D.C., in August and September 1868 before taking a month's leave.[81]

Remey's next duty station was Philadelphia.[82] During that assignment, he continued to try court-martial cases.[83] When he detached from the Philadelphia Marine Barracks in October 1869, he reported to the U.S. Army's chief signal officer.[84] After learning the Army's signal code, Remey taught it to the officers at Headquarters Marine Corps, then located at the Washington Marine Barracks.[85] He also continued to prosecute court-martial cases. In May 1870, for example, he served as judge advocate for the court-martial of a Marine private held at the Washington Navy Yard.[86] The following month, he prosecuted a Marine private at the Philadelphia Naval Yard.[87]

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[79] General Court-Martial in the Case of Private Robert S. Brown, Case No. 4727, NARA 27/125, *supra* note 65. The court-martial convicted Private Brown of the charge and both specifications and sentenced him to imprisonment for two years, forfeiture of all pay while imprisoned, and a dishonorable discharge. *Id*. After serving about six-and-a-half months of confinement, Brown was deemed insane by the warden of the prison in which he was held and the Commandant of the Marine Corps remitted the unexecuted portion of his sentence. Case No. 4727, 3 Register of General Courts-Martial, *supra* note 69, 37.

[80] General Court-Martial in the Case of Landsman William Bromley "(colored)," Case No. 4813, NARA 27/125, *supra* note 65. General Court-Martial in the Case of Coal Heaver Charles Irvin, Case No. 4812, NARA 27/125, *supra* note 65. The two sailors were both convicted and received identical sentences of confinement for six months at a naval station, loss of all pay during confinement in excess of $6 per month, and performance of "such police duties as the officer having him in charge shall direct."

[81] General Court-Martial in the Case of Private William Jones, Case No. 4877, NARA 27/125, *supra* note 65; General Court-Martial in the Case of Sergeant Charles Lombardy, Case No. 4880, NARA 27/125, *supra* note 65; General Court-Martial in the Case of Private William Collins, Case No. 4882, NARA 27/125, *supra* note 65; General Court-Martial in the Case of Private George H. Lewis, Case No. 4886, NARA 27/125, *supra* note 65.

[82] Remey Service Record, *supra* note 25, at 2.

[83] *E.g*., General Court-Martial in the Case of Private George Brown, Case No. 4912, NARA 27/125, *supra* note 65; General Court-Martial in the Case of Private Samuel Lindsay, Case No. 4919, NARA 27/125, *supra* note 65.

[84] *Changes in the Marine Corps*, ARMY & NAVY J., Nov. 13, 1869, at 194, https://bit.ly/44DqMmK; Remey Service Record, *supra* note 25, at 2.

[85] *See Changes in the Marine Corps*, ARMY & NAVY J., Feb. 5, 1870, at 385, https://bit.ly/43q4B2o; Remey Service Record, *supra* note 25, at 2; JON T. HOFFMAN, USMC: A COMPLETE HISTORY 32–33 (2002).

[86] General Court-Martial in the Case of Private Frederick W. DeKrafft, Case No. 5076, NARA 27/125, *supra* note 65.

[87] General Court-Martial in the Case of Private John Logue, Case No. 5092, NARA 27/125, *supra* note 65.

Remey's career was set on its ultimate trajectory when, on 2 July 1870, he was designated as acting "judge-advocate of the marine corps."[88] In that position, he became an itinerant prosecutor, trying cases at various East Coast Marine barracks and Navy yards from Norfolk to Boston.[89] The courts-martial involved a variety of offenses charged under the 1862 version of the Articles for the Government of the Navy.[90] Among the most common were desertion, disobedience, disrespecting superiors, drunkenness, and assaulting superiors—often with a weapon.

Sometimes the accused was a fellow Marine Corps officer. In January 1871, for example, Remey was at Boston's Charlestown Navy Yard prosecuting Marine Corps 1st Lieutenant Edward C. Saltmarsh, who faced charges including conduct unbecoming an officer and a gentleman by failing to pay a just debt.[91] It was Saltmarsh's second court-martial; in 1867, he had been found guilty of violating a Navy regulation by borrowing money from two enlisted members of

[88] A NAVAL ENCYCLOPÆDIA; COMPRISING A DICTIONARY OF NAUTICAL WORDS AND PHRASES; BIOGRAPHICAL NOTICES, AND RECORDS OF NAVAL OFFICERS; SPECIAL ARTICLES ON NAVAL ART AND SCIENCE, WRITTEN EXPRESSLY FOR THIS WORK BY OFFICERS AND OTHERS OF RECOGNIZED AUTHORITY IN THE BRANCHES TREATED BY THEM, TOGETHER WITH DESCRIPTIONS OF THE PRINCIPAL NAVAL STATIONS AND SEAPORTS OF THE WORLD 685 (Gale Rsch. Co. 1971) (1884), https://bit.ly/3D6GURW; Remey Service Record, *supra* note 25, at 2.

[89] *E.g.*, General Court-Martial in the Case of Private Edwin Stubbs, Case No. 5098, NARA 27/125, *supra* note 65 (tried 14 July 1870 at Brooklyn Navy Yard); General Court-Martial in the Case of Private Martin Hessian, Case No. 5099, NARA 27/125, *supra* note 65 (tried 16 July 1870 at Brooklyn Navy Yard); General Court-Martial in the Case of Private Charles Reilly, Case No. 5118, NARA 27/125, *supra* note 65 (tried 20 October 1870 at Philadelphia Navy Yard); General Court-Martial in the Case of Private Samuel Randolph, Case No. 5102, NARA 27/125, *supra* note 65 (tried 31 October 1870 at Philadelphia Navy Yard). In December 1870, Remey prosecuted six general courts-martial at the Brooklyn Navy Yard over the course of nine days. General Court-Martial in the Case of Private John Kelly, Case No. 5128, NARA 27/125, *supra* note 65; General Court-Martial in the Case of Private John Schurk, Case No. 5129, NARA 27/125, *supra* note 65; General Court-Martial in the Case of Private Winfield F. Workes, Case No. 5131, NARA 27/125, *supra* note 65; General Court-Martial in the Case of Private John Gavin, Case No. 5132, NARA 27/125, *supra* note 65; General Court-Martial in the Case of Private John O'Neill, Case No. 5133, NARA 27/125, *supra* note 65 ; General Court-Martial in the Case of Private Edwin Stubbs, Case No. 5130, NARA 27/125, *supra* note 65. The December 1870 court-martial of Private Stubbs was the second time Remey had prosecuted him. At his second trial, Stubbs was charged with and convicted of being drunk on duty about two weeks after being released from confinement following his first court-martial. *See* Stubbs, Case No. 5098, *supra*.

[90] *See* An Act for the Better Government of the Navy of the United States, ch. 204, 12 Stat. 600 (1862).

[91] General Court-Martial in the Case of 1st Lieutenant Edward C. Saltmarsh, Case No. 5210, NARA 27/125, *supra* note 65. After mixed findings that included a conviction of the conduct unbecoming charge, the court-martial sentenced the accused to suspension from rank and duty for a period of three years, during which he would forfeit all pay in excess of $80 per month. *Id*. President Grant approved the sentence. *Id*.

his command.[92] In February 1871, Remey prosecuted Marine Corps Captain Joseph F. Baker at the Brooklyn Navy Yard on charges of drunkenness and conduct to the prejudice of good order and military discipline.[93] The court-martial found Captain Baker guilty with certain exceptions and substitutions and sentenced him to a dismissal.[94] Secretary of the Navy George M. Robeson initially approved the dismissal but subsequently remitted it.[95] While in New York, Remey also prosecuted three enlisted Marines before resuming his travels.[96] Remey's legal duties were not limited to trying court-martial cases. In March 1871, for example, he served as judge advocate at a Marine Corps retiring board.[97]

IV. REMEY AS A LAW STUDENT

Amid a dearth of courts-martial in early October 1871, Remey jokingly complained that Marines were behaving too well.[98] Days later, he enrolled at the Columbian University's law school (which later became the George Washington University Law School), located in a former Episcopal church on Washington,

[92] General Court-Martial in the Case of Lieutenant Edward C. Saltmarsh, Case No. 4639, NARA 27/125, *supra* note 65. At Saltmarsh's first court-martial, the members sentenced him to suspension from rank and forfeiture of most of his pay and allowances for a period of one year, while offering a clemency recommendation. After Saltmarsh received a letter of admonition, the Secretary of the Navy remitted the sentence. Case No. 4639, 3 Register of General Courts-Martial, *supra* note 69, 35.
[93] General Court-Martial in the Case of Captain Joseph F. Baker, Case No. 5192, NARA 27/125, *supra* note 65.
[94] *Id*.
[95] *Id.*
[96] General Court-Martial in the Case of Private John Kane, Case No. 5144, NARA 27/125, *supra* note 65 (tried at Brooklyn Navy Yard on 18 February 1871); General Court-Martial in the Case of Sergeant Julius Konigs, Case No. 5145, NARA 27/125, *supra* note 65 (tried at Brooklyn Navy Yard on 18 February 1871); General Court-Martial in the Case of Private John McCarthy, Case No. 5146, NARA 27/125, *supra* note 65 (tried at Brooklyn Navy Yard on 20 February 1871); General Court-Martial in the Case of Private Thomas J. Moore, Case No. 5150, NARA 27/125, *supra* note 65 (tried at Annapolis Marine Barracks on 1 March 1871). In August 1870, Remey returned to the Brooklyn Navy Yard to try four cases. General Court-Martial in the Case of Private John G. Lynch, Case No. 5193, NARA 27/125, *supra* note 65; General Court-Martial in the Case of Private Thomas Carlin, Case No. 5194, NARA 27/125, *supra* note 65; General Court-Martial in the Case of Private John Tie, Case No. 5195, NARA 27/125, *supra* note 65; General Court-Martial in the Case of Private Peter Harris, Case No. 5196, NARA 27/125, *supra* note 65.
[97] *Various Naval Matters*, ARMY & NAVY J., Apr. 8, 1871, at 537, https://bit.ly/3D3x3wb.
[98] George C. Remey letter to Mary J. Mason (Oct. 6, 1871), *reprinted in* 8 George C. Remey Life and Letters, *supra* note 15, pt. 2, at 4, in Box 4, Remey Family Papers. William B. Remey did, however, try three general courts-martial at the Annapolis Marine Barracks that month. General Court-Martial in the Case of Private George R. Evans, Case No. 5215, NARA 27/125, *supra* note 65; General Court-Martial in the Case of Private John A. Wetzel, Case No. 5228, NARA 27/125, *supra* note 65; General Court-Martial in the Case of Private Charles Shade, Case No. 5229, NARA 27/125, *supra* note 65.

D.C.'s Judiciary Square.[99] Classes started in late afternoon to allow students with jobs to attend.[100] Tuition for the entire two-year program was $150 at a time when a Marine first lieutenant's annual base pay was $1,500.[101] First-year students took classes in real property, personal property, contracts, and bills, in addition to studying Blackstone's *Commentaries on the Law of England* and Kent's *Commentaries on American Law*.[102] Second-year students' curriculum consisted of courses on pleading, evidence, equity, chancery pleading, and the law of partnership.[103]

Remey studied diligently at the beginning of the program. In December 1871, George Remey observed that his brother Will "is quite occupied in studying law and says he will not go out much this winter."[104] Will became more social on New Year's Day 1872, when he and George attended President Ulysses S. Grant's reception in the morning, followed by calls on roughly fifty of their acquaintances.[105] Their holiday socializing concluded with a dance party that evening.[106] Will's studiousness slackened in the new year. By the end of January 1872, George reported that "Will is having a gay time, out almost every evening. Receptions and parties are constantly being given."[107]

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[99] OFFICE OF THE UNIV. HISTORIAN, THE GEORGE WASHINGTON UNIVERSITY 1821–1966, at 13 (1966).

[100] CATALOGUE OF THE OFFICERS AND STUDENTS OF THE COLUMBIAN UNIVERSITY, FOR THE ACADEMIC YEAR, 1872–'73, at 18 (Wash., Gibson Brothers, Printers 1873); *see also* CATALOGUE OF THE OFFICERS AND STUDENTS OF THE COLUMBIAN UNIVERSITY, FOR THE ACADEMIC YEAR, 1871–'72, at 11 (Wash., Gibson Brothers, Printers 1872) [hereinafter 1871–'72 COLUMBIAN UNIVERSITY CATALOGUE] (listing Remey as member of the law school's junior class).

[101] 1871–'72 COLUMBIAN UNIVERSITY CATALOGUE, *supra* note 100, at 20; Army Appropriation Act for 1871, ch. 294, § 24, 16 Stat. 315, 320 (1870). Marine officers' pay during that period was tied to Army infantry officers' pay. *See* Rev. Stat. § 1612 (1875). Marine officers below the rank of brigadier general were also "entitled to ten per centum in addition to their current yearly pay . . . for each and every period of five years' service, provided the total amount of such increase shall not exceed forty per centum of their current yearly pay . . . ." REGISTER OF THE COMMISSIONED, WARRANT, AND VOLUNTEER OFFICERS OF THE NAVY OF THE UNITED STATES, INCLUDING OFFICERS OF THE MARINE CORPS AND OTHERS, TO JANUARY 1, 1872, at 120 (Wash., Gov't Printing Off. 1872), http://bit.ly/47HtBFo. Remey passed the tenth anniversary of his official entry into service date in the month after he entered law school, raising his annual salary from $1,650 to $1,800. *See id*. at 120, 124.

[102] 1871–'72 COLUMBIAN UNIVERSITY CATALOGUE, *supra* note 100, at 19.

[103] *Id*.

[104] George C. Remey letter to Mary J. Mason (Dec. 3, 1871), *reprinted in* 8 George C. Remey Life and Letters, *supra* note 15, pt. 2, at 10, in Box 4, Remey Family Papers.

[105] George C. Remey letter to Mary J. Mason (Jan. 14, 1872), *reprinted in* 8 George C. Remey Life and Letters, *supra* note 15, pt. 2, at 15, in Box 4, Remey Family Papers.

[106] *Id.*

[107] George C. Remey letter to Mary J. Mason (Jan. 28, 1872), *reprinted in* 8 George C. Remey Life and Letters, *supra* note 15, pt. 2, at 18, in Box 4, Remey Family Papers.

The law school's academic year ran from the second Wednesday in October to the second Wednesday in June.[108] Remey often missed class. After serving as the judge advocate at four general courts-martial at the Washington Navy Yard in January 1872,[109] he traveled to Norfolk in February to prosecute first USS *Guerriere*'s captain and then her navigating officer for running the ship aground.[110] On 2 and 3 April, Remey was in Boston for the court-martial of one Marine private charged with assault with intent to kill and mutinous conduct for firing a pistol at the Charlestown Marine Barracks' sergeant of the guard and a second Marine for inciting the first Marine to shoot.[111] Later in April, Remey tried eight general court-martial cases at the Norfolk Navy Yard.[112] During his law school summer break, he served as judge advocate at a court of inquiry held at the

[108] 1871–'72 COLUMBIAN UNIVERSITY CATALOGUE, *supra* note 100, at 18.

[109] General Court-Martial in the Case of Private Stewart McKay, Case No. 5251, NARA 27/125, *supra* note 65; General Court-Martial in the Case of Fifer Edward B. Cochran, Case No. 5256, NARA 27/125, *supra* note 65; General Court-Martial in the Case of Private Chilton F. Fink, Case No. 5257, NARA 27/125, *supra* note 65; General Court-Martial in the Case of Private Josiah L. Kendricks, Case No. 5262, NARA 27/125, *supra* note 65.

[110] General Court-Martial in the Case of Captain Thomas H. Stevens, Case No. 5379, NARA 27/125, *supra* note 65; General Court-Martial in the Case of Lieutenant Commander John J. Read, Case No. 5380, NARA 27/125, *supra* note 65. In Captain Stevens's case, after a trial lasting almost three weeks, the members returned a mixed verdict that included findings of guilty to "through inattention and negligence, suffering a vessel of the Navy to be run upon a shoal," and three specifications of violating Navy regulations. They sentenced Captain Stevens to be suspended from rank and duty for three years and a secretarial reprimand to be issued in a general order. After initially approving the suspension, the Secretary of the Navy remitted the unexecuted portion on 26 November 1872. Case No. 5379, 3 Register of General Courts-Martial, *supra* note 69, at 204; *see also The Sentence of Capt. Thos. H. Stevens*, EVENING STAR (D.C.), May 9, 1872, at 1, http://bit.ly/3QQK5VR; *Suspension*, ARMY & NAVY J., Dec. 7, 1872, at 264, https://bit.ly/3YVs3np. After a four-day trial, the members of the Read court-martial returned a mixed verdict that included a finding of guilty to culpable inefficiency in the performance of duty and adjudged a sentence of suspension from rank and duty for a period of 18 months and a secretarial reprimand to be issued in a general order. General Court-Martial in the Case of Lieutenant Commander John J. Read, Case No. 5380, NARA 27/125, *supra* note 65.

[111] General Court-Martial in the Case of Private Robert Wilkinson, Case No. 5266, NARA 27/125, *supra* note 65. The Marine who fired the shot pleaded guilty. *Id*. The Marine accused of inciting him was convicted after a contested trial. General Court-Martial in the Case of Private Richard Sullivan, Case No. 5267, NARA 27/125, *supra* note 65.

[112] *See* General Court-Martial in the Case of Coxswain Patrick Hayes, Case No. 5287, NARA 27/125, *supra* note 65; General Court-Martial in the Case of Seaman Charles Palmer, Case No. 5288, NARA 27/125, *supra* note 65; General Court-Martial in the Case of Seaman John Taylor, Case No. 5289, NARA 27/125, *supra* note 65; General Court-Martial in the Case of Seaman John Johnson, Case No. 5290, NARA 27/125, *supra* note 65; General Court-Martial in the Case of Seaman Michael Faulkner, Case No. 5291, NARA 27/125, *supra* note 65; General Court-Martial in the Case of Ordinary Seaman William Davis, Case No. 5292, NARA 27/125, *supra* note 65; General Court-Martial in the Case of Coxswain Patrick Hayes, Case No. 5293 (second court-martial), NARA 27/125, *supra* note 65; General Court-Martial in the Case of Seaman John Johnson, Case No. 5294 (second court-martial), NARA 27/125, *supra* note 65.

Navy Department, followed by courts-martial in Norfolk and Annapolis.[113] He missed the beginning of the October 1872 law school term because he was in Philadelphia prosecuting a Navy lieutenant commander on charges involving drunkenness and violating a temperance pledge.[114]

Remey must have been relieved when, later in October, he was detailed as judge advocate of a court-martial that would not require him to leave town. He prosecuted three Marine privates at the Washington Marine Barracks for desertion.[115] But the night law student resumed his travels the following month, returning to Philadelphia to serve as judge advocate at another Marine Corps desertion court-martial.[116] In early December 1872, he was in Annapolis prosecuting Marine Private Richard Rahill for disobeying orders to remove an old striped shirt from his head and to fix his watch coat, which he was wearing inside-out; using provoking words and menace for saying to the sergeant of the guard, "When I get out of here I will put my foot on some damned Yankee Sergeant's neck"; and assaulting the sergeant of the guard as he placed Rahill in irons.[117] After returning findings of guilty, the court-martial sentenced Rahill to confinement at a Marine barracks for two years while wearing "upon his left leg an iron ring, to which shall be attached by a chain four (4) feet long, a ball weighing twelve (12) pounds," loss of pay, and a dishonorable discharge.[118] Later that month, Remey prosecuted a Marine private at the Washington Navy Yard for attempting to strike the sergeant of the guard with a bayonet, using provoking words toward him, and treating with contempt his superior officer while in the

[113] 8 Letters to the Commandant and Other Officers of the Marine Corps, at 495, 500–01, 523, Entry 1, Record Group 80, National Archives, Washington, D.C. [hereinafter SecNav letters to USMC officers]; General Court-Martial in the Case of Sergeant Abel Clegg, Case No. 5329, NARA 27/125, *supra* note 65 (tried at the Norfolk Navy Yard on 8 August 1872); General Court-Martial in the Case of Private Thomas Taylor, Case No. 5323, NARA 27/125, *supra* note 65 (tried at the Naval Academy on 29 July 1872).

[114] *See* General Court-Martial in the Case of Lieutenant Commander Stephen A. McCarty, Case No. 5387, NARA 27/125, *supra* note 65 (tried at Philadelphia Navy Yard from 30 September–17 October 1872). The members found Lieutenant Commander McCarty guilty of four of the five specifications and sentenced him to a dismissal, accompanied by a clemency recommendation. His sentence was remitted. Case No. 5387, 3 Register of General Courts-Martial, *supra* note 69, at 206.

[115] General Court-Martial in the Case of Private Joseph H. Duering, Case No. 5335, NARA 27/125, *supra* note 65; General Court-Martial in the Case of Private Thomas R. Rolin, Case No. 5336, NARA 27/125, *supra* note 65; General Court-Martial in the Case of Private Richard F. Leane, Case No. 5337, NARA 27/125, *supra* note 65.

[116] General Court-Martial in the Case of Private Samuel Arbuckle, Case No. 5340, NARA 27/125, *supra* note 65.

[117] General Court-Martial in the Case of Private Richard Rahill, Case No. 5372, NARA 27/125, *supra* note 65.

[118] *Id*. The sentence also required Private Rahill to "do police duty within the precincts of the barracks where he may be confined." *Id*.

execution of his office.[119] In January 1873, Remey tried four general court-martial cases in Norfolk.[120] During that same month, President Grant nominated him for promotion to captain, followed by Senate confirmation 19 days later.[121]

From 15 April to 16 May 1873, Remey was at Mare Island in California trying a high-profile general court-martial in the strange case of Paymaster's Clerk Robert D. Bogart.[122] While serving aboard the receiving ship USS *Vermont* at the Brooklyn Navy Yard, Bogart executed a scheme to divert tens of thousands of dollars from various sailors' accounts to himself.[123] He was tried by a general court-martial in 1869 and found guilty of stealing money of the United States, fraud, and desertion.[124] The court-martial sentenced him to three years' imprisonment, loss of all "pay and emoluments," and a dishonorable discharge.[125] At the advice of Naval Solicitor John A. Bolles, Secretary of the Navy George M. Roberson set aside the desertion and fraud findings on jurisdictional grounds.[126] He set aside the finding of guilty to the stealing money charge based on a fatal variance, concluding that the evidence proved embezzlement rather than theft.[127] An allegation was later made that Bogart bragged he had bribed Bolles $2,500 for

[119] General Court-Martial in the Case of Private Charles A. Montague, Case No. 5377, NARA 27/125, *supra* note 65. Following a contested trial, Private Montague was found guilty and sentenced to confinement for two years; loss of all pay and clothing "except so much of his clothing as may be required for his health, and so much of his pay as is necessary for laundry purposes"; and a dishonorable discharge. However, he was released from confinement after serving less than seven months. Case No. 5377, 3 Register of General Courts-Martial, *supra* note 69, at 204.
[120] *See* General Court-Martial in the Case of Landsman James Sullivan, Case No. 5382, NARA 27/125, *supra* note 65; General Court-Martial in the Case of Private John Humphries, Case No. 5383, NARA 27/125, *supra* note 65; General Court-Martial in the Case of Private William Acton, Case No. 5384, NARA 27/125, *supra* note 65; General Court-Martial in the Case of Private William H. Thomas, Case No. 5385, NARA 27/125, *supra* note 65.
[121] S. EXEC. JOURNAL, 42d Cong., 3d Sess. 368, 385–86 (1873).
[122] General Court-Martial in the Case of Paymaster's Clerk Robert D. Bogart, Case No. 5519, NARA 27/125, *supra* note 65. While at Mare Island, Remey also served as the judge advocate at a general court-martial trying a Marine private for stabbing a sergeant with a bayonet. The accused was convicted in accordance with his pleas and sentenced to confinement at the Mare Island Marine Barracks for one year. General Court-Martial in the Case of Private James Meehan, Case No. 5425, NARA 27/125, *supra* note 65.
[123] H.R. MISC. DOC. NO. 44-170, pt. 5, 134–37 (1876). While freely admitting to the embezzlement during his congressional testimony, Bogart also implicated Paymaster Ambrose J. Clark in the scheme. *Id.* Testifying before the same committee, Paymaster Clark denied Bogart's accusation. *Id.* at 358.
[124] General Order No. 143 (Oct. 28, 1869), NAVY DEP'T, GENERAL ORDERS AND CIRCULARS ISSUED BY THE NAVY DEPARTMENT FROM 1863 TO 1887, at 89 (Wash., Gov't Printing Off. 1887), https://bit.ly/3sCCNe4.
[125] *Id*.
[126] *Id*. at 89–90. The portion of the Secretary's action concerning the fraud conviction also noted vagueness concerns. *Id*.
[127] *Id*.

his recommendation.[128] Bogart denied it, explaining that "I had not $2,500 to give."[129] An effort was then made to try Bogart in the United States District Court for the Eastern District of New York, but Judge Charles L. Benedict ruled that because Bogart was a member of the naval forces, he was not susceptible to the portion of the federal false claims statute under which the case was brought.[130]

Bogart then worked as a journalist, first for the *New York Sun* and then the *San Francisco Chronicle*. In early 1873, the *Chronicle* sent him to the California-Oregon border to cover the U.S. Army's campaign against some members of the Modoc tribe.[131] However, after about a month, Bogart was reportedly "drummed out of headquarters and made to decamp."[132]

Once back in San Francisco, Bogart was apprehended by Marines, who took him to the Mare Island naval base to stand trial for embezzlement and desertion.[133] Bogart sought relief from the Circuit Court for the District of California, but the court denied his petition, clearing the way for Bogart's court-martial at which Remey served as judge advocate.[134] The court-martial found Bogart guilty and adjudged a sentence of confinement for four years, forfeiture of all pay, and a dismissal.[135] Secretary Robeson approved the findings, remitted one year of confinement as an act of clemency, and remitted 13 more months of

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[128] H.R. MISC. DOC. NO. 44-170, pt. 1, at 146 (1876) (testimony of Ambrose J. Clark).

[129] *Id.* at pt. 5, 139 (testimony of Robert D. Bogart). Bogart reiterated his denial that he or someone operating on his behalf had offered a bribe to Bolles. *Id*. at 138–39. Naval Solicitor Bolles appeared before the committee after Bogart's testimony. *Id.* at 491–94. While he was asked some questions about Bogart's case, curiously, he was not asked about the allegation that he received a bribe. *Id.*

[130] *United States v. Bogart*, 24 F. Cas. 1184 (E.D.N.Y. 1869). The relevant portion of the federal false claims statute provided that it applied to "any person not in the military or naval forces of the United States, nor in the militia called into or actually employed in the service of the United States." An Act to Prevent and Punish Frauds upon the Government of the United States, ch. 67, § 3, 12 Stat. 696, 698 (1863), https://bit.ly/44hKhkW.

[131] *See, e.g.*, *Local Brevities*, DAILY BEE (Sacramento), Jan. 24, 1873, at 3.

[132] *From Daily of Tuesday, March 18*, WEEKLY OREGON STATESMAN, Mar. 18, 1873, at 2. Indiana University journalism professor Oliver Knight noted that "Bogart left the field on March 5[, 1873.]" OLIVER KNIGHT, FOLLOWING THE INDIAN WARS: THE STORY OF THE NEWSPAPER CORRESPONDENTS AMONG THE INDIAN CAMPAIGNERS 137 (1960). Professor Knight characterized Bogart's writing about the Modoc campaign as "irresponsible and inaccurate," making "it appear that he was ineptly trying to whip up a sensation." *Id*. at 138.

[133] *Bogart Habeas Corpus Case*, SALT LAKE TRIB., Mar. 27, 1873, at 2; *A "Sensation" Writer*, BROOKLYN DAILY EAGLE, Apr. 4, 1873, at 4; *Robeson, the Kidnapper*, KANSAS CITY TIMES, Apr. 9, 1873, at 1; *Mr. Bogart's Arrest*, S.F. EXAM'R, Mar. 22, 1873, at 3.

[134] *In re* Bogart, 3 F. Cas. 796 (D. Cal. 1873). From 1866 to 1886, California was a single federal judicial district. An Act in Relation to the District Courts of the United States in the States of California and Louisiana, ch. 280, 14 Stat. 300 (1866); An Act to Detach Certain Counties from the United States Judicial District of California, and Create the United States Judicial District of Southern California, ch. 928, 24 Stat. 308 (1886).

[135] H.R. MISC. DOC. NO. 44-170, *supra* note 128, pt. 5, at 139 (reproducing Secretary Robeson's action in the general court-martial case of Robert D. Bogart, Paymaster's Clerk (Dec. 23, 1873)).

confinement to offset time served.[136] Bogart was confined aboard a receiving ship at Mare Island.[137] Following reports that Bogart was dying of consumption, Secretary Robeson directed that he be allowed to exercise at the Navy yard.[138] Two or three days into that regime, Bogart escaped.[139] Far from lying low, the fugitive became the *Virginia City Chronicle*'s reporter in Washington, D.C., where he testified before a House committee investigating alleged naval improprieties in 1876.[140] Secretary Robeson did not seek to have him taken into custody, explaining to the House Naval Affairs Committee that "I did not want to have it said that I was interfering with the witnesses of this committee."[141]

V. REMEY THE LAWYER

Despite Remey's frequent absences from class, at the end of the 1872–73 academic year, Columbian University's president certified that the Marine captain had "successfully passed the general examination required by the regulations of the Law School as the condition of receiving the degree of Bachelor of Laws."[142] Remey graduated on the evening of 11 June 1873.[143] A week later, he became a member of the Supreme Court of the District of Columbia's bar.[144] The new lawyer was soon dispatched to participate in a court-martial at Pensacola, Florida.[145] Then in July, he was the judge advocate at the general court-martial of a Marine private charged with drunkenness and sleeping on post while on sentry

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[136] *Id*.
[137] *Id*. at 681 (testimony of Secretary Robeson).
[138] *Id*.
[139] *Id*.
[140] *Id*. at 133–41 (testimony of Robert D. Bogart). *See generally* H.R. REP. NO. 44-784 (1876).
[141] H.R. MISC. DOC. NO. 44-170, *supra* note 128, pt. 5, at 681 (testimony of Secretary Robeson). Bogart remained a journalist until shortly before his death in 1898 at the age of 55. *Death of R. D. Bogart*, ST. LOUIS GLOBE-DEMOCRAT, Aug. 6, 1898, at 11; Report of Death, Robert Depew [*sic*] Bogart (Aug. 5, 1898), New Jersey State Archives, Trenton, N.J.
[142] Columbian University Board of Trustees Minutes (June 7, 1873), at 358, Special Collections Research Center, Gelman Library, George Washington University, Washington, D.C. Some earlier works incorrectly stated that Remey had no legal training or that he did not graduate from law school. *See, e.g*., Captain Homer A. Walkup, *Lawyers for and of the Navy*, Bicentennial Issue, JUDGE ADVOC. J. 29, 34 (1976), https://bit.ly/45P49MK; Long, *supra* note 9, at 18; SIEGEL, *supra* note 9, at 176 nn.5–7.
[143] *Law Department Columbian College*, EVENING STAR (D.C.), June 12, 1873, at 4, https://bit.ly/3YU1ij4; *see Budding Blackstones*, NAT'L REPUBLICAN (D.C.), June 12, 1873, at 1, https://bit.ly/44vdcB6.
[144] Index to Attorneys, 4/1/1863–10/22/1946, Entry A1 9, Record Group 21, National Archives Identifier 586492, National Archives, Washington, D.C.
[145] General Court-Martial in the Case of Private George Wilson, Case No. 5432, NARA 27/125, *supra* note 65; *Personal*, NAT'L REPUBLICAN (D.C.), June 21, 1873, at 1, https://bit.ly/3QX9Pji.

duty at the Naval Academy.[146] After trying the general court-martial case of a Navy doctor in Norfolk,[147] Remey returned to Maryland's capital in August to prosecute Medical Director Marius Duvall of the Annapolis Naval Hospital, who was charged with firing a double-barreled shotgun at three enlisted Marines.[148] Dr. Duvall reportedly discharged the weapon in a rage because the Marines were gathering strawberries from the hospital's farm.[149] At the end of a two-week trial, the members found Duvall guilty as charged and sentenced him "to be suspended from rank and duty for the period of three (3) years, and to receive no increase of pay during said time."[150] The Secretary of the Navy reduced the length of suspension to two years.[151] From September to November, Remey prosecuted numerous general court-martial cases at the Brooklyn Navy Yard.[152] In late November and early December, he tried two general courts-martial in Washington, D.C.[153]

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[146] General Court-Martial in the Case of Private Ambrose J. Martin, Case No. 5453, NARA 27/125, *supra* note 65. Private Martin was found guilty after a contested trial and sentenced to confinement for two years, loss of $10 pay per month, and a dishonorable discharge. *Id*.

[147] General Court-Martial in the Case of Passed Assistant Surgeon William S. Bowen, Case No. 5467, NARA 27/125, *supra* note 65. The accused was found guilty of offenses including embezzlement while serving as the caterer of the wardroom mess aboard USS *Worcester*. *Id*.

[148] General Court-Martial in the Case of Medical Director Marius Duvall, Case No. 5468, NARA 27/125, *supra* note 65; *see also Personal Notes*, NAT'L REPUBLICAN (D.C.), Sept. 1, 1873, at 1, https://bit.ly/3PfQPLC; *The Duvall Court-Martial at Annapolis*, N.Y. TRIB., Aug. 20, 1873, at 5, https://bit.ly/44uEszT. Medical directors had the relative rank of Navy captains. REGISTER OF THE COMMISSIONED, WARRANT, AND VOLUNTEER OFFICERS OF THE NAVY OF THE UNITED STATES, INCLUDING OFFICERS OF THE MARINE CORPS AND OTHERS, TO JULY 1, 1873, at 25 (Wash., Gov't Printing Off. 1873).

[149] *A Naval Court-Martial*, EVENING STAR (D.C.), Aug. 2, 1873, at 1, https://bit.ly/3OWd1Jh.

[150] General Court-Martial in the Case of Medical Director Marius Duvall, Case No. 5468, *supra* note 148.

[151] *Sentence of Dr. Duvall*, EVENING STAR (D.C.), Oct. 23, 1873, at 1, https://bit.ly/45s7ZLT.

[152] *See* General Court-Martial in the Case of Second Assistant Engineer Jones Godfrey, Case No. 5484, NARA 27/125, *supra* note 65; General Court-Martial in the Case of Private Ernest Dahlman, Case No. 5485, NARA 27/125, *supra* note 65; General Court-Martial in the Case of Sailmaker Robert L. Tatem, Case No. 5486, NARA 27/125, *supra* note 65; General Court-Martial in the Case of Sergeant John F. Nelson, Case No. 5487, NARA 27/125, *supra* note 65; General Court-Martial in the Case of Landsman Henry H. Guy, Case No. 5488, NARA 27/125, *supra* note 65; General Court-Martial in the Case of Lieutenant Commander Frederick R. Smith, Case No. 5512, NARA 27/125, *supra* note 65; General Court-Martial in the Case of Private John Casey, Case No. 5490, NARA 27/125, *supra* note 65; General Court-Martial in the Case of Private John Carney, Case No. 5491, NARA 27/125, *supra* note 65; General Court-Martial in the Case of Corporal William Higgins, Case No. 5492, NARA 27/125, *supra* note 65; General Court-Martial in the Case of Ordinary Seaman Edward Morris, Case No. 5493, NARA 27/125, *supra* note 65; General Court-Martial in the Case of Private Thomas R. Rolin, Case No. 5495, NARA 27/125, *supra* note 65; General Court-Martial in the Case of Seaman Charles Palmer, Case No. 5528, NARA 27/125, *supra* note 65; General Court-Martial in the Case of Seaman Patrick Murphy, Case No. 5503, NARA 27/125, *supra* note 65.

[153] *See* General Court-Martial in the Case of Corporal Cornelius Moran, Case No. 5513, NARA 27/125, *supra* note 65; General Court-Martial in the Case of Private Charles S. Mooney, Case No. 5514, NARA 27/125, *supra* note 65.

Remey would soon take an enforced break from his duties as acting judge advocate of the Marine Corps. In September 1873, Marine Captain C. D. Hebb complained to the Secretary of the Navy that Remey had not been assigned to sea duty since 1867.[154] The Acting Secretary of the Navy curtly responded, "In regard to Captain Remey, the Department must be the judge of the use to which it puts its officers."[155] Remey was nevertheless soon reassigned to a ship. The Commandant of the Marine Corps at the time, Brigadier General Jacob Zeilin, maintained a "sea roster" to ensure that Marine officers were assigned equitably to shipboard duty.[156] The list was colloquially known as "the General's rooster."[157] By November 1873, Remey's name was atop the "rooster."[158] He was reassigned to USS *Colorado*, reporting aboard on 3 December 1873 at the Brooklyn Navy Yard to take command of the ship's Marine guard.[159] Before Remey left Washington, Secretary of the Navy Robeson wrote to him: "I desire to express my satisfaction of the manner in which you have performed your duties as Judge Advocate in the numerous cases in which you have performed your duties as such under the orders of the Navy Department."[160]

Remey's brother George explained that Will's "fitness for and experience in" judge advocate "duty causes him to be detailed for it when he is available."[161] Demonstrating George's point, a mere seven months after reporting aboard *Colorado*, Remey was ordered back to Headquarters Marine Corps to reassume the acting judge advocate billet.[162] Even while on sea duty, Remey continued to try cases. For much of Remey's tour aboard *Colorado*, the ship was

[154] SHULIMSON, *supra* note 24, at 25, 218 n.31 (citing Capt C. D. Hebb letter to SecNav and SecNav endorsement, September 13, 1873, Marine Officer Letter Supplement, 1870–1875, Record Group 80, National Archives, Washington, D.C.).
[155] Acting Secretary of the Navy Wm. Reynolds to Captain C. D. Hebb, U.S. Marine Corps (Sept. 18, 1873), *reprinted in* 9 SecNav letters to USMC officers, *supra* note 113, at 20, 24–25.
[156] *Various Naval Matters*, ARMY & NAVY J., Nov. 8, 1873, at 199, https://bit.ly/44ugsN9.
[157] *Id*.
[158] *Id*.
[159] USS *Colorado* Logbook, 12/2/1873–6/17/1874 (Dec. 3, 1873), NARA 118/24, *supra* note 60; U.S. Marine Corps Muster Roll, USS *Colorado* (Dec. 1873), Roll 85, T1118, National Archives, Washington, D.C.
[160] Secretary of the Navy Geo. M. Robeson to Captain Wm. B. Remey, USMC (Nov. 28, 1873), *reprinted in* 9 SecNav letters to USMC officers, *supra* note 113, at 67.
[161] George C. Remey to Mary J. Remey (May 10, 1874), *reprinted in* 3 Life and Letters of Mary Josephine Mason Remey, Wife of Rear Admiral George Collier Remey, United States Navy, 115, 118, in Box 5, Remey Family Papers, *supra* note 15.
[162] U.S. Marine Corps Muster Roll, USS *Colorado* (July 1874), Roll 87, T1118, National Archives, Washington, D.C.; USS *Colorado* Logbook, 6/18/1874–12/17/1874 (July 7, 1874), NARA 118/24, *supra* note 60.

anchored at Key West.[163] While there, Remey served as judge advocate for two general courts-martial held aboard USS *Congress* in January 1874.[164] In March 1874, he was the judge advocate at the general court-martial of Navy Captain Somerville Nicholson, also tried aboard USS *Congress* at Key West.[165] Captain Nicholson was charged with having been incapacitated for duty due to intoxication on multiple occasions while in command of USS *Lancaster*. The court-martial found Nicholson guilty and sentenced him to a 10-year furlough, though Secretary of the Navy Robeson later reduced that sentence.[166] In early April, Remey prosecuted another Navy officer at Key West, followed by courts-martial of eight enlisted members from late April through early May.[167] After *Colorado* went into dry dock at Norfolk in June 1874, he served as judge advocate for two courts-martial of members of the ship's crew.[168] The following month, Remey was in Washington, D.C., prosecuting a Marine private for absence without leave.[169]

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[163] USS *Colorado* Logbook, 12/2/1873–6/17/1874 (Dec. 21, 1873–Feb. 3, 1874; Mar. 3–Apr. 10, 1874; Apr. 25–June 10, 1874), NARA 118/24, *supra* note 60.

[164] *See* General Court-Martial in the Case of Landsman George H. Taylor, Case No. 5534, NARA 27/125, *supra* note 65; General Court-Martial in the Case of First Class Fireman George Goldy, Case No. 5533, NARA 27/125, *supra* note 65.

[165] General Court-Martial in the Case of Captain Somerville Nicholson, Case No. 5642, NARA 27/125, *supra* note 65.

[166] *Id*. Secretary Robeson initially mitigated the sentence by reducing the length of the furlough from ten years to six. Geo. M. Robeson to Captain Somerville Nicholson, U.S. Navy (Nov. 18, 1874), *reprinted in* S. EXEC. DOC. NO. 46-159, at 72 (1880). Two years later, Secretary Robeson remitted the unexpired portion of the sentence. Geo. M. Robeson to Captain Somerville Nicholson, U.S. Navy (Oct. 23, 1876), *reprinted in* S. EXEC. DOC. NO. 46-159, at 72; Case No. 5642, 4 Register of General Courts-Martial, *supra* note 69, at 21.

[167] *See* General Court-Martial in the Case of Passed Assistant Paymaster Frank Bissell, Case No. 5549, NARA 27/125, *supra* note 65; General Court-Martial in the Case of Private William H. Finegan, Case No. 5556, NARA 27/125, *supra* note 65; General Court-Martial in the Case of Private William H. Young, Case No. 5557, NARA 27/125, *supra* note 65; General Court-Martial in the Case of Ordinary Seaman James Carney, Case No. 5558, NARA 27/125, *supra* note 65; General Court-Martial in the Case of Landsman H. R. Reynolds, Case No. 5559, NARA 27/125, *supra* note 65; General Court-Martial in the Case of Ships Corporal William Carvill, Case No. 5567, NARA 27/125, *supra* note 65; General Court-Martial in the Case of Landsman John F. Carr, Case No. 5568, NARA 27/125, *supra* note 65; General Court-Martial in the Case of Landsman Samuel Haskill, Case No. 5569, NARA 27/125, *supra* note 65; General Court-Martial in the Case of Landsman William J. Brown, Case No. 5570, NARA 27/125, *supra* note 65.

[168] *See* General Court-Martial in the Case of Landsman Frederick H. Black, Case No. 5578, NARA 27/125, *supra* note 65; General Court-Martial in the Case of Ordinary Seaman Jeremiah Williams, Case No. 5579, NARA 27/125, *supra* note 65.

[169] General Court-Martial in the Case of Private Thomas Thompson, Case No. 5581, NARA 27/125, *supra* note 65. Private Thompson pleaded guilty and was sentenced to forfeiture of pay and a dishonorable discharge. His loss of pay was "entirely remitted." Case No. 5581, 4 Register of General Courts-Martial, *supra* note 69, at 6.

At the beginning of September 1874, Remey was dispatched to Pensacola, Florida, to serve as judge advocate at the general court-martial of Marine Captain Joseph F. Baker, who was charged with "[s]candalous conduct tending to the destruction of good morals" by becoming so intoxicated, he required medical attention.[170] Remey had previously prosecuted Baker in 1871 for offenses involving drunkenness.[171] On his way to Pensacola, Remey traveled through Louisville, where he and another officer planned a detour to explore Mammoth Cave.[172] Upon Remey's ultimate arrival at Pensacola, he learned that the Navy yard there was suffering a yellow fever outbreak, leading to an indefinite delay in the court-martial proceedings.[173] His stay at Pensacola lasted just two hours.[174]

Remey struggled with his weight. Just after his brother's return from Florida, George noted that "Will is growing fatter than ever."[175] Remey had hoped to shed some weight during his Pensacola trip but, upon his return, discovered he had gained five pounds.[176]

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[170] 9 SecNav letters to USMC officers, *supra* note 113, at 181–82; Letter from George C. Remey to Mary J. Remey (Aug. 26, 1874), *reprinted in* 3 George C. Remey Life and Letters, *supra* note 15, pt. 1, at 161, in Box 2, Remey Family Papers; Letter from George C. Remey to Mary J. Remey (Aug. 31, 1874), *reprinted in* 3 George C. Remey Life and Letters, *supra* note 15, pt. 1, at 161–62, in Box 2, Remey Family Papers; *The Navy—The Trial of Capt. Jos. F. Baker—Changes and Promotions in the Service—Some Talk of Abolishing Some Navy Yards*, MORNING J. & COURIER (New Haven, Ct.), Sept. 5, 1874, at 3.

[171] General Court-Martial in the Case of Captain Joseph F. Baker, *supra* note 93.

[172] Letter from George C. Remey to Mary J. Remey (Sept. 1, 1874), *reprinted in* 3 George C. Remey Life and Letters, *supra* note 15, pt. 1, at 163, in Box 2, Remey Family Papers.

[173] Letter from George C. Remey to Mary J. Remey (Sept. 8, 1874), *reprinted in id*. at 166–67; *The Baker Court Martial Postponed*, N.Y. HERALD, Sept. 8, 1874, at 10, https://bit.ly/45I6c4W. Captain Baker became seriously ill around this time, which spared him from being court-martialed. *City and County Items*, ALTON WEEKLY TELEGRAPH, Dec. 3, 1874, at 1; *Personal*, NAT'L REPUBLICAN (D.C.), Jan. 18, 1875, at 1, https://bit.ly/3YSo9M6; Acting Secretary of the Navy to the President (Sept. 30, 1876), in General Court-Martial in the Case of Captain Joseph F. Baker, Case No. 5888, NARA 27/125, *supra* note 65. Captain Baker was tried by a general court-martial in August 1876 at the Boston Navy Yard for being drunk on duty. General Court-Martial in the Case of Captain Joseph F. Baker, Case No. 5888, NARA 27/125, *supra* note 65. The court-martial sentenced him to a dismissal but recommended clemency. Baker died before the President acted on his sentence. Acting Secretary of the Navy to the President (Oct. 4, 1876), in *id*. His cause of death was believed to be related to excessive drinking. *Brieflets*, BOS. EVENING TRANSCRIPT, Oct. 3, 1876, at 8. As a second lieutenant, Baker had been lauded for his performance in action aboard USS *Congress* while engaged with the Confederate ironclad vessel CSS *Virginia* (formerly USS *Merimac*). *See* LEWIS R. HAMERSLY, THE RECORDS OF LIVING OFFICERS OF THE U.S. NAVY AND MARINE CORPS 334 (rev. ed. Philadelphia, J. B. Lippincott & Co. 1870); RICHARD S. COLLUM, HISTORY OF THE UNITED STATES MARINE CORPS 141 (1903), https://bit.ly/3KZPpSY.

[174] Letter from George C. Remey to Mary J. Remey (Sept. 21, 1874), *reprinted in* 3 George C. Remey Life and Letters, *supra* note 15, pt. 1, at 170, in Box 2, Remey Family Papers.

[175] Letter from George C. Remey to Mary J. Remey (Sept. 17, 1874), *reprinted in* 3 George C. Remey Life and Letters, *supra* note 15, pt. 1, at 171, in Box 2, Remey Family Papers.

[176] *Id.*

In October 1874, Remey resumed his itinerant court-martial appearances, this time in Portsmouth, New Hampshire.[177] He continued serving as judge advocate in numerous courts-martial and courts of inquiry at various East Coast naval stations until July 1875, when he took leave to visit his hometown of Burlington, Iowa.[178] His pastimes there included hunting prairie chickens.[179] Following his return from leave, he traveled to Philadelphia, where he served as judge advocate in three general courts-martial of Navy officers.[180]

In addition to performing his legal duties, Remey was an active member of a reformist klatch of Marine Corps officers.[181] The reformists sought to increase the quality of enlisted Marines and the professionalism of the officer corps.[182]

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[177] General Court-Martial in the Case of Private John J. Jones, Case No. 5619, NARA 27/125, *supra* note 65.

[178] 9 SecNav letters to USMC officers, *supra* note 113, at 200, 203, 210, 223, 244, 257, 278; *Various Naval Matters*, ARMY & NAVY J., Oct. 24, 1874, at 167 (noting Remey's service as judge advocate of a court of inquiry investigating the grounding of USS *Brooklyn* in Key West's harbor); General Court-Martial in the Case of Private Lawrence Tayman, Case No. 5651, NARA 27/125, *supra* note 65; General Court-Martial in the Case of Paymaster Horace P. Tuttle, Case No. 5681, NARA 27/125, *supra* note 65; General Court-Martial in the Case of Private George Clifford, Case No. 5682, NARA 27/125, *supra* note 65; General Court-Martial in the Case of Private Thomas Gilroy, Case No. 5683, NARA 27/125, *supra* note 65; General Court-Martial in the Case of Private William W. Davis, Case No. 5684, NARA 27/125, *supra* note 65; General Court-Martial in the Case of Private Patrick Malone, Case No. 5685, NARA 27/125, *supra* note 65; General Court-Martial in the Case of Private Charles McDonnell, Case No. 5686, NARA 27/125, *supra* note 65; General Court-Martial in the Case of Private Richard Thoroughgood, Case No. 5687, NARA 27/125, *supra* note 65; General Court-Martial in the Case of Passed Assistant Paymaster George F. Bemis, Case No. 5719, NARA 27/125, *supra* note 65; General Court-Martial in the Case of Landsman William A. Frazier, Case No. 5729, NARA 27/125, *supra* note 65; Letter from George C. Remey to Mary J. Remey (Aug. 25, 1875), *reprinted in* 3 George C. Remey Life and Letters, *supra* note 15, pt. 2, at 223–24, in Box 2, Remey Family Papers.

[179] Letter from George C. Remey to Mary J. Remey (Aug. 25, 1875), *reprinted in* 3 George C. Remey Life and Letters, *supra* note 15, pt. 2, at 223, in Box 2, Remey Family Paper.

[180] General Court-Martial in the Case of Master Charles A. Clarke, Case No. 5741, NARA 27/125, *supra* note 65; General Court-Martial in the Case of Passed Assistant Engineer George H. White, Case No. 5739, NARA 27/125, *supra* note 65; General Court-Martial in the Case of Chief Engineer Thomas J. Jones, Case No. 5764, NARA 27/125, *supra* note 65.

[181] J. F. HOLDEN-RHODES, SMART AND FAITHFUL FORCE: HENRY CLAY COCHRANE AND THE UNITED STATES MARINE CORPS, 1861–1905, at 73–74, 99 (2013); 1881 Henry Cochrane Diary (Jan. 14, 1881), 1881 Folder, Box 19, Henry Clay Cochrane Personal Papers, Historical Resources Branch, Marine Corps History Division, Marine Corps Base Quantico, Va. [hereinafter Cochrane Papers].

[182] *See, e.g.*, Cochrane, The Status of the Marine Corps. A Plan for Its Reorganization, which Proposes Twenty-four Companies, and Involves Twenty-five Immediate Promotions and other Changes (Oct. 1, 1875), Folder 11, Box 34, Cochrane Papers, *supra* note 181.

By October 1875, Remey worried that he would again be dispatched from Washington on sea duty.[183] He hoped that the position of acting judge advocate of the Marine Corps would soon become permanent and believed a rival was attempting to get him out of the way.[184] Whatever the actual reason, Remey was soon ordered back to the fleet. After first traveling to Panama, Remey hopped a ride on a mail steamer to Coquimbo, Chile.[185] There, on 10 December 1875, he reported aboard USFS *Richmond*, an old wooden steam sloop that was a veteran of the Battle of Mobile Bay.[186] Another captain took Remey's place as acting judge advocate at Headquarters Marine Corps.[187]

Aboard *Richmond*, the U.S. Navy South Pacific Station's flagship, Remey was dual-hatted as commanding officer of the Marine guard and Fleet Marine Officer of the South Pacific Station.[188] His first sergeant aboard *Richmond* later recalled that Remey was a respected leader who looked out for his subordinates' wellbeing.[189] In October 1876, the flagship transited the Strait of Magellan and took up duty at the South Atlantic Station, making Remey the Fleet Marine Officer there.[190]

Even south of the Equator, Remey continued to litigate cases. In February 1877, he served as the judge advocate for a general court-martial held aboard USS *Frolic* in Montevideo, Uruguay's harbor.[191] A Marine private assigned to USFS *Richmond* pleaded guilty to attempting to desert by leaving the flagship without permission and swimming to a nearby vessel.[192] His sentence included being clapped in double irons for the remainder of the cruise, followed by imprisonment for four years and a dishonorable discharge.[193] Secretary of the Navy Richard W. Thompson, however, remitted confinement in excess of one

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[183] Letter from George C. Remey to Mary J. Remey (Oct. 4, 1875), *reprinted in* 3 George C. Remey Life and Letters, *supra* note 15, pt. 2, at 241–42, in Box 2, Remey Family Papers.
[184] *Id.* at 242.
[185] *See Various Naval Matters*, ARMY & NAVY J., Dec. 18, 1875, at 301, https://bit.ly/44uQokU; USS *Richmond* Logbook, 7/21/1875–2/3/1876 (Dec. 10, 1875), NARA 118/24, *supra* note 60.
[186] USFS *Richmond* Logbook (Dec. 10, 1875); 6 DANFS, *supra* note 30, at 102–04.
[187] *Various Naval Matters*, ARMY & NAVY J., Nov. 20, 1875, at 233 (section on Captain Henry A. Bartlett, identified as Remey's relief), https://bit.ly/44uQokU.
[188] U.S. Marine Corps Muster Roll, USFS *Richmond* (Dec. 1875), Roll 89, T1118.
[189] Letter from David Bourke to Captain G. C. Remey (Jan. 23, 1895), "George C. Remey Personal Correspondence" Folder, Box 20, Remey Family Papers, *supra* note 15; U.S. Marine Corps Muster Roll, USFS *Richmond* (Apr. 1876), Roll 90, T1118.
[190] USS *Richmond* Logbook, 8/23/1876–3/11/1877 (Sept. 20–Oct. 7, 1876), NARA 118/24, *supra* note 60. *See The South-Atlantic Squadron*, EVENING STAR (D.C.), Nov. 17, 1876, at 1, https://bit.ly/3swOUtm.
[191] General Court-Martial in the Case of Private Maurice Moore, Case No. 5940, NARA 27/125, *supra* note 65.
[192] *Id.*
[193] *Id.*

year and ordered the Marine's release from double irons.[194] Remey also served as judge advocate at the courts-martial of two sailors tried aboard *Richmond* the following month while still in Montevideo's harbor.[195] In both cases, at the recommendation of Naval Solicitor John A. Bolles, Secretary Thompson disapproved the findings of guilty of mutinous conduct.[196] Bolles noted that his review disclosed unspecified "irregularities" and "fatal defects."[197] Both sailors were restored to duty.[198]

After eight months at various ports on South America's east coast, *Richmond* set sail for home, arriving at Boston on 1 September 1877.[199] Sixteen days later, Remey and the ship's other officers detached from *Richmond* when she was decommissioned.[200] Remey returned to Headquarters Marine Corps the following month to serve as acting adjutant and inspector, followed by additional short-term assignments.[201] He also continued to perform legal duties. In March 1878, he was detailed as the judge advocate of a general court-martial convened to try a passed assistant paymaster on a charge of attempting to defraud the United States.[202] Due to the accused's illness, however, the trial never commenced.[203]

VI. THE CIVILIAN OFFICE OF SOLICITOR AND NAVAL JUDGE ADVOCATE GENERAL

The first Navy Department official to hold the title "judge advocate-general" was a civilian with no previous naval or military experience—unless two terms at a military secondary school count.[204] William E. Chandler was a 29-year-old Harvard Law School alumnus, former Speaker of the New Hampshire House of Representatives, and adroit Republican Party campaign manager when President Lincoln nominated him on 6 March 1865 to become the "solicitor and

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[194] *Id*.; Case No. 5940, 4 Register of General Courts-Martial, *supra* note 69, at 96.
[195] General Court-Martial in the Case of Seaman Charles Lumpe, Case No. 5957, NARA 27/125, *supra* note 65; General Court-Martial in the Case of Captain of Top George Hill, Case No. 5958, NARA 27/125, *supra* note 65.
[196] General Court-Martial in the Case of Seaman Charles Lumpe, *supra* note 195; General Court-Martial in the Case of Captain of Top George Hill, *supra* note 195.
[197] General Court-Martial in the Case of Seaman Charles Lumpe, *supra* note 195.
[198] Case Nos. 5957, 5958, 4 Register of General Courts-Martial, *supra* note 69, at 100.
[199] USFS *Richmond* Logbook 8/23/1876–3/11/1877 (Nov. 10, 1876–Sept. 1, 1877), NARA 118/24, *supra* note 60; *From Washington*, BROOKLYN DAILY EAGLE, Sept. 2, 1877, at 4.
[200] USS *Richmond* Logbook 3/10/1877–9/18/1877 (Sept. 17, 1877); Officers Who Reported and Detached Page, NARA 118/24, *supra* note 60.
[201] Remey Service Record, *supra* note 25, 2–3.
[202] General Court-Martial in the Case of Passed Assistant Paymaster William M. Preston [unnumbered case following case no. 5990 in container #90], NARA 27/125, *supra* note 65.
[203] *Id.*
[204] LEON BURR RICHARDSON, WILLIAM E. CHANDLER: REPUBLICAN 16–17, 35 (1940).

naval judge advocate-general of the Navy Department."[205] Three days later, the Senate confirmed the nomination.[206] Even before his appointment to that position, Chandler had represented the Navy Department amid a widespread naval contracting scandal.[207]

Chandler's new office was established by a March 1865 statute authorizing the President, with the advice and consent of the Senate, to appoint "for service during the rebellion and one year thereafter, an officer in the Navy Department, to be called the 'Solicitor and Naval Judge Advocate-General,' at an annual salary of $3,500."[208] The position's creation resulted from the same naval contracting scandal that Chandler had previously been retained to address.[209] Confronted with evidence of what he characterized as naval contractors' "fraud and villainy," Secretary of the Navy Gideon Welles complained that "the Navy Department had no solicitor or law officer whom I could consult, or with whom I could share responsibility."[210]

Chandler did not stay in the position long. In June 1865, President Andrew Johnson installed him as Assistant Treasury Secretary.[211] Chandler later

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[205] *See generally id*. at 26–55; *see also* Jacob H. Ela, *Secretary William E. Chandler*, in SKETCHES OF SUCCESSFUL NEW HAMPSHIRE MEN 255–56 (Manchester, J.B. Clarke 1882); QUINQUENNIAL CATALOGUE OF THE OFFICERS AND STUDENTS OF THE LAW SCHOOL OF HARVARD UNIVERSITY 1817–1889, at 58 (Cambridge, College Press 1890) [hereinafter HLS QUINQUENNIAL CATALOGUE]; 14 S. EXEC. JOURNAL, 38th Cong., 2d Sess., 252 (1865).

[206] 14 S. EXEC. JOURNAL, 37th Cong., 2d Sess., 266 (1865).

[207] *See, e.g.*, 2 GIDEON WELLES, DIARY OF GIDEON WELLES 200 (1911) (Dec. 17, 1864) ("Mr. Chandler, employed by the Department to attend to alleged frauds in the Philadelphia Navy Yard, arrived here this morning." (footnote omitted)); *id*. at 218 (Jan. 1, 1865) ("Mr. Solicitor Chandler, who has charge of the cases of fraud at the Philadelphia Navy Yard, made a report and spent some time with me this morning"); *see also* RICHARDSON, *supra* note 204, at 53–54.

[208] An Act to Establish the Office of Solicitor and Naval Judge-Advocate, ch. 76, 13 Stat. 468 (1865).

[209] "Historical Sketch," Report of the Judge Advocate General of the Navy (Sept. 1, 1923), in ANNUAL REPORTS OF THE NAVY DEPARTMENT FOR THE FISCAL YEAR 1923, at 165 (1924) [hereinafter "Historical Sketch"].

[210] 1 WELLES, *supra* note 207, at 540 (Mar. 12, 1864). Even before the position of solicitor and naval judge advocate-general was created by statute, Secretary Welles—acting without express statutory authorization—appointed Assistant District Attorney Nathaniel Wilson as "Solicitor for the Navy Department" in 1864. "Historical Sketch," *supra* note 209, at 165; *Hymenial*, EVENING STAR (D.C.), Oct. 7, 1863, at 2 (referring to "our popular Assistant District Attorney, Nathaniel Wilson, Esq."); 1 WELLES, *supra* note 207, at 543 (Mar. 16, 1864) ("I have matters arranged for young Mr. Wilson to go to New York and attend to the subjects that are undergoing investigation."). Wilson went on to become a leading member of the District of Columbia bar, serving four terms as president of the District Bar Association. *Nathaniel Wilson Dies in This City*, EVENING STAR (D.C.), Oct. 24, 1922, at 10.

[211] *The New Assistant Secretary of the Treasury*, N.Y. DAILY HERALD, June 20, 1865, at 1 (reporting that on 19 June 1865, Chandler "resigned his position as Solicitor of the Navy Department, and has entered upon the duties of his new office"). President Johnson formally nominated Chandler for the

served as Secretary of the Navy during the Arthur administration and, later still, as a U.S. senator from New Hampshire.[212] His second wife—Lucy Hale, the daughter of a New Hampshire senator—reputedly had been secretly engaged to John Wilkes Booth around the time of Lincoln's assassination.[213]

John A. Bolles succeeded Chandler as solicitor and naval judge advocate-general.[214] A Brown University alumnus (class of 1829), Bolles became a member of the Boston bar in 1833.[215] He was active in the anti-slavery and temperance movements.[216] He also held several public offices in Massachusetts, including Secretary of State.[217] In 1862, he was appointed as an aide-de-camp to Major General George B. McClellan.[218] By the end of the Civil War, Bolles was a U.S. Army major serving as aide-de-camp and judge advocate of the Department of the East.[219] After the war, he was breveted as a brigadier general, U.S. Volunteers.[220] Bolles assumed the role of solicitor and naval judge advocate-general on 21 July 1865,[221] though President Johnson did not formally nominate him for the position until 4 December 1865.[222] The Senate confirmed the nomination the following month.[223]

President Johnson proclaimed an end to the Civil War on 20 August 1866.[224] Under the terms of the statute creating the office of solicitor and naval

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position in January 1866; he was confirmed the following month. 14 S. EXEC. JOURNAL, 39th Cong., 1st Sess., 505, 561 (1866).

[212] Walter R. Herrick, *William E. Chandler*, in 1 AMERICAN SECRETARIES OF THE NAVY 1775–1913, at 397–402 (Paolo E. Coletta, ed., 1980) [hereinafter Coletta].

[213] *See generally* TERRY ALFORD, FORTUNE'S FOOL: THE LIFE OF JOHN WILKES BOOTH 217–18, 242, 253, 397–98 n.69 (2015).

[214] *Naval Judge Advocate General*, CHARLESTON DAILY COURIER, July 17, 1865, at 1.

[215] *Death of Hon. John A. Bolles*, EVENING STAR (D.C.), May 27, 1878, at 1; HISTORICAL CATALOGUE OF BROWN UNIVERSITY, PROVIDENCE, RHODE ISLAND 1764–1894, at 102 (Providence, Press of P. S. Remington & Co. 1895).

[216] *Death of Hon. John A. Bolles*, *supra* note 215, at 1.

[217] HISTORICAL CATALOGUE OF BROWN UNIVERSITY, *supra* note 215, at 102.

[218] 12 S. EXEC. JOURNAL, 37th Cong., 2d Sess., 425, 433 (1862).

[219] *See, e.g.*, *Court-Martial Trial of Surgeon Salisbury*, DAILY COURANT (Hartford), Sept. 24, 1863, at 2; *The Hotel-Burning Plot—Conclusion of H. C. Kennedy's Trial*, CLEVELAND DAILY LEADER, Mar. 4, 1865, at 1; *The Osbon Court-Martial*, BROOKLYN UNION, May 19, 1865, at 1; *see also* 13 S. EXEC. JOURNAL, 37th Cong., 3d Sess., 57 (nominating Captain John A. Bolles to be promoted to major, serving as aide-de-camp to Major General Wool, assigned to duty with Major General Dix), 64 (nominating John A. Bolles to be judge advocate for the Seventh Army Corps in the field, under the command of Major General Dix, with the rank of major), 145 (confirming Bolles's nomination [it is unclear whether the confirmation was for one or both of the nominations]) (1863).

[220] 14 S. EXEC. JOURNAL, 39th Cong., 1st Sess., 681, 716 (1866).

[221] 2 WELLES, *supra* note 207, at 339–40 (July 21, 1865).

[222] 14 S. EXEC. JOURNAL, 39th Cong., 1st Sess., 300 (1865).

[223] *Id*. at 485 (1866).

[224] Proclamation, 14 Stat. 817 (1866).

judge advocate-general, that should have resulted in the position's elimination on 20 August 1867.[225] But the appropriations act for the fiscal year ending on 30 June 1868 provided funds to continue the solicitor and naval judge advocate-general's salary.[226] The following year's appropriations act funded only about three-quarters of Bolles's previous salary of $3,500 while providing that "this office shall cease on the 4th day of March, 1869, and no further appropriation for its continuance shall be made until said office shall have been established by law."[227] Yet a deficiency appropriations act that President Johnson signed into law on 3 March 1869—just one day before the office of solicitor and naval judge advocate-general was to terminate—provided additional funds for Bolles's salary in that position through 1 July 1869.[228]

During congressional debate on a deficiency appropriation bill in April 1869, Senator Charles D. Drake (R.-Mo.) introduced an amendment that would have continued Bolles's salary while also making the office of solicitor and naval judge advocate-general permanent.[229] Drake, a Senate Naval Affairs Committee member,[230] had personal experience with the naval justice system. As a 16-year-old, he became a U.S. Navy acting midshipman.[231] The following year, 1828, he tendered his resignation in lieu of being tried by court-martial after cursing at a sailor he deemed insolent and beating the sailor with a wooden rod.[232] Following entreaties by influential family friends, Drake was returned to duty only to be dismissed from the naval service for "general insubordination" at the age of 18.[233] Forty years later, as a U.S. senator, Drake offered letters supporting his amendment from Secretary of the Navy Adolph E. Borie and General of the Army Ulysses S. Grant, who had been inaugurated as President since signing the letter in his former capacity.[234] The venerable Senator William P. Fessenden (R-Me.), chair of the Appropriations Committee,[235] objected to the portion of Drake's amendment that would have made the position permanent, stating, "I think it

[225] An Act to Establish the Office of Solicitor and Naval Judge-Advocate, ch. 76, 13 Stat. 468 (1866).
[226] Appropriations Act of Mar. 2, 1867, ch. 166, 14 Stat. 440, 450 (1867).
[227] Appropriations Act of July 20, 1868, ch. 176, 15 Stat. 92, 103 (1868).
[228] Deficiencies Appropriations Act of Mar. 3, 1869, ch. 123, 15 Stat. 311, 313 (1869). The combination of the two acts resulted in Bolles being paid $3,830 for the fiscal year ending on 30 June 30, $330 more than his previous and subsequent annual salaries.
[229] CONG. GLOBE, 41st Cong., 1st Sess. 578 (1869).
[230] *Id*. at 27.
[231] Autobiography of Charles Daniel Drake, unpublished manuscript, at 239–314, C1003, State Historical Society of Missouri, Columbia, Mo.
[232] *Id*. at 297–314.
[233] *Id*. at 371–75.
[234] CONG. GLOBE, 41st Cong., 1st Sess. 578 (1869).
[235] *Id*. at 27.

improper to legislate in that way on this bill."[236] Drake agreed to delete that portion of his proposal.[237] After further discussion, the Senate adopted the remainder of Drake's amendment, which would continue the solicitor and naval judge advocate general's salary through 30 June 1870.[238] That further extension was ultimately enacted as part of the Deficiency Appropriation Act of 1869.[239]

President Grant signed into law the landmark statute creating the Department of Justice on 22 June 1870.[240] That act changed the title of the "solicitor and naval judge advocate-general" to "naval solicitor" and transferred the post from the Navy Department to the new Department of Justice effective 1 July 1870.[241] While the statute formally placed the naval solicitor under the attorney general's supervision,[242] in reality little changed. As a Senate Committee on Naval Affairs document later noted, "Notwithstanding the provision transferring the said office to the Department of Justice, the Solicitor retained his office in the Navy Department, where he continued to perform the same duties as were required of him before the passage of said act."[243]

While Bolles remained naval solicitor, a new position of Naval Department judge advocate was created to help the Secretary of the Navy review records of courts-martial, courts of inquiry, and retiring boards.[244] That duty was assigned to Rear Admiral Andrew A. Harwood, U.S. Navy (Ret.), assisted initially by Captain William G. Temple, U.S. Navy.[245] Harwood's father was John Edmund Harwood, considered one of America's leading comic actors of his era.[246] His mother, Eliza Franklin Bache, was a granddaughter of Benjamin Franklin.[247] Andrew had not yet turned seven when his father died.[248] He became

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[236] *Id*. at 578.
[237] *Id*.
[238] *Id*. at 578–79.
[239] Deficiency Appropriation Act of 1869, ch. 15, 16 Stat. 9, 10 (1869).
[240] An Act to Establish the Department of Justice, ch. 150, 16 Stat. 162 (1870).
[241] *Id*. §§ 3, 19, 16 Stat. at 162, 165.
[242] *Id*. § 3, 16 Stat. at 162.
[243] Notes in favor of the bill appt'g Judge Advocate General, S. 1033, at 2–3 (undated), Senate 46A-E14, S. 1030–1933, Committee on Naval Affairs, 46th Congress, Box 107, Record Group 46, National Archives, Washington, D.C.
[244] *Id*. at 3–4.
[245] *Id*. at 4; *Proposed Bureau of Justice in the Navy Department*, EVENING STAR (D.C.), Nov. 12, 1870, at 1.
[246] GERALD BORDMAN, THE CONCISE OXFORD COMPANION TO AMERICAN THEATRE 209 (1987).
[247] 1 BENJAMIN FRANKLIN, THE LIFE OF BENJAMIN FRANKLIN 94 n.* (John Bigelow, ed., 2d ed., Phila., J. B. Lippincott & Co. 1879).
[248] 3 APPLETON'S CYCLOPÆDIA OF AMERICAN BIOGRAPHY 109 (James Grant Wilson & John Fiske, eds., N.Y., D. Appleton and Company 1888); WILLIAM B. COGAR, DICTIONARY OF ADMIRALS OF THE U.S. NAVY, VOLUME 1, 1862–1900, at 77 (1989).

a U.S. Navy acting midshipman at the age of 15.[249] Over the course of his long naval career, Harwood developed an expertise in ordnance.[250] During the Civil War, he was assigned to the crucial post of commandant of the Washington Navy Yard and Potomac Flotilla.[251] Though he was officially retired on 9 October 1864, his services were so highly valued that he remained on active duty as secretary of the Light House Board.[252] Late in his career, Harwood developed a particular interest in naval justice. In 1863, he published a 29-page pamphlet titled, *Practice of Naval Summary Courts-Martial*.[253] While serving on the Light House Board, he spent his spare time researching a larger work, resulting in the publication of his 297-page (excluding index) treatise, *The Law and Practice of United States Naval Courts-Martial*, in 1867.[254]

When assigned to their judge advocate duties in October 1870, Harwood and Temple were tasked with reviewing records of all Navy Department summary courts-martial (roughly equivalent to today's special courts-martial) and general courts-martial and advising the Secretary as to their disposition.[255] But Temple soon detached from his position as assistant judge advocate to assume command of the screw frigate USS *Tennessee*.[256] Harwood remained the Navy Department's judge advocate until 1 October 1871, when he left active service eight days before his 69th birthday.[257] It does not appear that anyone was assigned to the judge advocate position in his place.[258] John Bolles continued to serve as naval solicitor until his death on 25 May 1878.[259] But even before Bolles died, his office was in the process of being eliminated.

A House Appropriations Committee budget bill reported on the House floor on 26 March 1878 included a provision abolishing the position of naval

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[249] COGAR, *supra* note 248, at 77.
[250] H.R. REP. NO. 49–817, at 1 (1886).
[251] APPLETON'S CYCLOPÆDIA, *supra* note 248, at 109.
[252] COGAR, *supra* note 248, at 77–78; H.R. REP. NO. 49-817, *supra* note 250, at 1.
[253] A. A. HARWOOD, U.S.N., PRACTICE OF NAVAL SUMMARY COURTS-MARTIAL (Wash., Franck Taylor 1863).
[254] H.R. REP. NO. 49-817, *supra* note 250, at 2 ("While on light-house duty, after he had been placed on the retired list, he devoted his leisure hours to the preparation of his work on naval courts-martial . . . ."); HARWOOD, *supra* note 63.
[255] *Proposed Bureau of Justice in the Navy Department*, EVENING STAR (D.C.), Nov. 12, 1870, at 1.
[256] *Telegraph News from Washington*, SUN (Balt.), Dec. 29, 1870, at 1; 7 DANFS, *supra* note 42, at 87; 4 NAVAL HISTORY DIVISION, OFFICE OF THE CHIEF OF NAVAL OPERATIONS, NAVY DEPARTMENT, DICTIONARY OF AMERICAN NAVAL FIGHTING SHIPS 188 (1969).
[257] H.R. REP. NO. 49-817, *supra* note 250, at 2; COGAR, *supra* note 248, at 78.
[258] The *Navy Registers* for the years 1872–1877 include no listing for the position of "Judge Advocate."
[259] *Death of Hon. John A. Bolles*, EVENING STAR (D.C.), May 27, 1878, at 1.

solicitor.[260] The Committee's chairman, Representative John DeWitt Clinton Atkins (D-Tenn.), argued:

> It is difficult to see what necessity there can be for such an officer in view of the well-organized Department of Justice, with the Attorney-General at its head and a corps of skilled assistants, upon whom the responsibility of able and just interpretations of the laws devolve. The decisions of a subordinate could not be accepted as final; nor would it be sound policy thus to divide responsibility between the Attorney General and one of inferior grade, although confined to naval matters.[261]

Attorney General Charles Devens and Secretary of the Navy Thompson opposed the position's elimination.[262] During the House of Representatives' consideration of the appropriations bill, Representative John Hanna (R-Ind.) moved to delete the provision terminating the office of naval solicitor.[263] After a spirited debate, the House rejected the amendment by a vote of 58 to 92.[264] On the other hand, four days after Bolles's death, the Senate voted to retain his former office.[265] The House-Senate conference committee on the bill, however, accepted the House position,[266] thus terminating the office upon the bill's enactment.[267]

VII. PRECURSORS TO A UNIFORMED JUDGE ADVOCATE GENERAL OF THE NAVY

Less than two weeks after enactment of the statute eliminating the civilian position of naval solicitor, the Navy Department assigned a uniformed officer to perform legal duties.[268] That officer was Captain William B. Remey, USMC.[269] On 1 July 1878, Secretary Thompson informed Remey that he was "detailed in this Department as Acting Judge Advocate."[270] The *New York Herald* explained, "The selection was made from the line of the service because of the failure of Congress to provide an appropriation for the pay of the civilian who has

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[260] 7 CONG. REC. 2032, 2897 (1878).
[261] *Id*. at 2897 (statement of Rep. Atkins).
[262] *Id*. at 3159 (statement of Rep. Harris of Mass.).
[263] *Id*. at 3158.
[264] *Id*. at 3160.
[265] *Id*. at 3905.
[266] *Id*. at 4614 (statement of Rep. Atkins).
[267] Appropriations Act of June 19, 1878, ch. 329, 20 Stat. 178, 205 (1878).
[268] *Appointments in the Navy Department*, N.Y. HERALD, July 2, 1878, 3.
[269] *Id*.
[270] Secretary of the Navy R. W. Thompson to Capt Wm B. Remey, U.S. Marine Corps (July 1, 1878), *reprinted in* 10 SecNav letters to USMC officers, *supra* note 113, at 146.

usually discharged the duties of the office, and Captain Remey was chosen because of his acknowledged legal acquirements."[271]

As acting judge advocate, Remey's duties included reviewing the records of all courts-martial, courts of inquiry, and boards for the examination of officers for retirement and promotion; preparing charges and specifications for courts-martial; supervising the organization of naval courts and boards; reviewing claims filed for investigation; reviewing naval contracts; and answering questions of law, regulation, and discipline.[272]

One case Remey reviewed as acting judge advocate ultimately reached the Supreme Court. In a lengthy opinion dated 30 January 1879, Remey rejected a challenge to a revised court-martial sentence—far more severe than the original sentence—imposed on Paymaster's Clerk Alvin Reed after the rear admiral who convened the court-martial informed the members that the first sentence was inadequate.[273] Reed, confined aboard a ship in Boston Harbor, then sought habeas relief from the Circuit Court of the United States for the District of Massachusetts.[274] That court, however, concluded that the "proceedings of the court-martial and the action of" the convening authority "seem to have been in exact accordance with the statutes and regulations of the navy, and to be fully justified by the principles of military law, as well as by the well-settled usage of the army and navy departments of the government."[275] The Supreme Court then reviewed the case, also denying relief.[276]

Less than two weeks after Remey issued his opinion in Reed's case, his title changed. On 12 February 1879, Secretary Thompson wrote to Remey: "[A]s

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[271] *Washington*, N.Y. HERALD, July 2, 1878, at 3.
[272] Notes in favor of the bill appt'g Judge Advocate General, S. 1033, *supra* note 243, at 5–6.
[273] Reed, Alvin R., P'm. Clerk. Case of (Jan. 30, 1879), Opinions Issued by the Judge Advocate General ("Record, No. 1"), Aug 1878–April 1884, at 47–56, Entry 115, Record Group 125, National Archives, Washington, D.C. [hereinafter JAG Opinions]. The president of the court-martial was then-Commander Winfield S. Schley, who would later, as a rear admiral, direct the U.S. Navy's ships during the Spanish American War's Battle of Santiago de Cuba. Reed's original sentence was confinement for one year, forfeiture of all pay above the amount of $50 per month during his confinement, a $500 fine with a provision for contingent confinement if the fine was not paid, and a dishonorable discharge from the service of the United States. *In re* Reed, 20 F. Cas. 409, 414 (Cir. Ct. D. Mass. 1879); General Court-Martial in the Case of Paymaster's Clerk Alvin R. Reed, Case No. 6068, at 132–33, NARA 27/125, *supra* note 65. The revised sentence was confinement for two years, forfeiture of all pay above the amount of $10 per month, a $500 fine with a provision for contingent confinement if the fine was not paid, and a dishonorable dismissal from the naval service. *Ex parte* Reed, 100 U.S. 13, 14–15 (1879).
[274] *In re* Reed, 20 F. Cas. 409 (Cir. Ct. D. Mass. 1879). In addition to challenging his sentence, Reed unsuccessfully claimed that a Navy paymaster's clerk was not subject to trial by court-martial.
[275] *Id*. at 416.
[276] *Ex parte* Reed, 100 U.S. at 20–21.

you have been and are now discharging the duties formerly assigned to the Naval Solicitor and Judge Advocate General, you will hereafter be regarded as acting Judge Advocate General of the Navy Department and will be addressed and recognized as such."[277] In that edict's wake, the *Army and Navy Journal* reported that Remey's friends "are divided on the question as to what new title is to be given him in recognition of his acting appointment. Some insist upon calling him 'Judge,' and others are equally decided in favor of 'General.'"[278]

Soon after being designated acting judge advocate general, Captain Remey was among the first Navy Department officers to move into the ornate State, War, and Navy Building, now called the Eisenhower Executive Office Building.[279] There he amassed a law library that by 1882 included "1239 volumes, exclusive of Public documents."[280]

Remey continued to issue opinions on legal matters, now signing them as "Actg. Judge Advocate Gen'l." For example, in an opinion that Secretary Thompson subsequently approved, Remey rejected a challenge to a court-martial because two of its members—both Navy ensigns—were under the age of 21.[281]

VIII. A STATUTORY UNIFORMED JUDGE ADVOCATE GENERAL OF THE NAVY

At Secretary Thompson's request, in December 1879, Representative Washington Curran Whitthorne (D.-Tenn.)—chairman of the House Naval Affairs Committee and a former Confederate Army adjutant and adjutant general of Tennessee[282]—introduced a bill to create the office of "judge-advocate-general of the Navy" to be filled by a Navy or Marine Corps officer.[283] The position's incumbent would receive the rank, pay, and allowances of a Navy captain or Marine Corps colonel.[284] The new office's prescribed duties would be to "receive,

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[277] Secretary of the Navy R. W. Thompson to Capt W. B. Remey, U.S. Marine Corps (Feb. 12, 1879), *reprinted in* 8 SecNav letters to USMC officers, *supra* note 113, at 146, 254.
[278] Untitled, ARMY & NAVY J., Mar. 8, 1879, at 550.
[279] *The Navy Department in the New Building*, EVENING STAR (D.C.), May 17, 1879, at 1.
[280] Wm. B. Remey, Judge Advocate General, to the Honorable Wm. E. Chandler, Secretary of the Navy (Nov. 9, 1882), Letters Sent, Dec. 1879–Jan. 1883, Entry 8, Record Group 125, National Archives, Washington, D.C. [hereinafter Remey Letters Sent].
[281] Phillips. Charles L. – Re: To dismissal. (Mar. 18, 1880), JAG Opinions, *supra* note 273, at 59–64.
[282] BIOGRAPHICAL DIRECTORY OF THE UNITED STATES CONGRESS 1774–2005, at 2156–57 (2005); KENNETH MCKELLAR, TENNESSEE SENATORS AS SEEN BY ONE OF THEIR SUCCESSORS 416–25 (1942).
[283] 10 CONG. REC. 80 (1879) (introducing H.R. No. 2788); R. W. Thompson to Senator J. R. McPherson, Chairman, Senate Naval Affairs Committee (Jan. 7, 1880), *reprinted in* 10 CONG. REC. 4133–34 (1880).
[284] H.R. 2788, 130 Cong. Rec. 2455 (1880).

revise, and have recorded the proceedings of all courts-martial, courts of inquiry, and boards for the examination of officers for retirement and promotion in the naval service, and perform such other duties as have heretofore been performed by the solicitor and naval judge-advocate-general."[285] Secretary Thompson explained:

> The necessity of having an officer familiar with the practice of courts-martial, the rules, regulations, and customs of the Navy, of practical experience in the naval service, and with proper legal attainments to discharge the duties of judge-advocate-general, has been recognized by preceding administrations of this Department; and in the absence of a provision of law for that office such as is contemplated by this bill the difficulty has been partially met by the temporary detail of a suitable officer by the Secretary of the Navy to act in that capacity.[286]

Secretary Thompson maintained that a well-qualified officer should be provided "to aid the Secretary in transacting" the Department's legal business. Thompson added that the Secretary himself was prevented by "other varied and important duties" from giving that legal business "the attention that its importance demands."[287] Senator John R. McPherson (D-N.J.), chairman of the Naval Affairs Committee, introduced a similar bill in the Senate.[288]

After the bill received a favorable report from the House Committee on Naval Affairs,[289] the full House of Representatives passed it without debate on 15 April 1880.[290] On 4 June 1880, the Senate amended the legislation by providing a four-year fixed term of office for the judge advocate general of the Navy.[291] By contrast, the judge advocate general of the Army was a brigadier general with no term limit.[292] Following a brief debate, the Senate passed the bill without a recorded vote.[293] The House agreed to the Senate amendment the following day.[294]

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[285] *Id*.
[286] R. W. Thompson to Hon. J. R. McPherson, Chairman of the Committee on Naval Affairs, United States Senate (Jan. 7, 1880), *reprinted in* 10 CONG. REC. 4133–34.
[287] *Id*.
[288] 10 CONG. REC. 338 (1880) (introducing S. 1033).
[289] H.R. REP. NO. 46-459 (1880).
[290] 10 CONG. REC. 2455 (1880).
[291] *Id*. at 4134. The Senate had previously postponed consideration of Senate Bill 1033 and agreed to consider House Bill 2788, with an amendment proposed by the Senate Naval Affairs Committee, in its place. *Id.* at 4102.
[292] An Act to increase and fix the Military Peace Establishment of the United States, ch. 159, § 12, 14 Stat. 332, 334 (1866), codified at Rev. Stat. § 1198 (1875).
[293] 10 CONG. REC. 4134 (1880).
[294] *Id*. at 4196.

On 8 June 1880, President Rutherford B. Hayes—himself a former reluctant judge advocate[295]—signed the bill into law.[296]

IX. REMEY'S SERVICE AS JUDGE ADVOCATE GENERAL OF THE NAVY

Unsurprisingly, at Secretary Thompson's recommendation, President Hayes nominated Remey for the newly created position of judge advocate general of the Navy.[297] The *Chicago Tribune* observed: "This appointment is a very great compliment to Capt. Remey. The office has really been created for him at the present session of Congress, the Secretary of the Navy finding it impossible to conduct the affairs of his Bureau without the legal advice of a competent officer."[298] The Senate confirmed the nomination the day after receiving it.[299] Though his permanent rank remained Marine Corps captain, Remey received the rank and pay of a colonel while serving as judge advocate general.[300] Before he assumed that position, there were only two colonels in the Marine Corps, one of

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[295] A Harvard Law School graduate, Hayes practiced law in Ohio before the Civil War, including service as the Cincinnati city solicitor. HLS QUINQUENNIAL CATALOGUE, *supra* note 205, at 30 (class of 1845); HARRY BARNARD, RUTHERFORD B. HAYES AND HIS AMERICA 131–211 (1954). Soon after the Civil War began, he became a major in the 23rd Ohio Volunteer Infantry Regiment. *Id*. at 215. Writing from Sutton in what is now West Virginia on 5 September 1861, he informed his wife: "We are to have a bore here in a few days—a court-martial on some officer in the Tenth or Twelfth, and I am to be judge advocate, unless I can diplomatize out of it, which I hope to do." 2 DIARY AND LETTERS OF RUTHERFORD BIRCHARD HAYES, NINETEENTH PRESIDENT OF THE UNITED STATES 86 (Charles Richard Williams, ed., 1922). In a diary entry that same day, he recorded, "As judge-advocate, with General Benham, Colonels Scammon, Smith, *et al*., I tried two cases." *Id*. at 87. On 19 September, he wrote to his wife that in addition to commanding a unit of almost regimental size, "I have thus far been the sole judge advocate also of this Army; so I am very busy." *Id*. at 95–96. Later that same day, he wrote:

> I have tried four or five cases on general orders, and here comes an order making me permanently a J.A. It is not altogether agreeable. I shall get out of it after a while somehow. For the present I obey. It is pleasant in one respect as showing that in my line I have done well.

Id. at 97. That same day, he wrote to his mother, "I am acting judge-advocate and have tried five cases lately." *Id*. at 98. He was finally relieved of his unwanted judge advocate duties upon his promotion to lieutenant colonel at the end of October 1861. *Id*. at 133–34.

[296] An act to authorize the President to appoint an officer of the Navy or the Marine Corps to perform the duties of solicitor and judge-advocate-general, and so forth, and to fix the rank and pay of such officer, ch. 129, 21 Stat. 164 (1880), https://bit.ly/454VIMh.

[297] Secretary of the Navy R. W. Thompson to the President (June 3, 1880), *reprinted in Remey v. United States* Record, *supra* note 25, at 25; 22 S. EXEC. JOURNAL, 46th Cong., 2d Sess., 348 (1880).

[298] *Promoted*, CHI. TRIB., June 10, 1880, at 8.

[299] 22 S. EXEC. JOURNAL, 46th Cong., 2d Sess., 353 (1880).

[300] *See, e.g.*, Secretary of the Navy R. W. Thompson to Colonel Wm B. Remey (June 12, 1880), *reprinted in* 10 SecNav letters to USMC officers, *supra* note 113, at 423; Secretary of the Navy Wm E. Chandler to Colonel Wm B. Remey (June 12, 1884), *reprinted in* 11 SecNav letters to USMC officers, *supra* note 113, at 271.

whom was the commandant.[301] He leaped over 11 captains, three majors, and two lieutenant colonels with greater seniority.[302] His annual pay almost doubled from $2,340 to $4,500.[303]

Remey's duties as judge advocate general were varied. He served as judge advocate at a court of inquiry convened in Boston in 1880 to investigate the origin of a fire at the Charlestown Navy Yard's Ropewalk—a stone building that was the U.S. government's only rope-manufacturing facility.[304] The following year, he joined then-Commander George Dewey, among others, for an inspection of the upper Mississippi River's lighthouses.[305] In 1887, Remey traveled to Boston to inspect a newly constructed prison at the Charlestown Navy Yard.[306] His more typical duties included drafting regulations,[307] providing Congress with views on naval legislation,[308] reviewing records of naval courts and boards, and preparing recommended actions.[309] He also continued to issue legal opinions, including one dealing with the unusual question of the shipping fees to be paid for a merchant vessel transporting naval freight that was diverted from its route after the ship's second mate killed the captain.[310] Another opinion concluded that a

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[301] REGISTER OF THE COMMISSIONED, WARRANT, AND VOLUNTEER OFFICERS OF THE NAVY OF THE UNITED STATES, INCLUDING OFFICERS OF THE MARINE CORPS AND OTHERS, TO JANUARY 1, 1881, at 132 (Wash., Gov't Printing Off. 1881) [hereinafter 1881 NAVY REGISTER].

[302] *Id.* One of the lieutenant colonels was Clement D. Hebb, who seven years earlier had complained to the Commandant of the Marine Corps about Remey's paucity of sea duty. *See supra* notes 154–155 and accompanying text.

[303] 1881 NAVY REGISTER, *supra* note 301, at 130. The base pay of a captain at the time was $1,800 and that of a colonel $3,500. *Id.* Marine Corps officers below the rank of brigadier general were also "entitled to ten per centum in addition to their current yearly pay . . . for each and every period of five years' service, provided the total amount of such increase shall not exceed forty per centum of their current yearly pay; and provided further, that the pay of a Colonel shall not exceed $4,500 per annum." *Id.* At the time, Remey had between 18 and 19 years of service, giving him a 30 percent addition. His pay as a captain was, therefore, $2,340. The per centum addition would have exceeded the $4,500 cap, making that his pay as a colonel.

[304] *Various Naval Items*, ARMY & NAVY J., Sept. 11, 1880, at 105; *A Destructive Fire*, BOS. SUNDAY GLOBE, Aug. 22, 1880, at 1.

[305] *Some Personal Items*, ARMY & NAVY J., Aug. 13, 1881, at 30, https://bit.ly/3PUJeTh.

[306] *The Navy Yard*, SUNDAY HERALD (Bos.), Sept. 4, 1887, at 9.

[307] *See, e.g.*, *Answers to Correspondents*, ARMY & NAVY J., July 4, 1885, at 1001; Untitled, ARMY & NAVY J., Dec. 3, 1887, at 357; Untitled, ARMY & NAVY J., Dec. 10, 1887, at 386.

[308] *See, e.g.*, *Forty-Ninth Congress*, ARMY & NAVY J., Mar. 20, 1886, at 684.

[309] *See, e.g.*, *Some Personal Items*, ARMY & NAVY J., Jan. 1, 1881, at 431; *Personal Items*, ARMY & NAVY J., Aug. 26, 1882, at 73; *Various Naval Items*, ARMY & NAVY J., May 26, 1883, at 972; *Various Naval Items*, ARMY & NAVY J., June 4, 1887, at 897, https://bit.ly/3Q3V3Xr; *Personal Items*, ARMY & NAVY J., Dec. 31, 1887, at 439, https://bit.ly/3PRbIx0; *The Pork Barrel Opened*, N.Y. TIMES, Feb. 22, 1888, at 5; *Defence of Captain Selfridge*, ARMY & NAVY J., June 16, 1888, at 937; *Settling the Question*, N.Y. TIMES, Aug. 7, 1888, at 1; *Personal Items*, ARMY & NAVY J., Aug. 18, 1888, at 1111; *Personal Items*, ARMY & NAVY J., Oct. 27, 1888, at 163, https://bit.ly/3rCZCOG.

[310] "Marianne Nottebohm." General average in case of (June 4, 1881), JAG Opinions, *supra* note 273, at 78–79.

Navy officer traveling on orders was entitled to expenses arising from his quarantine en route due to a cholera outbreak.[311] An opinion he issued in 1884 would have particularly long-lasting consequences. Remey opined that establishing the Naval War College on Coasters Harbor Island in Newport, Rhode Island, was permissible under the 1882 statute accepting Rhode Island's cession of the island "for use as a Naval Training Station."[312]

Remey's judgment was highly valued, leading to increased responsibilities. In December 1880, Secretary Thompson gave him a seat on the Board of Bureau Affairs, which met twice weekly to help guide the Navy Department.[313] The following year, when the chief of the Navy Department's Bureau of Yards and Docks was temporarily absent, President James Garfield named Remey as the bureau's acting chief.[314]

A lifelong bachelor, Remey lived a few blocks from his office in a well-appointed apartment at 1715 H Street, N.W.[315] He was a member of the toney Metropolitan Club.[316] He ate his meals at its clubhouse, just across the street from his apartment.[317] As judge advocate general, Remey wore a bushy mustache atop a long goatee.[318] An engaging raconteur and purveyor of Washington gossip, he was a popular capital socialite.[319] He promenaded about town in a sporty one-horse carriage.[320] A former Marine Corps officer-turned-publisher described him as "a very genial, companionable man, with a great many friends who are warmly attached to him."[321] He was also prone to using salty language.[322]

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[311] Wm. B. Remey, Judge Advocate General, Memorandum (Oct. 8, 1884), JAG Opinions, *supra* note 273, at 163–64.
[312] William B. Remey, Judge Advocate General, to Acting Secretary of the Navy (Aug. 10, 1884), Communications to the Secretary of the Navy, July 1885 [*sic*]–Feb. 1912, June 8, 1884–May 16, 1892 at 17, Entry 16, Record Group 125, National Archives, Washington, D.C. (construing, *inter alia*, a portion of the Appropriations Act of Aug. 7, 1882, ch. 433, 22 Stat. 302, 324 (1882)).
[313] *Appointed on the Board*, EVENING STAR (D.C.), Dec. 16, 1880, at 1; *Some Personal Items*, ARMY & NAVY J., Dec. 18, 1880, at 390.
[314] *Washington Notes*, N.Y. TRIB., June 7, 1881, at 1.
[315] BOYD'S DIRECTORY OF THE DISTRICT OF COLUMBIA 709 (Wash., Wm. H. Boyd 1887); REMEY, *supra* note 9, at 15, 22–24.
[316] CONSTITUTION, BY-LAWS, OFFICERS AND MEMBERS OF THE METROPOLITAN CLUB OF THE CITY OF WASHINGTON 8 (Wash., Gibson Bros. 1882).
[317] REMEY, *supra* note 9, at 15.
[318] *See* UNITED SERV. Front Piece, *supra* note 9; NH 171, *supra* note 9.
[319] REMEY, *supra* note 9, at 15.
[320] *Id.*
[321] L. R. H. [Lewis Randolph Hamersly], *Colonel William B. Remey, United States Marine Corps*, UNITED SERV., Aug. 1891, at 213, 214.
[322] Deposition of Thomas V. Hammond (Dec. 26, 1894), *Remey v. United States* Record, *supra* note 25, at 370, 397.

Remey maintained close family ties, regularly taking a month of leave in the summer to visit relatives in Burlington, Iowa.[323] When his brother George and his family were stationed in Norfolk, Remey took advantage of their proximity by visiting them there.[324] Though not particularly religious, Remey was the godfather of one of George's sons.[325]

The first uniformed judge advocate general of the Navy performed his legal duties diligently. One Sunday afternoon in May 1881, his brother George helped him review a court-martial by reading the proceedings aloud.[326] George noted that Remey "takes considerable matter to his rooms to look over, not always having the time during office hours to do it."[327] Nevertheless, Colonel Remey took full advantage of the entertainment opportunities in the nation's capital. Along with his brother George, he attended a circus, quaffed drinks at a beer garden on E Street (George disapproved of "ladies" being among the establishment's clientele), and frequently went to the theater.[328]

Remey seems to have been a bit accident-prone. In May 1881, as described by his brother George, Will had "quite an accident which might have been a serious one."[329] As he crossed "15th St in front of the Treasury a heavily loaded cart struck and knocked him down, he having presence of mind to roll himself over to avoid the wheels."[330] The incident left the judge advocate general "literally covered with dust," one leg sore and bruised.[331] George deemed his brother "fortunate to get off as he did."[332] Three years later, Colonel Remey was

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[323] *See, e.g.*, *Some Personal Items*, ARMY & NAVY J., Aug. 13, 1881, at 30; *Some Personal Items*, ARMY & NAVY J., Sept. 17, 1881, at 136; *see also Personal Items*, ARMY & NAVY J., Oct. 6, 1883, at 184, https://bit.ly/46smSOh.
[324] *See, e.g.*, *Personal Items*, ARMY & NAVY J., Aug. 27, 1887, at 79; *Judge-Advocate General W. B. Remey*, ARMY & NAVY J., Jan. 5, 1889, at 367, https://bit.ly/3PPKcjv.
[325] REMEY, *supra* note 9, at 19.
[326] George C. Remey to Mary J. Remey (May 23, 1881), *reprinted in* 5 George C. Remey Life and Letters, *supra* note 15, pt. 1, at 542, 543, in Box 3, Remey Family Papers.
[327] *Id.*
[328] *See, e.g.*, George C. Remey to Mary J. Remey (Sept. 13, 1879), *reprinted in* 4 George C. Remey Life and Letters, *supra* note 15, pt. 2, at 503, in Box 2, Remey Family Papers; George C. Remey to Mary J. Remey (July 10, 1880), *reprinted in* 4 George C. Remey Life and Letters, *supra* note 15, pt. 2, at 507, in Box 2, Remey Family Papers; George C. Remey to Mary J. Remey (Nov. 6, 1880), *reprinted in* 4 George C. Remey Life and Letters, *supra* note 15, pt. 2, at 514, in Box 2, Remey Family Papers; George C. Remey to Mary J. Remey (Nov. 24, 1880), *reprinted in* 4 George C. Remey Life and Letters, *supra* note 15 pt. 2, at 523, in Box 2, Remey Family Papers.
[329] George C. Remey to Mary J. Remey, (May 25, 1881), *reprinted in* 5 George C. Remey Life and Letters, *supra* note 15, pt. 1, at 543, 544, in Box 3, Remey Family Papers.
[330] *Id.*
[331] *Id.*
[332] *Id.*

knocked down and injured by a runaway horse.[333] Nevertheless, he arrived at his office the next morning, merely complaining of bruises.[334]

When Remey's first four-year term as judge advocate general expired in 1884, during President Chester Arthur's administration, several Navy and Marine Corps officers vied to displace him.[335] Countering those moves, as the *Army and Navy Journal* reported, "[i]nfluential Iowians [*sic*] have commenced work in [Remey's] behalf, and his experience in the office is a strong argument in his favor."[336] The *Chicago Tribune* wrote that while there were "numerous applicants" for the position,

> Col. Remey has filled the office very acceptably for four years, is well esteemed by the Secretary of the Navy, is thoroughly familiar with the peculiar technical duties of the office, is a man of high character and good record, and it is thought probable that Secretary Chandler will not find it necessary to yield to the strong political pressure that is being brought to bear in the interests of applicants. Col. Remey himself has made no effort to secure a reappointment.[337]

Consistent with that assessment, at Secretary Chandler's recommendation, President Arthur formally nominated Remey for a second four-year term in May 1884.[338] Two weeks later, the Senate confirmed the nomination.[339]

A bizarre personal tragedy struck the Remey family in February 1885. The youngest of the Remey brothers—Lieutenant Edward W. Remey, an 1867 Naval Academy graduate[340]—disappeared.[341] Then the executive officer of the training ship *Portsmouth* at Norfolk, he checked into a hotel under the name Hugh Kemple before using a different pseudonym when he boarded an Old Dominion steamer heading to New York.[342] After arriving there, he seemingly vanished. In August 1885, Will and George Remey performed the morbid duty of examining

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[333] *Department Notes*, EVENING CRITIC (D.C.), June 25, 1884, at 1.
[334] *Id.*
[335] *See, e.g.*, Untitled, ARMY & NAVY J., Mar. 8, 1884, at 652; *Naval News*, NORFOLK VIRGINIAN, Mar. 15, 1884, at 4; *Personal Items*, ARMY & NAVY J., Mar. 22, 1884, at 685.
[336] Untitled, ARMY & NAVY J., Mar. 8, 1884, at 652.
[337] *Capital Gossip*, CHI. DAILY TRIB., May 19, 1884, at 1.
[338] Secretary of the Navy Wm. E. Chandler to the President (May 28, 1884), *reprinted in Remey v. United States* Record, *supra* note 25, at 28; 24 S. EXEC. JOURNAL, 48th Cong., 1st Sess., 276 (1884).
[339] *Id.* at 286.
[340] HAMERSLY 1878, *supra* note 13, at 243.
[341] *See, e.g.*, *Personal Items*, ARMY & NAVY J., Feb. 28, 1885, at 63; *Various Naval Items*, ARMY & NAVY J., Mar. 7, 1885, at 630.
[342] *Lieut. Remey's Disappearance*, N.Y. TIMES, Mar. 15, 1885, at 3.

a badly decomposed corpse recovered from New York's North River.[343] The body was discovered against a piling at the North River's Pier No. 37, near the last place Edward Remey had been seen alive.[344] A Navy officer who examined the body was convinced it was the missing lieutenant.[345] The *New York Times* theorized that upon his arrival in New York, Edward Remey was "demented, and it is probable that that night he fell or jumped into the river and was jammed near some elevator or grain pier, as his clothes were full of oats and corn, when he was taken from the water."[346] But in what may have been a case of wishful thinking, his brothers Will and George concluded that the corpse was not Edward, noting dental differences among other dissimilarities.[347] Whatever the decomposed corpse's true identity, Edward Remey was never found.[348] In 1886, he was dropped from the Navy's rolls, presumed dead.[349] The cause of his disappearance remains a mystery.

While President Grover Cleveland was serving the first of his non-consecutive terms, the Navy underwent a modernization campaign that laid the foundation for its dominant performance during the Spanish-American War. Having spent most of his sea duty aboard wooden relics, Remey contributed to the Navy's acquisition of powerful steel ships by negotiating and drafting contracts.[350]

The end of Remey's second term as judge advocate general in 1888 generated far less drama than the expiration of his first appointment four years earlier. President Cleveland's Secretary of the Navy, William C. Whitney, relied on his judge advocate general so heavily that Remey's renomination was considered a foregone conclusion.[351] Sure enough, on 5 June 1888—at Secretary Whitney's recommendation—President Cleveland transmitted Remey's

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[343] Untitled, ARMY & NAVY J., Aug. 15, 1885, at 43.
[344] *Lieut. Remey's Fate*, N.Y. TIMES, Aug. 14, 1885, at 1.
[345] *Id.*
[346] *Id.*
[347] *Not the Body of Lieut. Remey*, N.Y. TIMES, Aug. 15, 1885, at 8.
[348] *Celebrities Who Vanished from Public Eye*, EVENING STAR (D.C.), Jan. 15, 1910, at pt. 3, 3.
[349] *Dropped from the Rolls*, KANSAS CITY STAR, Jan. 2, 1886, at 1; REGISTER OF THE COMMISSIONED AND WARRANT OFFICERS OF THE NAVY OF THE UNITED STATES, INCLUDING OFFICERS OF THE MARINE CORPS, TO JANUARY 1, 1886, at 148 (Wash., Gov't Printing Off. 1886) [hereinafter 1886 NAVY REGISTER].
[350] Untitled, ARMY & NAVY J., June 25, 1887, at 960; *Various Naval Items*, ARMY & NAVY J., July 9, 1887, at 996; *Various Naval Items*, ARMY & NAVY J., Jan. 21, 1888, at 508; *Chiefs of Naval Bureaus*, SUN (Balt.), Apr. 10, 1888, at 1.
[351] *Chiefs of Naval Bureaus*, *supra* note 350, at 1; Untitled, ARMY & NAVY J., Apr. 14, 1888, at 752.

renomination to the Senate, followed by unanimous confirmation the following day.[352] The *Army and Navy Journal* reported:

> Col. Remey, during the administration of Secretary Whitney, has increased the importance of his office to such a degree that his services are looked upon by the Secretary as almost indispensable. The name of the office does not indicate all its duties, for it has absorbed the larger portion of the correspondence that comes to the Department relating not only to the personnel but to the new vessels of the Navy. That Col. Remey is appreciated outside of the Department is evidenced by the promptness with which his nomination was confirmed. It was sent to the Senate one day and confirmed the next, an almost unprecedented act in connection with Navy appointments, except during the closing days of session.[353]

The esteem was not universal. One anonymous naval officer complained that Remey was a headquarters homesteader. The unnamed wag explained to a newspaper correspondent that the slang term "Coburger" was applied to naval officers "who have always held soft berths, and whom it seems impossible to dislodge."[354] He named Remey as a prime culprit, complaining that he "has a pretty easy time of it. He is only a captain in the Marine Corps, but his total sea duty is very small. He has been so long in Washington that people have almost forgotten his real rank."[355]

During Remey's third term as judge advocate general, some shipbuilders sought his removal because the contracts he negotiated were so advantageous to the government, they provided little opportunity for profit.[356] The attempt backfired. Washington's *Evening Star* reported that the shipbuilders' complaints were widely considered "a compliment to Col. Remey's efficient administration of the judge advocate general's office. He has watched the interests of the government with the most careful eye and has so constructed his contracts that poor work meant no pay."[357]

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[352] Secretary of the Navy Wm. C. Whitney to the President (June 5, 1888), *reprinted in Remey v. United States* Record, *supra* note 25, at 31; 26 S. EXEC. JOURNAL, 50th Cong., 1st Sess., 274–75 (1888).
[353] *Personal Items*, ARMY & NAVY J., June 9, 1888, at 911.
[354] *Coburgers*, DETROIT FREE PRESS, Jan. 10, 1886, at 12 (reprinting article by Charles F. Towle originally published in *Boston Traveller*).
[355] *Id.*
[356] *Building War Ships*, EVENING STAR (D.C.), Aug. 26, 1889, at 1; *Shipbuilders Dissatisfied*, SUN (Balt.), Aug. 27, 1889, at 1.
[357] *The Naval Judge Advocate*, EVENING STAR (D.C.), Aug. 27, 1889, at 1.

The size of the Office of the Judge Advocate General expanded throughout Remey's tenure. In 1881, the office had two civilian clerks.[358] One was an English immigrant and failed Kansas farmer who moved to Washington after grasshoppers devoured his crops.[359] The other was a promising young man from Ohio.[360] It does not appear that either was a lawyer. Remey lobbied his home-state senator William B. Allison (R-Iowa), chairman of the Senate Appropriations Committee, to enlarge his civilian support staff and upgrade the pay of the senior position.[361] In 1883, Congress appropriated funds to expand the office's civilian workforce to four clerks and a "laborer."[362] Also in 1883, Lieutenant (Junior Grade) Samuel C. Lemly, U.S. Navy—a class of 1873 Naval Academy graduate—was assigned to the office on special duty.[363] Lemly left the office in 1884 to participate in USS *Thetis*'s rescue of the surviving members of Lieutenant Adolphus W. Greely's disastrous arctic exploration expedition.[364] After *Thetis*'s successful mission, Lemly resumed his duties at the Office of the Judge Advocate General.[365] He would later return to the office for another tour in

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[358] 1 OFFICIAL REGISTER OF THE UNITED STATES, CONTAINING A LIST OF OFFICERS AND EMPLOYÉS IN THE CIVIL, MILITARY, AND NAVAL SERVICE ON THE FIRST OF JULY, 1881, at 440 (Wash., Gov't Printing Off. 1881).

[359] *Id.* (Charles F. Kelsey); *Found Dead in His Bed*, EVENING STAR (D.C.), Jan. 4, 1902, at 11.

[360] *Personal*, EVENING CRITIC (D.C.), Aug. 10, 1882, at 3 (Frank E. Waterman). Waterman went on to become the private secretary to two West Virginia senators before transitioning to a successful banking and life insurance career. *Briefs*, SHEPHERDSTOWN REGISTER, July 1, 1887, at 3; *West Virginia Notes*, WHEELING DAILY INTELLIGENCER, Oct. 19, 1888, at 1; *Newsy Notes*, VIRGINIA FREE PRESS, Mar. 9, 1892, at 2; *Important Bank Change*, WHEELING DAILY INTELLIGENCER, Jan. 3, 1895, at 3; *Life Insurance Notes*, INDICATOR, June 5, 1907, at 210 ("Frank E. Waterman, of Parkersburg, has been appointed West Virginia manager of the North American Life of New Jersey.").

[361] Wm. B. Remey, Judge Advocate General, to the Hon. Wm. B. Allison, U.S. Senate (Feb. 26, 1881), Remey Letters Sent, *supra* note 280.

[362] Appropriations Act of Mar. 3, 1883, ch. 128, 22 Stat. 531, 555 (1883), https://bit.ly/4532EcZ; *see also* 1 OFFICIAL REGISTER OF THE UNITED STATES, CONTAINING A LIST OF OFFICERS AND EMPLOYÉS IN THE CIVIL, MILITARY, AND NAVAL SERVICE ON THE FIRST OF JULY, 1883, at 436 (Wash., Gov't Printing Off. 1883) (listing four clerks and one laborer).

[363] REGISTER OF THE COMMISSIONED AND WARRANT OFFICERS OF THE NAVY OF THE UNITED STATES, INCLUDING OFFICERS OF THE MARINE CORPS TO AUGUST 1, 1883, at 28 (Wash., Gov't Printing Off. 1883); *News from Washington*, N.Y. DAILY TRIB., July 6, 1883, at 2; *Salem Sunbeams*, WINSTON LEADER (N.C.), Sept. 25, 1883, at 3; REGISTER OF THE COMMISSIONED AND WARRANT OFFICERS OF THE NAVY OF THE UNITED STATES, INCLUDING OFFICERS OF THE MARINE CORPS TO JANUARY 15, 1884, at 32 (Wash., Gov't Printing Off. 1884); *Judge Samuel C. Lemly Dies in Washington, D.C.*, WESTERN SENTINEL (Winston-Salem, N.C.), Sept. 7, 1909, at 5.

[364] *The Thetis*, BROOKLYN DAILY EAGLE, May 1, 1884, at 4; *see generally* COMMANDER W. S. SCHLEY & PROFESSOR J. R. SOLEY, U.S.N., THE RESCUE OF GREELY (N.Y., Charles Scribner's Sons 1885), https://bit.ly/3RJbfOG.

[365] *The Greeley* [*sic*] *Relief Expedition*, PEOPLE'S PRESS (Salem, N.C.), Oct. 3, 1884, at 3; *Naval Orders*, EVENING STAR (D.C.), Oct. 22, 1884, at 1; *Naval Orders*, EVENING STAR (D.C.), Oct. 21, 1885, at 1; 1886 NAVY REGISTER, *supra* note 349, at 32, https://bit.ly/3ZBPjr0.

1890[366] before ultimately succeeding Remey as judge advocate general in 1892.[367] Several other Navy and Marine Corps officers served there as well.[368] At least four officers stationed there during Remey's tenure earned degrees from Columbian University's law school—Remey's *alma mater*—during their assignments.[369]

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[366] *From Washington*, SUN (Balt.), June 25, 1890, at 1.

[367] *To Be Judge Advocate General*, EVENING STAR (D.C.), July 14, 1892, at 5 (reporting President Benjamin Harrison's nomination of Lieutenant Samuel C. Lemly to be the judge advocate general of the Navy); 28 S. EXEC. JOURNAL, 52d Cong., 1st Sess., 277 (1892) (Senate confirmation).

[368] For example, Lieutenant James D. J. Kelley, U.S. Navy, an 1868 Naval Academy graduate, was assigned there in 1884 and 1885. HAMERSLY 1902, *supra* note 36, at 212; REGISTER OF THE COMMISSIONED AND WARRANT OFFICERS OF THE NAVY OF THE UNITED STATES, INCLUDING OFFICERS OF THE MARINE CORPS TO FEBRUARY 1, 1885, at 24 (Wash., Gov't Printing Off. 1885), https://bit.ly/3GRU0UZ. From 1886 through 1887, Lieutenant Adolph Marix—another 1868 Naval Academy graduate—was assigned to the office. HAMERSLY 1902, *supra* note 36, at 156; REGISTER OF THE COMMISSIONED AND WARRANT OFFICERS OF THE NAVY OF THE UNITED STATES, INCLUDING OFFICERS OF THE MARINE CORPS TO FEBRUARY 1, 1887, at 18 (Wash., Gov't Printing Off. 1887), https://bit.ly/3RY92yZ. (Marix was the first Jewish graduate of the United States Naval Academy. H. MICHAEL GELFAND, SEA CHANGE AT ANNAPOLIS: THE UNITED STATES NAVAL ACADEMY 1949–2000, at 48 (2006).) From 1889 to 1891, Navy Lieutenant Robert M. G. Brown was stationed at the Office of the Judge Advocate General of the Navy. REGISTER OF THE COMMISSIONED AND WARRANT OFFICERS OF THE NAVY OF THE UNITED STATES AND OF THE MARINE CORPS TO JANUARY 1, 1890, at 16 (Wash., Gov't Printing Off. 1890) [hereinafter 1890 NAVY REGISTER]; HAMERSLY 1902, *supra* note 36, at 279. Marine Corps 1st Lieutenant Frank L. Denny served there from 1890 to 1892. REGISTER OF THE COMMISSIONED AND WARRANT OFFICERS OF THE NAVY OF THE UNITED STATES AND OF THE MARINE CORPS TO JANUARY 1, 1891, at 126 (Wash., Gov't Printing Off. 1891); *Personal Items*, ARMY & NAVY J., Mar. 26, 1892, at 538. In 1891, he and Lieutenant Lemly published a 28-page pamphlet on trying summary court-martial cases. LIEUT. S. C. LEMLY, U.S.N. & LIEUT. F. L. DENNY, U.S.M.C., NAVAL SUMMARY COURTS-MARTIAL (Wash., Army and Navy Register Publishing Co. 1891).

[369] Navy Lieutenant Perry Garst, an 1868 Naval Academy graduate, was assigned to the Office of the Judge Advocate General from 1888 to 1890. 1890 NAVY REGISTER, *supra* note 368, at 18; HAMERSLY 1902, *supra* note 36, at 279. Garst earned a law degree from the Columbian University's law school during that assignment. H. L. HODGKINS, HISTORICAL CATALOGUE OF THE OFFICERS AND GRADUATES OF THE COLUMBIAN UNIVERSITY, WASHINGTON, D.C., 1821–1891, at 163 (Wash., Byron S. Adams, Printer 1891), https://bit.ly/3TxYV56. Marine 2nd Lieutenant William H. Stayton, an 1881 Naval Academy graduate, was assigned to the office from 1887 to 1890. *National Academies*, CHI. TRIB., June 10, 1881, at 6; 1890 NAVY REGISTER, *supra* note 368, at 126, https://bit.ly/4auE5cW; REGISTER OF THE COMMISSIONED AND WARRANT OFFICERS OF THE NAVY OF THE UNITED STATES AND OF THE MARINE CORPS TO JANUARY 1, 1891, at 126 (Wash., Gov't Printing Off. 1891). He received an LL.B. from Columbian University in 1889 and an LL.M. in 1890. HODGKINS, *supra*, at 162, 170. He resigned his commission in 1891. REGISTER OF THE COMMISSIONED AND WARRANT OFFICERS OF THE NAVY OF THE UNITED STATES AND OF THE MARINE CORPS TO JANUARY 1, 1892, at 135 (Wash., Gov't Printing Off. 1892). He established a law practice in New York and later became a leader in the effort to repeal the 18th Amendment. *See* DAVID E. KYVIG, REPEALING NATIONAL PROHIBITION 39–52 (2d ed. 2000). Ensign Wilford B. Hoggatt, an 1884 Naval Academy graduate, was assigned to the office from April 1892 until January 1894. REGISTER OF THE COMMISSIONED AND WARRANT OFFICERS OF THE NAVY OF THE UNITED STATES AND OF THE MARINE CORPS TO JANUARY 1, 1893, at 28 (Wash., Gov't Printing Off. 1893) [hereinafter 1893 NAVY REGISTER]; *The United Service*, N.Y. TIMES, Jan. 16, 1894, at 6. He received

The number of civilian clerks employed by the office grew to seven by 1889.[370] Some members of Remey's expanded civilian workforce had legal training. For example, both Edwin P. Hanna (who joined the office as chief clerk in November 1889) and Pickens Neagle (who joined the office as a clerk in July 1888) were graduates of the Columbian University Law School.[371] Hanna and Neagle would each later serve as the Naval Solicitor after that position was statutorily authorized in 1900 as "an assistant to the Judge-Advocate of the Navy, and to perform the duties of that officer in case of his death, resignation, absence, or sickness."[372] Another notable hire during Remey's tenure was John D. Biddis. Originally from Milford, Pennsylvania, Biddis became a member of the Pike County bar after studying under the tutelage of a local lawyer.[373] He was later elected as a district attorney and then a state senator.[374] After serving as the solicitor for the U.S. Internal Revenue Department in the Cleveland administration, he passed a Civil Service Commission examination and was

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an LL.B. from Columbian University in 1893. THOMAS A. MCMULLIN & DAVID WALKER, BIOGRAPHICAL DIRECTORY OF AMERICAN TERRITORIAL GOVERNORS 11 (1984), https://bit.ly/41qM3iZ. He resigned his commission in 1898. REGISTER OF THE COMMISSIONED AND WARRANT OFFICERS OF THE NAVY OF THE UNITED STATES AND OF THE MARINE CORPS TO JANUARY 1, 1899, at 112 (Wash., Gov't Printing Off. 1899). With the advice and consent of the Senate, President Theodore Roosevelt appointed him governor of Alaska in 1906. 36 S. EXEC. JOURNAL, 59th Cong., 1st Sess., 299 (nomination), 320–21 (Senate confirmation) (1906), https://bit.ly/3GPPHth. Marine 1st Lieutenant Charles H. Lauchheimer, an 1881 Naval Academy graduate, was assigned to the office from March 1892 until 1899. 1893 NAVY REGISTER, *supra*, at 124; *Captain Lauchheimer Promoted*, SUN (Balt.), Mar. 7, 1899, at 2. He received an LL.B. from Columbian University in 1894, earning an honorable mention for best examination for a bachelor of law degree. *Shingles Ready for Them*, WASH. TIMES, June 13, 1894, at 1. In 1916, the Senate confirmed Lauchheimer as Adjutant and Inspector of the Marine Corps with the rank of brigadier general. 49 S. EXEC. JOURNAL, 64th Cong., 1st Sess., 785 (nomination by President Woodrow Wilson), 794 (Senate confirmation) (1916), https://bit.ly/3NuIJO7. He was the first Jewish Marine Corps general officer. SIMON WOLF, THE PRESIDENTS I HAVE KNOWN FROM 1860–1918, at 393 (1918), https://bit.ly/3NVNa4T.

[370] 1 OFFICIAL REGISTER OF THE UNITED STATES, CONTAINING A LIST OF OFFICERS AND EMPLOYÉS IN THE CIVIL, MILITARY, AND NAVAL SERVICE ON THE FIRST OF JULY, 1889, at 473 (Wash., Gov't Printing Off. 1889).

[371] *A Kansas Man Given a Place*, KAN. CITY TIMES, Nov. 12, 1889, at 4; *Transfers of Navy Department Clerks*, EVENING STAR (D.C.), July 24, 1888, 1; HODGKINS, *supra* note 369, at 151, 168 (Edwin P. Hanna, LL.B., 1883; LL.M., 1884), 157 (Pickens Neagle, LL.B., 1886). Edwin Hanna held the position from its creation until his death in 1909. *Personal*, ARMY & NAVY J., June 16, 1900, at 987; *Solicitor Edwin P. Hanna Dead*, EVENING STAR (D.C.), July 4, 1909, at 2. Pickens Neagle held the office from 1921 until his retirement in 1933 at the age of 72. *Neagle New Solicitor*, EVENING STAR (D.C.), Sept. 2, 1921, at 5; *Pickens Neagle Placed on Retired Rolls*, EVENING STAR (D.C.), June 2, 1933, at C-5.

[372] Appropriations Act of Apr. 17, 1900, ch. 192, 31 Stat. 86, 117 (1900).

[373] *Hon. J. D. Biddis Claimed by Death*, MILFORD DISPATCH, May 13, 1909, at 1.

[374] *Id.*

appointed as a clerk in the Office of the Judge Advocate General of the Navy in 1889.[375] By the end of 1891, the office also included two female clerks.[376]

Remey was among those rumored to be under consideration to become Commandant of the Marine Corps upon Colonel Charles G. McCawley's retirement in January 1891.[377] The position went instead to Lieutenant Colonel Charles Heywood, the impressive officer under whom Remey served aboard *Sabine* during the Civil War.[378]

X. REMEY'S MENTAL ILLNESS

Remey's mental condition deteriorated in 1891, leading to a nervous breakdown.[379] A vacation in Atlantic City, New Jersey, failed to restore his mental health.[380] On 27 July 1891, he was admitted to the Naval Dispensary in Washington, D.C., then co-located with the Museum of Hygiene at 1707 New York Avenue, N.W.[381] There, Remey received three days of in-patient treatment for his diagnosed condition of "Neurasthenia."[382] Doctors listed the cause as "close confinement to official duties."[383] Following discharge from the dispensary, Remey vacationed at the Deer Park resort in western Maryland's mountains.[384] When he returned to duty in September, his mental faculties were somewhat improved, though far from fully restored.[385] While Remey was in this weakened condition, he was assigned one of his most significant duties during his long service as judge advocate general.

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[375] *Id.*; *Hereabout and Thereabouts*, WAYNE COUNTY HERALD (Honesdale, Penn.), Mar. 21, 1889, at 3.
[376] "Miss Katie S. White" and "Miss Isabel Smith." H.R. EXEC. DOC. 52-92, at 4 (1892).
[377] *Commander of the Marines*, SUN (Balt.), Oct. 9, 1890, at 1; *The Cloture Fight*, PHILA. INQUIRER, Jan. 21, 1891, at 2.
[378] 27 S. EXEC. JOURNAL, 51st Cong., 2d Sess., 852 (nomination by President Benjamin Harrison), 856–57 (Senate confirmation by unanimous consent) (1891).
[379] *Insane from Overwork*, GAZETTE (Cedar Rapids), May 23, 1892, at 4.
[380] *Personal Items*, ARMY & NAVY J., June 27, 1891, at 746; *Personal Items*, ARMY & NAVY J., July 4, 1891, at 762.
[381] Medical Record of Colonel William B. Remey, U.S.M.C. (Aug. 2, 1894), *Remey v. United States* Record, *supra* note 25, at 510; *The Naval Dispensary, Washington, D.C.*, U.S. NAVY MED., Sept. 1970, at 15, 17.
[382] Medical Record of Colonel William B. Remey, U.S.M.C. (Aug. 2, 1894), *Remey v. United States* Record, *supra* note 25, at 510.
[383] *Id.*
[384] *Pleasant Days at Deer Park*, SUNDAY HERALD (D.C.), July 12, 1891, at 3; *Personal Items*, ARMY & NAVY J., Aug. 8, 1891, at 2.
[385] *Personal Items*, ARMY & NAVY J., Aug. 8, 1891, at 846; *see also Personal Items*, ARMY & NAVY J., Sept. 5, 1891, at 22 (noting Remey's return to duty "after an enforced vacation of several months"); *Insane from Overwork*, *supra* note 379, at 4.

On 16 October 1891, during a port call by the cruiser USS *Baltimore* at Valparaíso, Chile, violence erupted between U.S. sailors on liberty and Chileans.[386] Two of *Baltimore*'s crewmembers were killed, one by a bullet shot through his throat, and another 20 were injured, five of them seriously.[387] Twenty-three others were arrested and detained.[388] U.S. sailors accused Chilean policemen of complicity in the violence and firing the shot that killed Boatswain's Mate Charles W. Riggin.[389] Amid flaring tensions in the incident's aftermath, war seemed possible.[390] As the United States calculated its diplomatic and military response, one key question was whether the attacks on the American sailors represented a spontaneous drunken melee or were preplanned acts of aggression. Secretary of the Navy Benjamin F. Tracy turned to Remey to help answer that question.

On the last day of 1891, Tracy dispatched Remey on what was initially a secret mission to Mare Island, California, where *Baltimore* would soon dock on her return from Chile. Tracy directed the judge advocate general to "make a thorough investigation into all the circumstances connected with the attack on a portion of the crew of the U. S. S. Baltimore, at Valparaiso, Chile, on the 16th of October last." [391] The Secretary also instructed Remey to "be careful to conduct this examination with absolute fairness and impartiality and with a view to ascertaining, with the utmost accuracy and fullness, the exact facts of the case."[392]

For eight arduous days, Remey, accompanied by U.S. Attorney for the Northern District of California Charles A. Garter and Commissioner James S. Manley of the U.S. Circuit Court for the Northern District of California, took testimony from a total of 70 witnesses, resulting in a written record spanning 266 printed pages.[393] Secretary Tracy, a former U.S. Attorney for the Eastern District

[386] *See generally* JOYCE S. GOLDBERG, THE BALTIMORE AFFAIR (1986).
[387] *Id.* at 3–19, 61, 70.
[388] *Id.* at 132.
[389] *Id.* at 8–13.
[390] *Id.* at 107–12, 118–23.
[391] Secretary of the Navy B. F. Tracy to Col. W. B. Remey, U. S. M. C., Judge-Advocate-General (Dec. 31, 1891) [hereinafter Tracy to Remey], *reprinted in* Message of the President of the United States Respecting the Relations with Chile, EXEC. DOC. NO. 52-91, at 341 (1892) [hereinafter President's Message Respecting U.S. Relations with Chile]; *see also Col. Remey's Mission*, ST. LOUIS POST-DISPATCH, Jan. 2, 1892, at 1; *Home from Chili* [*sic*], SUN (Balt.), Jan. 6, 1892, at Supp. 4. Word of Remey's secret mission leaked, leading the Navy Department to acknowledge it. *An Inquiry into the Assault*, PHILA. INQUIRER, Jan. 3, 1892, at 2.
[392] Tracy to Remey, *supra* note 391.
[393] President's Message Respecting U.S. Relations with Chile, *supra* note 391, at 341–607.

of New York and state appellate judge,[394] followed the proceedings closely, reportedly telegraphing specific questions to be asked of particular witnesses.[395]

The evidence that Remey developed suggested that the American sailors killed and injured in the *Baltimore* incident were blameless and the attacks against them were preplanned. Remey's work influenced the Harrison administration's ongoing response. Chile ultimately paid a $75,000 indemnification that the U.S. government distributed to the families of the two dead sailors and 51 sailors injured or arrested and detained in the incident.[396]

The *Baltimore* investigation was laborious, requiring Remey to work long hours.[397] The effort was undoubtedly even more taxing because Remey's mental faculties were again failing. During the proceedings, he spent an evening with Captain Henry Cochrane, a highly respected officer stationed at the Mare Island Marine Barracks.[398] Cochrane recorded in his diary that he found "Remey's memory impaired & many evidences of aphasia."[399]

During his return trip to Washington, Remey made what would be his last visit to his hometown of Burlington, Iowa.[400] Once back in the nation's capital, he felt nervous and irritable while suffering from headaches and insomnia.[401] His mental troubles became public when he traveled to New York in April 1892 for the launching of *Bancroft*, a practice ship destined for the Naval

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[394] Walter R. Herrick, *Benjamin F. Tracy*, Coletta, *supra* note 212, at 415–16.
[395] *Growing Critical*, ST. LOUIS POST-DISPATCH, Jan. 14, 1892, at 3.
[396] *Chile Pays Indemnity*, N.Y. TIMES, July 20, 1892, at 4; *Chili's* [*sic*] *Indemnity Apportioned*, N.Y. TRIB., Feb. 10, 1893, 2.
[397] *General Remey Talks*, ATLANTA CONSTITUTION, Jan. 25, 1892, at 1.
[398] Marine Corps Muster Roll, Marine Barracks, Mare Island, Cal. (Jan. 1–31, 1892), Roll 122, T1118, U.S. Marine Corps Muster Rolls, 1798–1892, National Archives, Washington, D.C.; HAMERSLY 1902, *supra* note 36, at 482–86; Henry Cochrane Diary (Jan. 10, 1892), 1892 Folder, Box 21, Cochrane Papers, *supra* note 181; *see generally* HOLDEN-RHODES, supra note 181; Maj J.F. Holden-Rhodes, *The Adventures of Henry Clay Cochrane: "The Marines Would Stay,"* MARINE CORPS GAZETTE, Nov. 1982, at 69; Maj J.F. Holden-Rhodes, *The Adventures of Henry Clay Cochrane: Life at Sea*, MARINE CORPS GAZETTE, Dec. 1982, at 14; Maj J.F. Holden-Rhodes, *The Adventures of Henry Clay Cochrane: Assault on the Consulate*, MARINE CORPS GAZETTE, Jan. 1983, at 32; Maj J.F. Holden-Rhodes, *The Adventures of Henry Clay Cochrane: This Smart and Faithful Force*, MARINE CORPS GAZETTE, Feb. 1983, at 46; Maj J.F. Holden-Rhodes, *The Adventures of Henry Clay Cochrane: Paris Exposition, 1889*, MARINE CORPS GAZETTE, Mar. 1983, at 50; Maj J.F. Holden-Rhodes, *The Adventures of Henry Clay Cochrane: Commanding Marine Barracks*, MARINE CORPS GAZETTE, Apr. 1983, at 54.
[399] Henry Cochrane Diary (Jan. 10, 1892), 1892 Folder, Box 21, Cochrane Papers, *supra* note 181.
[400] *The Baltimore Investigation*, DAILY INTER OCEAN (Chi.), Jan. 25, 1892, at 1, https://bit.ly/41qUb35.
[401] Naval Hospital Form H, *Remey v. United States* Record, *supra* note 25, at 512.

Academy.[402] While in New York, Remey stayed at the luxurious Gilsey House Hotel at 1200 Broadway in what is now known as Manhattan's NoMad neighborhood.[403] Joseph Pulitzer's New York *World* reported that during his stay at Gilsey House, "Col. Remey behaved in a very eccentric manner."[404] The newspaper explained that on one occasion, he

> entered the hotel in pompous style. Around his neck was a huge laurel wreath, while twined about his hat was an abundance of smilax. Protruding from each buttonhole of his coat and vest were red and white roses, and still other flowers were pinned to the breast of his coat. In his left hand the Colonel carried a bouquet of violets, tuberoses and yellow rosebuds; in his right a cane.
>
> With military precision and as if passing in review he marched. Upon being recognized by a chance acquaintance the Colonel saluted with much gravity and sat down.
>
> "You resemble a walking nosegay, Colonel," remarked the gentleman.
>
> "Do I? Well perhaps I do, sir; but you must understand, sir, that these are my deserved decorations. Honors bestowed, yet fully earned, sir."[405]

Later that night, Remey strutted in the hallway outside his room, still adorned with his floral display.[406]

The following evening, Remey stood near 30th Street, carrying a small basket filled with boutonnieres, which he offered to women passing by.[407] The *World* reported that "[s]ometimes his offering was accepted, sometimes indignantly spurned."[408] An acquaintance of Remey's ultimately intervened and escorted him to Gilsey House.[409] The next day, his behavior became even more eccentric as he

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[402] *Jersey Folk Proud of Her*, N.Y. TIMES, May 1, 1892, at 13; *Insane from Overwork*, *supra* note 379, at 4.
[403] *Decked Like a May Queen*, WORLD (N.Y.), May 22, 1892, at 1.
[404] *Id.*
[405] *Id.*
[406] *Id.*
[407] *Id.*
[408] *Id.*
[409] *Id.*

> sauntered into the jewelry store of D. Roth, Broadway, near Twenty-ninth [S]treet. There he asked to be shown rings set with precious stones, bracelet[s], necklaces and even watches. After having made a selection the articles were put into a box and tied up. Without tendering any money in payment the Colonel seized the package and left the place.
>
> Pursued by Roth he went into the Gilsey House. Entering the cafe he seated himself at a table. With evident delight he was proceeding to examine his purchase, when Roth rushed in, snatched the bundle and ran away.
>
> "Stop the thief! Stop the thief!" cried the Colonel excitedly.
>
> Several persons interrupted the jeweler in his flight, but he satisfactorily explained the situation and was permitted to retain his property. Then Col. Remey was taken to his room and Dr. J. A. Irwin was hurriedly summoned. For two or three days the Colonel was under treatment for, it is said, acute nervous prostration.[410]

On 6 May, Colonel Remey's brother George—who was then in Washington—was told of the judge advocate general's eccentric behavior.[411] George took a train to New York, arriving on the morning of Sunday, 8 May.[412] After spending the day with Will, George returned to Washington, believing his brother's condition had improved.[413] But two days later, he received a telegram summoning him back to New York.[414] He found Will dressed eccentrically, with bouquets of flowers on his coat's lapels and rings worn on the outside of his gloves.[415] Will's statements, as assessed by George, were "largely nonsensical, on the grandiose order."[416] It was now apparent to George that his brother's mind was disordered.[417] George took Will back to Washington.[418] A civilian doctor who examined Colonel Remey the next day concluded he was experiencing

[410] *Id.*
[411] Deposition of George C. Remey (Dec. 6, 1894), *Remey v. United States* Record, *supra* note 25, at 347.
[412] *Id.* at 327, 347.
[413] *Id.* at 347–48.
[414] *Id.* at 348.
[415] *Id.* at 349.
[416] *Id.*
[417] *Id.* at 348–49.
[418] *Id.* at 348.

"hallucinations."[419] A Navy doctor was summoned for a consultation.[420] After conducting a thorough examination, the two doctors recommended Remey's hospitalization.[421] A day later, George Remey took his brother to the Washington Naval Hospital, then located on Pennsylvania Avenue, S.E., where he was admitted.[422]

Colonel Remey demonstrated severe mental disorders throughout his stay at the Washington Naval Hospital from 13 to 22 May 1892. Right after being admitted, the hospital's records show, "he began dictating dispatches, general orders, and letters of nonsensical, grandiose import, ordering grand dinners and theatre parties, in deep oratorical tones."[423] He believed he was fabulously wealthy, with horses, carriages, and anything he desired at his command.[424] Sometime during his hospitalization, Remey thought he was the Colonel Commandant of the Marine Corps.[425] The hospital records reveal that during his first evening there, Remey "insisted on going out to a big dinner he was to give to the vice president and all the officers of the Navy."[426] At another point, he dressed himself in preparation to go to the nearby Washington Marine Barracks at 8th and I Streets, S.E., to host the Cabinet, Members of Congress, and the diplomatic corps.[427] He compulsively decorated his room with colorful paper, strings, and newspaper clippings, covering all four walls and his bed's headboard.[428]

On his third evening in the hospital, according to his patient record, Remey "became violent, threatening to break furniture if not released from unlawful imprisonment."[429] He was administered two doses of a sedative with no effect.[430] He "rattled the grating" of his hospital room's window "and called to people on the street" before finally dozing off at 4 a.m.[431] At another point, he

[419] Deposition of Dr. Thomas V. Hammond (Dec. 26, 1894), *Remey v. United States* Record, *supra* note 25, at 380–82. What Dr. Hammond described would today be termed delusions rather than hallucinations.
[420] *Id.* at 381–82.
[421] *Id.* at 372, 382–83.
[422] *Id.* at 383; Hospital Ticket (May 13, 1892), *Remey v. United States* Record, *supra* note 25, at 511.
[423] Naval Hospital Form H, 2, *Remey v. United States* Record, *supra* note 25, at 513.
[424] Deposition of Medical Director H. M. Wells, U.S. Navy (Oct. 27, 1894), *Remey v. United States* Record, *supra* note 25, at 281, 288.
[425] *Id.* at 281, 301.
[426] Naval Hospital Form H, 2, *Remey v. United States* Record, *supra* note 25, at 513.
[427] Deposition of Medical Director H. M. Wells, U.S. Navy (Oct. 27, 1894), *Remey v. United States* Record, *supra* note 25, at 281, 284.
[428] *Id.* at 281, 284, 286.
[429] Naval Hospital Form H, 2, *Remey v. United States* Record, *supra* note 25, at 513.
[430] *Id.*
[431] *Id.* at 2–3, *Remey v. United States* Record, *supra* note 25, at 513–14.

threatened to hit the hospital's superintendent in the head with a water pitcher.[432] He continued to suffer from insomnia, sleeping only if administered narcotics.[433] To persuade Remey to take medications, doctors had to pretend the medicine was a cocktail, which Remey would drink and proclaim to be "good stuff."[434] The hospital's Medical Director in Charge, Dr. Henry M. Wells, assessed Remey's mental disorder as "megalomania," which he described as "the insanity of grandeur."[435]

By 22 May, Dr. Wells wanted to transfer Colonel Remey to the Government Hospital for the Insane, but George Remey insisted on taking his brother home to Will's H Street apartment instead.[436] The doctors acquiesced.[437] Once back in his apartment, Colonel Remey intermittently manifested the symptoms he had displayed during his hospitalization.[438]

On 28 May, Colonel Remey's brother George advised him to request retirement because of his condition.[439] George suggested it was in Will's financial interest to retire while still serving in the rank of colonel, as the third of Remey's four-year appointments neared its end.[440] Will initially refused, explaining that he expected to recover.[441] The next day, when George raised the subject again, Will agreed to sign a retirement request.[442] He did so the following morning.[443] Twice during the days when Colonel Remey's retirement was under discussion, George looked over at his brother as the two sat quietly reading and noticed that "tears were rolling down his cheeks."[444] Neither said anything about it. George explained that "so far as I could judge," his brother "wanted it to be unnoticed."[445]

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[432] Deposition of Medical Director H. M. Wells, U.S. Navy (Oct. 27, 1894), *Remey v. United States* Record, *supra* note 25, at 281, 283.
[433] *Id*. at 281, 287–88, 305.
[434] *Id*. at 281, 291–92; Naval Hospital Form H, 2, *Remey v. United States* Record, *supra* note 25, at 513.
[435] Deposition of Medical Director H. M. Wells, U.S. Navy (Oct. 27, 1894), *Remey v. United States* Record, *supra* note 25, at 281, 284, 318.
[436] *Id*. at 281, 293; Naval Hospital Form H, 1, 3, *Remey v. United States* Record, *supra* note 25, at 512, 514.
[437] Naval Hospital Form H, 3, *Remey v. United States* Record, *supra* note 25, at 514.
[438] Deposition of Dr. Thomas V. Hammond (Dec. 26, 1894), *Remey v. United States* Record, *supra* note 25, at 373, 385, 391.
[439] Deposition of George C. Remey (Dec. 6, 1894), *Remey v. United States* Record, *supra* note 25, at 329–30.
[440] *Id.* at 355, 357–58, 364.
[441] *Id.* at 329–30.
[442] *Id.* at 330.
[443] *Id.* at 331.
[444] *Id.* at 335.
[445] *Id.*

After Colonel Remey signed the retirement request, George personally delivered it to the Assistant Secretary of the Navy.[446] The following day, Secretary Tracy ordered a board of medical survey to examine Colonel Remey.[447]

On the morning of 1 June, Remey jumped from his apartment window and visited the Metropolitan Club across the street before registering at a nearby hotel.[448] When George found him, Will refused to accompany him home.[449] George then told him, "You have got to do it, or I will send for a policeman."[450] Will responded that he would kill George or the police officer if they detained him.[451] On that same day, a board of three Navy doctors, including Dr. Wells of the Washington Naval Hospital, examined the judge advocate general.[452] The board's diagnosis was "mania" caused by "prolonged mental strain in the performance of his official duties."[453] The Acting Secretary of the Navy approved the doctors' recommendation that Remey "be transferred to the Government Hospital for the Insane, Washington, D.C."[454] That same afternoon, Colonel Remey was admitted to what was then colloquially, and is now officially, known as St. Elizabeths Hospital.[455]

Also on 1 June, President Benjamin Harrison approved Remey's retirement request.[456] Three days later, Colonel William B. Remey was officially

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[446] *Id.* at 332.
[447] Secretary of the Navy B. F. Tracy to Medical Director G. S. Beardsley, U.S. Navy (June 1, 1892), *Remey v. United States* Record, *supra* note 25, at 44.
[448] Deposition of George C. Remey (Dec. 6, 1894), *Remey v. United States* Record, *supra* note 25, at 327, 337.
[449] *Id.* at 341.
[450] *Id.*
[451] *Id.*
[452] Report of Medical Survey (June 1, 1892), *Remey v. United States* Record, *supra* note 25, at 45.
[453] *Id.*
[454] *Id*.; 2d endorsement of Report of Medical Survey (June 1, 1892), *Remey v. United States* Record, *supra* note 25, at 531.
[455] Deposition of George C. Remey (Dec. 6, 1894), *Remey v. United States* Record, *supra* note 25, at 327, 338. What had been the Government Hospital for the Insane's nickname became its official title in 1916. Appropriations Act of July 1, 1916, Pub. L. No. 64-132, 39 Stat. 262, 309 (1916) (renaming the institution, "St. Elizabeths Hospital").
[456] *Remey v. United States* Record, *supra* note 25, at 65; Retirement Board Record, Colonel Wm. B. Remey, USMC, #569, Entry 58, Record Group 125, National Archives, Washington, D.C. President Harrison, who had commanded a U.S. Army brigade during the Civil War, himself has a place in the annals of military law. Following his landmark Supreme Court victory establishing limits on military tribunals' applicability to civilians in areas where regular courts still functioned, Lambden P. Milligan filed a lawsuit against several officials involved in his prosecution before a military commission. *See generally Ex parte* Milligan, 71 U.S. 2 (1866); Milligan v. Hovey, 17 F. Cas. 380 (D. Ind. 1871); Allen Sharp, *An Echo of the War: The Aftermath of the Ex parte Milligan Case*, TRACES OF INDIANA AND MIDWESTERN HISTORY (Summer 2003), at 42–47. The defendants were represented by Benjamin Harrison. Sharp, *supra*, at 44. While Milligan won a jury verdict, Harrison's skillful advocacy limited the damages to $5 plus court costs. *Id*. at 47.

retired, bringing his distinguished Marine Corps career of more than thirty years to a melancholy end.[457]

XI. POST-RETIREMENT

Remey's mental condition further deteriorated during his stay at St. Elizabeths. He believed he was about to be married, though he had no fixed idea as to his betrothed.[458] Instead, he seemed to think that any woman he encountered on the hospital grounds was his fiancée.[459] He rarely slept, talking loudly throughout the night as if delivering a courtroom argument.[460] Dr. William W. Godding, the hospital's superintendent, found Remey's ability to persist on so little sleep remarkable.[461] Remey ornamented both his clothing and room with oak leaves he collected on the hospital grounds.[462] He often uttered profanities and obscenities.[463] In addition to being delusional, Remey was sometimes violent, making what Dr. Godding characterized as three "homicidal assaults" on his caretakers.[464] Near the end of July 1892, he reportedly made an unsuccessful escape attempt, suffering lacerations to his hands, face, and body when he ran into a barbed-wire fence.[465] He delusionally believed he had the ability to pass through the fence.[466]

During Colonel Remey's 81 days as a patient at the Government Hospital for the Insane, his brother George arranged for what were later characterized as "greater attention and comforts than as an officer of the Marine Corps he was entitled to as of right."[467] George sent Superintendent Godding two checks totaling $294.96 (equivalent to approximately $10,000 in 2023 purchasing power) as payment for those "greater attention and comforts."[468]

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[457] Secretary of the Navy to Colonel William B. Remey, U.S.M.C. (June 2, 1892), "Other Family Members – Papers" Folder, Box 21, Remey Family Papers, *supra* note 15.
[458] Deposition of Dr. William W. Godding, Superintendent of Government Hospital for the Insane (Apr. 5, 1895), *Remey v. United States* Record, *supra* note 25, at 410, 415.
[459] *Id.*
[460] *Id.* at 410, 417, 431.
[461] *Id.* at 410, 416.
[462] *Id.* at 410, 412–13, 417.
[463] *Id.* at 410, 413, 417, 419.
[464] *Id.* at 410, 413, 418.
[465] *Unfortunate Col. Remey's Successor*, ST. LOUIS GLOBE-DEMOCRAT, July 15, 1892, at 2.
[466] *Id.*
[467] Petition, *In re* William B. Remey, Alleged Lunatic, 4, Supreme Court of the District of Columbia, Equity No. 14,623, Entry A1 69, Record Group 21, National Archives, Washington, D.C.
[468] Captain Geo. C. Remey, U.S.N. to W. W. Godding, M.D. (Aug. 4, 1892), File No. 8485, Entry 66, Record Group 418, National Archives, Washington, D.C. [hereinafter File No. 8485]; Geo C. Remey to W. W. Godding, M.D. (Sept. 16, 1892), File No. 8485.

On 4 August 1892, George Remey asked the Secretary of the Navy for permission to remove his brother from St. Elizabeths "to place him for treatment in the private Asylum at Somerville, Mass., near Boston, where it is hoped he may be better contented and the change of location be of benefit to him."[469] The McLean Hospital in Somerville was also closer to where George Remey was then stationed at Portsmouth, New Hampshire.[470] Superintendent Godding supported the request, writing:

> The ultimate prognosis in this case is unfavorable, and the chief object to be attained is the comfort and well being of the patient. I have always felt that Col. Remey's proximity to Washington and to his large circle of friends here, has been in a certain degree a source of irritation to him under restraint, and has tended to add to his mental disturbance.[471]

Superintendent Gooding added that the McLean Hospital "is under capable management."[472]

The Acting Secretary of the Navy approved the request, resulting in Colonel Remey's discharge from St. Elizabeths on 21 August 1892 and admission to the McLean Hospital a day later.[473] The move did not improve the retired colonel's condition.[474] In January 1893, the McLean Hospital's superintendent described Remey as continuously "in a state of considerable mental excitement, somewhat noisy, and for the most part incoherent," adding that he had lost "considerable" weight.[475] Two months later, upon the petition of Colonel Remey's two surviving brothers, the Supreme Court of the District of Columbia issued a writ *de lunatico inquirendo*[476] but suspended any inquiry into Remey's sanity,

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[469] Captain Geo. C. Remey, U.S.N., to Secretary of the Navy (Aug. 4, 1892), *Remey v. United States* Record, *supra* note 25, at 532.
[470] *Col. Remey's Misfortune*, S.F. EXAM'R, Mar. 27, 1893, at 1; Deposition of George C. Remey (Dec. 6, 1894), *Remey v. United States* Record, *supra* note 25, at 328.
[471] 3rd endorsement at 1 (Aug. 8, 1892), *Remey v. United States* Record, *supra* note 25, at 538.
[472] *Id.* at 3, *Remey v. United States* Record, *supra* note 25, at 539. *See generally* ALEX BEAM, GRACEFULLY INSANE: THE RISE AND FALL OF AMERICA'S PREMIER MENTAL HOSPITAL (2001) (providing a history of the McLean Hospital).
[473] Acting Secretary of the Navy James R. Solely to Captain Geo. C. Remey, U.S.N. (Aug. 11, 1892), *Remey v. United States* Record, *supra* note 25, at 533; Superintendent W. W. Godding to Secretary of the Navy B. F. Tracy (Aug. 21, 1892), *Remey v. United States* Record, *supra* note 25; Certificate by Edward Cowles, M.D., Superintendent, McLean Hospital (Jan. 5, 1893), Exhibit C, Petition, *In re* William B. Remey, Alleged Lunatic, Equity No. 13,623, Dock. 35 [hereinafter Cowles Certificate].
[474] Geo C. Remey to W. W. Godding, M.D. (Sept. 16, 1892), File No. 8485, *supra* note 468.
[475] Cowles Certificate, *supra* note 473.
[476] A proceeding *de lunatico inquirendo* evaluates the mental capacity of the person named in the writ. Overholser v. Tracy, 147 F.2d 705, 709 (D.C. Cir. 1945).

instead appointing George Remey to manage his brother's finances.[477] Colonel Remey suffered a stroke in August 1894, leaving him partially paralyzed.[478] He remained at the McLean Hospital until dying there on 20 January 1895.[479]

Remey continued to influence the law posthumously. From 4 June 1892 until Remey's death in 1895, the Treasury Department calculated his retirement pay based on his permanent rank of Marine Corps captain.[480] George and John Remey—acting, respectively, as a committee for Will and administrator of his estate—claimed their brother was entitled to retirement pay based on his rank when President Harrison approved his retirement request: colonel.[481] The Secretary of the Treasury submitted the question to the United States Court of Claims, which ultimately decided the case three years after Remey's death.[482] The court concluded that at the time of his retirement, Remey "was in law and fact a colonel in the Marine Corps. The further fact that this commission was limited as to time does not change the other fact that at the moment of retirement he was a colonel."[483] The court, therefore, concluded that Remey was entitled to retirement pay based on the grade of colonel.[484]

When Remey retired in 1892, he was succeeded by his deputy, then-Navy Lieutenant Samuel C. Lemly.[485] Lemly remained in office for three terms,

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[477] *In re* William B. Remey, Alleged Lunatic, Equity No. 13,623, Dock. 35 (D.C. Sup. Ct. Mar. 24, 1893), Entry A1 69, Record Group 21, National Archives, Washington, D.C. The McLean Hospital's superintendent suggested that it would not be in Colonel Remey's interest to subject him to a sanity inquiry. Cowles Certificate, *supra* note 473.

[478] Defendant's Requests for Findings, 151, George C. Remey, Committee of William B. Remey v. United States, Court of Claims, Departmental No. 48, RG 123, Entry 24, Box 15, National Archives, Washington, D.C.

[479] Remey Death Certificate, *supra* note 10.

[480] Supplemental Requests for Findings, *Remey v. United States* Record, *supra* note 25, at 2, no. IX.

[481] Petition at 3, *Remey v. United States*, 33 Ct. Cl. 218 (1898) (Departmental, No. 48), Box 15, Entry PI-58 24, Record Group 123, National Archives, Washington, D.C.

[482] *Remey v. United States*, 33 Ct. Cl. 218 (1898).

[483] *Id.* at 223.

[484] *Id.*

[485] 28 S. EXEC. JOURNAL, 52d Cong., 1st Sess., 277 (1892) (confirming Lemly's nomination to be judge advocate general of the Navy on 16 July 1892). As the judge advocate general, Lemly implausibly claimed he was entitled to the higher pay of a captain on sea duty rather than a captain on a shore-based assignment. Following a referral from the Secretary of the Treasury, the Court of Claims predictably ruled against him. *Lemly v. United States*, 28 Ct. Cl. 468 (1893). Congress then granted Lemly the relief he sought. An 1896 statute raised the pay of a Navy officer serving as the judge advocate general of the Navy to the "highest pay of a captain [in] the Navy," making the raise retroactive to Lemly's first day in office as judge advocate general of the Navy. An Act Amending the Act of June eighth, eighteen hundred and eighty, entitled "An Act to authorize the President to appoint an officer of the Navy or the Marine Corps to perform the duties of solicitor and judge-advocate-general, and so forth, and to fix the rank and pay of such officer," and for other purposes, ch. 331, 29 Stat. 251 (1896). Notably, that law was enacted without President Cleveland's signature. *Id*.

serving as a captain in the U.S. Navy, until retiring on 4 June 1904.[486]

Like his predecessor, Lemly also became a St. Elizabeths patient. In 1907, he was recalled from retirement to revise and codify naval laws and regulations.[487] While performing those duties, he suffered from cerebral arteriosclerosis.[488] Following medical treatment at the Army and Navy General Hospital in Hot Springs, Arkansas, and then Johns Hopkins Hospital in Baltimore, Lemly was detached from duty in February 1908.[489] On 4 November 1908, he began receiving treatment at the Naval Medical School Hospital in Washington before being transferred to the Government Hospital for the Insane on 16 November.[490] There he died on 3 September 1909.[491] The life of each of the first two uniformed judge advocates general of the Navy ended in a mental asylum.

Since Remey's retirement in 1892, there have been another 44 judge advocates general of the Navy. But 131 years after leaving office, Colonel William B. Remey remains the only Marine to have held that distinction.

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[486] *Captain Lemly Retires as Judge Advocate*, WASH. TIMES, June 4, 1904, at 12.
[487] *Captain Lemly Detached*, WASH. TIMES, Feb. 19, 1908, at 6; 7 Abstracts of Service Records of Naval Officers, 1829–1924, at 205, M1328, National Archives, Washington, D.C. [hereinafter Lemly Service Record].
[488] Samuel Conrad Lemly, Certificate of Death 187962, District of Columbia, District of Columbia Archives, Washington, D.C. [hereinafter Lemly Death Certificate].
[489] *Captain Lemly Detached*, *supra* note 487, 6; *Captain Lemly at Hospital*, SUN (Balt.), Jan. 11, 1908, 6; Lemly Service Record, *supra* note 487.
[490] Lemly Service Record, *supra* note 487; 6 Register of Cases, Government Hospital for the Insane, Entry 64, Record Group 418, National Archives, Washington, D.C.
[491] Lemly Death Certificate, *supra* note 488; *Capt. S. C. Lemly Dead*, WASH. POST, Sept. 5, 1909, at 2.

A HACKER'S GUIDE TO NOT GETTING SHOT: DIRECT PARTICIPATION IN CYBER HOSTILITIES

Lieutenant Commander Jason Thelen, JAGC, USN*

"I should have checked myself."
-Guy Who Wrecked Himself

Back in the day civilians had to be close enough to toss a Molotov cocktail to join an armed conflict. Today a laptop and internet connection not only up the ante of destructive capability, but now any kid with a computer can do real damage from anywhere. On the digital battlefield, identifying who gets civilian protection and who's a target comes down to what rules the trigger-puller follows. Those who lean towards civilian protections keep to strict rules that take an objective look at damage, the connection between an act and harm, and relationship to the fight. Others offer a more flexible alternative that considers the military mission and looks to the intent of the actor. Understanding these rules before jumping into the online fight can help guide your actions and keep you out of trouble.

This article is for the military commanders, the black-hatters, the script kiddies, the legal experts, and the everyday user like you who care about injustice and conflict in the world. For those military commanders, this guide's plain language explanations offer a framework for making split second life and death decisions about who is a civilian in armed conflict. Lawyers can look below the line to link references and resources with easy to understand analogies to demystify the crossover between cyber and the law. Better understanding the rules in war and what online actions can put you at risk won't keep all civilians from harm, but it just might be a guide for not getting shot.

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I. INTRODUCTION

Remarkable innovations in technology brought us all closer together with the birth of social media, invited the world into our homes through streaming services, and made our everyday lives easier with cool gadgets. But the reach of new technology stretches far beyond the boundaries of our daily lives, crossing into the intense and dangerous world of warfare.[1] Here, countries and even ordinary citizens armed with keyboards and code dive into the digital realm like characters in *The Matrix* waging war against enemies and becoming victims.[2] We're not just talking about soldiers with guns anymore.[3] Countries and their civilian populations need to be aware of the potential life and death consequences of getting involved in operations during armed conflict, even online.[4] This article is meant to be a hacker's guide to understanding the concept of civilians participating in hostilities. Think of it as the "Hacker's Manifesto" meets international law. Shining a light on the grey areas where civilians jump into the fray of armed conflict.

Well-intentioned bystanders coming face-to-face with the barbaric world of war, once sought to make things just a little better with rules that would protect innocent civilians from harm. These brilliant minds decided to "call in the lawyers." But assembling this team of legal Avengers created more confusion than clarity, like a secret code filled with complicated terms, acronyms, and a whole lot of "it depends." The fact that no normal person can understand or explain these rules remains as much of a problem today as it did back when "lawyer" meant a white guy in a powdered wig. So, to clear things up, this humble guide provides a plain language explanation of the laws of war and specifically when a civilian joins the fight, with easy-to-understand analogies for everyone. While critics might see this as an oversimplification, the below-the-line citations offer legal context for those who seek it. Ultimately, this guide aims to give

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[1] *See* Matthew T. King, *High-Tech Civilians, Participation in Hostilities, and Criminal Liability*, *in* THE IMPACT OF EMERGING TECHNOLOGIES ON THE LAW OF ARMED CONFLICT 175, 176 (Ronald T.P. Alcala & Eric Talbot Jensen eds., 2019) (describing "the blurring, flattening, and expanding of the battlefield brought about by new technologies.").

[2] *See* Andreas Wenger & Simon J.A. Mason, *The Civilianization of Armed Conflict: Trends and Implications*, 90 INT'L REV. RED CROSS 835 (2008); THE MATRIX (Warner Bros. Pictures 1999).

[3] *See* Michael N. Schmitt, *Cyber Operations and the Jus in Bello: Key Issues*, 87 INT'L L. STUD. 89, 97 (2011) ("Those who qualify as combatants enjoy the belligerent right of engaging in hostilities; no reason exists to distinguish cyber from kinetic military operations in this regard.").

[4] *See* Spencer Ackerman, Ewan MacAskill & Alice Ross, *Junaid Hussain: British Hacker for ISIS Believed Killed in US Air Strike*, THE GUARDIAN (Aug. 27, 2015, 12:28 EDT), https://bit.ly/3NzK2LQ (profiling the first time a hacker was lethally targeted); Julia Glum, *ISIS Hacker Junaid Hussain Confirmed Dead After US Airstrike on Islamic State in Syria: Pentagon*, INT'L BUS. TIMES (Aug. 28, 2015, 2:52 PM),https://bit.ly/481xKEb.

anyone a basic understanding of what actions can get a civilian in trouble during armed conflict.

The powerful legal term for this kind of trouble is "direct participation in hostilities" (DPH) and refers to situations where everyday people take an active part in armed conflict, such as by fighting alongside combatants, providing weapons or other support, or carrying out attacks themselves.[5] This is different from situations where civilians are simply caught in the crossfire or are unintentionally harmed during military operations. These actions raise legal issues, which get even more tangled when the action takes place in and through cyberspace.[6]

Our journey begins in Part II with a dive into the backstory of direct participation in hostilities, tracing the evolution of international law and targeting civilians. Throughout history, the concept of direct participation has been constantly debated, leading to the establishment of various rules and laws trying to protect civilians. Bystanders should not be targeted, only the ones in the fight. But things can start to blend together when the onlookers start to get involved making it unclear where one thing stops and another starts. Part III is the starting point for drawing a line in the sand. Breaking down the criteria offered by *Interpretive Guidance* provided by the International Committee of the Red Cross (ICRC), we will get a feel for what actions can get protected and what actions can get you shot. The list of acts that can get you shot gets longer in Part IV where we look to exceptions from *Interpretive Guidance* carved out by military manuals and a group of experts applying the rules to cyberspace. Part V then goes deeper into some of the questions about actions in and through cyberspace that are still up for debate and provides some clarity on how a case-by-case determination might come out. Finally, Part VI concludes by gawking at the ongoing slow motion train wreck caused by the collision between how countries fight wars and how civilians use the internet. States are losing their monopoly on the use of force to a bunch of kids with keyboards. When civilians understand the rules of the road in warfare, they can take actions that keep them from finding themselves targeted in the rifle's scope, the drone-operator's console, or the cyber commander's target list.

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[5] Kai Ambos, *International Criminal Responsibility in Cyberspace*, *in* RESEARCH HANDBOOK ON INTERNATIONAL LAW AND CYBERSPACE 118, 131 (Tsagourias & Buchan eds., 2015) (highlighting the challenge of distinguishing between civilians and combatants in cyberspace).

[6] *See* Eric Talbot Jensen, *Unexpected Consequences from Knock-on Effects: A Different Standard for Computer Network Operations?*, 18 AM. U. INT'L L. REV. 1145, 1175 (2003) (applying the same kinetic operating principles of necessity and proportionality during cyber operations).

II. README.TXT FOR THE LAWS OF WAR

A. "hello, world" Old Testament to the 21st-Century Digital Realm

From the dawn of time, or at least as far back as the Old Testament, rules about not targeting civilians lived in the "Law of War," also known as "International Humanitarian Law" (IHL) or the "Law of Armed Conflict" (LOAC).[7] Like a masked vigilante with multiple nicknames and secret identities, this legal concept makes protecting innocent civilians during warfare as simple as following one basic rule: never target civilians under any circumstances.[8] Think of it as the original "no harm, no foul" policy. Over time, however, things got a bit more complicated. Let's take a trip through history to see how the protection of innocents evolved, starting from biblical times and ending with the *Tallinn Manual* 2.0.

Back in 1859, about the time Oregon was joining the Union in the United States, a Swiss businessman named Henry Dunant witnesses first-hand the horrors of war at the Battle of Solferino, which left thousands of wounded soldiers suffering and dying on the battlefield for lack of medical care.[9] Out of this chaos came the International Committee of the Red Cross (ICRC) which aimed to provide aid and protection to wounded soldiers on the battlefield and to establish rules about how to treat non-combatants.[10] Around the same time, new efforts to make "non-combatant immunity" a thing were popping up all over the world.[11]

Militaries like the U.S. Union Army drafted "Instructions for the Government of Armies" nicknamed the "Lieber Code" during the American Civil War.[12] On the academic side, the Oxford University Press in 1880 created the Oxford Manual of the Laws of War, a non-binding document that sought to write

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[7] *See Deuteronomy* 20:10–12 (New Int'l Version) ("When you march up to attack a city, make its people an offer of peace. If they accept and open their gates, all the people in it shall be subject to forced labor and shall work for you. If they refuse to make peace and they engage you in battle, lay siege to that city.").

[8] *See* HUGO GROTIUS, DE JURE BELLI AC PACIS LIBRI TRES 216 (John W. Parker ed., William Whewell trans., London 1853) (1625) ("Slaughter of men armed and resisting is the law of war . . . it is reasonable that they who have taken arms should be punished in battle but that Non-combatants are not to be hurt.").

[9] *See* HENRY DUNANT, A MEMORY OF SOLFERINO (ICRC English ed. 1986) (1862).

[10] *See* INT'L COMM. OF THE RED CROSS, *The ICRC's Mandate and Mission*, https://bit.ly/481xZ23 (last visited May 1, 2023).

[11] *See* JUDITH GARDAM, NON-COMBATANT IMMUNITY AS A NORM OF INTERNATIONAL HUMANITARIAN LAW 116 (1993).

[12] *See* Adjutant General's Office, General Order No. 100: Instructions for the Government of Armies of the United States in the Field (Apr. 24, 1863), *reprinted in* 2 FRANCIS LIEBER, CONTRIBUTIONS TO POLITICAL SCIENCE 245, 247–74 (1881) [hereinafter Lieber Code].

down "the accepted ideas of our age so far as this has appeared allowable and practicable."[13] The Oxford Manual even said, "[T]he state of war does not admit of acts of violence, save between the armed forces of belligerent States."[14] Basically, "Hey folks, leave the fighting to the ones holding guns and marching in military uniforms, alright?"

Fast forward to the Hague Conventions of 1899 and 1907, which aimed to turn these ideas into binding treaty form.[15] Binding treaties are like promises between countries.[16] Once a country agrees to be bound by a treaty, they have to follow through on their promises or face legal consequences. But then World War I happened, and all bets were off. Aerial bombings and gas attacks changed the game, causing devastating civilian casualties. But if you thought World War I was bad, just wait until World War II. With an estimated forty-five million civilian deaths, people around the globe gasped in horror and said, "Enough is enough!"[17] So, in 1949, they adopted the Fourth Geneva Convention, which formally provided legal protections for civilians "not belonging to armed forces or armed groups."[18] The ICRC also issued Draft Rules in 1956, which stated that civilians should be "outside the sphere of armed attacks."[19]

To give these protections some muscle, the international community introduced two Additional Protocols in 1977 to supplement the existing Geneva Conventions.[20] These protocols covered both international armed conflicts—when countries fight each other—and non-international armed conflicts—when

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[13] *See* INSTITUTE OF INTERNATIONAL LAW, *Preamble, The Laws of War on Land*, Sept. 9, 1880, 5 INSTITUT DE DROIT INTERNATIONAL, ANNUAIRE 156 (1881–82), *translated and reprinted in* THE LAWS OF ARMED CONFLICTS: A COLLECTION OF CONVENTIONS, RESOLUTIONS AND OTHER DOCUMENTS 36 (Dietrich Schindler & Jiri Toman eds., 3d rev. ed. 1988).
[14] *Id.* at art. 1.
[15] Hague Convention (IV) Respecting the Laws and Customs of War on Land, annex, art. 25, Oct. 18, 1907.
[16] *See* Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1969, art. 26, 1155 U.N.T.S. 331, 339 (stating the principle of "pacta sunt servanda" to mean that treaties ought to be observed).
[17] *See* NAT'L WWII MUSEUM, *Research Starters: Worldwide Deaths in World War II*, https://bit.ly/3TxPylH (last visited May 1, 2023).
[18] INT'L COMM. OF THE RED CROSS, THE GENEVA CONVENTIONS OF 12 AUGUST 1949: COMMENTARY ON GENEVA CONVENTION (IV) RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR 8 (Jean S. Pictet ed., 1958).
[19] INT'L COMM. OF THE RED CROSS, DRAFT RULES FOR THE LIMITATION OF THE DANGERS INCURRED BY THE CIVILIAN POPULATION IN TIME OF WAR (1956) [hereinafter ICRC DRAFT RULES].
[20] Protocol Additional to the Geneva Conventions of Aug. 12, 1949 and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), art. 51(2)–(3), *adopted* June 8, 1977, 1125 U.N.T.S 3 [hereinafter AP I]; Protocol Additional to the Geneva Conventions of Aug. 12 1949 and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), art. 13(3), *adopted* June 8, 1977, 1125 U.N.T.S 609 [hereinafter AP II].

fighting happens within a country, like between a government and a rebel group.[21] Articles 50 and 51 of Protocol I were particularly significant, defining "civilian" and outlining various actions from which civilians should be protected.[22]

If you want to see where principles and norms protecting civilians are codified today, you need to look at treaties like the 1949 Geneva Conventions and their 1977 Additional Protocols, as well as a thing called customary international law, which are part of the broader body of laws and customs that govern armed conflicts.[23] Article 48 of Additional Protocol I sums it up nicely, emphasizing that all parties in a conflict must "distinguish between the civilian population and combatants" and direct their operations only against military objectives.[24]

Rulemaking took a digital turn between 2010 and 2013. The concept of DPH in cyberspace, among many other aspects of "cyber warfare," was examined by a group of experts at the NATO Cooperative Cyber Defence Centre of Excellence.[25] The result of their work was the 2013 *Tallinn Manual* on the International Law Applicable to Cyber Warfare.[26] This groundbreaking document tackled the complex world of cyber warfare and attempted to apply existing international law to this new frontier.[27] The Department of Defense (DoD) dipped its toe into the digital pond when it published its *Law of War Manual* in 2015 to reflect "sound legal positions based on relevant authoritative sources of the law."[28]

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[21] TALLINN MANUAL 2.0 ON THE INTERNATIONAL LAW APPLICABLE TO CYBER OPERATIONS 386 (Michael N. Schmitt & Liis Vihul eds., 2017) [hereinafter TALLINN MANUAL 2.0] (discussing different schools of thought on the scope of non-international armed conflict).
[22] AP I, *supra* note 20, art. 50, 51(2)–(3) ("Civilians shall enjoy the protection afforded by this Section, unless and for such time as they take a direct part in hostilities.").
[23] *See* JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW: VOLUME I, RULES, 19–24 (2005) [hereinafter IHL RULES]; *see* John B. Bellinger, *Unlawful Enemy Combatants*, DIG. U.S. PRAC. INT'L L. 911, 915–16 (2007) ("While we agree that there is a general principle of international law that civilians lose their immunity from attack when they engage in hostilities, we disagree with the contention that the provision as drafted in AP I is customary international law."); *see also* Michael J. Matheson, *Remarks on Session One: The United States Position on the Relation of Customary International Law to the 1977 Protocols Additional to the 1949 Geneva Conventions*, 2 AM. U. J. INT'L L. & POL. 419 (1987).
[24] AP I, *supra* note 20, art. 48.
[25] *About Us*, NATO CCDCOE, https://ccdcoe.org/about-us/ (last visited May 1, 2023).
[26] TALLINN MANUAL ON THE INTERNATIONAL LAW APPLICABLE TO CYBER OPERATIONS (Michael N. Schmitt ed., 2013).
[27] *See* Harold H. Koh, *International Law in Cyberspace*, 54 HARV. INT'L. L.J. 1, 3 (2012) ("But the United States has made clear our view that established principles of international law *do* apply in cyberspace."); *see also* Michael N. Schmitt, *International Law in Cyberspace: The Koh Speech and Tallinn Manual Juxtaposed*, 54 HARV. INT'L. L.J. 13, 15 (2012).
[28] U.S. DEP'T OF DEF., LAW OF WAR MANUAL § 1.1.1 (2016) [hereinafter DOD LAW OF WAR MANUAL] ("Although the preparation of this Manual has benefited from the participation of lawyers from the Department of State and the Department of Justice, this Manual does not necessarily reflect

In addition to setting out a guide to commanders for when civilians are considered to have joined the fight, it defined "cyberspace" as an "operational domain" where the armed forces must be able to secure, operate, and defend, just like land, sea, air, and space.[29]

But as countries started to accept that traditional law of war rules applying to the physical world also cover what happens online, more questions and disagreements came up and the rules needed an update.[30] Enter the *Tallinn Manual* 2.0, released in 2017, which expanded and updated the original work.[31] The *Tallinn Manual* concluded that, just like in the physical world, civilians in cyberspace "enjoy protection against attack unless and for such time as they directly participate in hostilities."[32] In other words, if you're a civilian hacker who decides to join the digital battlefield, you might find yourself losing those protections and getting shot. From the Old Testament to the 21st-century digital realm, the protection of innocent civilians has come a long way. While the basic principle of not harming non-combatants remains the same, there is a rich history of how the protection of innocents in times of conflict has evolved to adapt to the ever-changing landscape of warfare.

B. System Update for the Old Rulebook

When the rules were first drawn up, the notion of war consisted only of soldiers marching into battle, then it became tanks rumbling through the battlefield and planes soaring overhead. Civilians could get involved, but the amount of damage they could cause was limited to smaller weapons like Molotov Cocktails or Improvised Explosive Devices (IEDs). Jump ahead to today, and we

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the views of any other department or agency of the U.S. Government or the views of the U.S. Government as a whole.").

[29] *See* SUMMARY OF THE 2018 NATIONAL DEFENSE STRATEGY OF THE UNITED STATES OF AMERICA, 3, https://bit.ly/3v4xsOe (last visited May 1, 2023) ("Today, every domain is contested—air, land, sea, space, and cyberspace"); JOINT CHIEFS OF STAFF, JOINT PUBLICATION 3-12 (R), CYBERSPACE OPERATIONS GL-4 (Feb. 5, 2013) (defining cyberspace as "[a] global domain within the information environment consisting of the interdependent networks of information technology infrastructures and resident data, including the Internet, telecommunications networks, computer systems, and embedded processors and controllers.").

[30] *Compare* Michael Schmitt & Liis Vihul, *International Cyber Law Politicized: The UN GGE's Failure to Advance Cyber Norms*, JUST SEC. (June 30, 2017), https://bit.ly/41tHYL0 (characterizing the rejection of the final report's proposed text by a small number of States that includes Cuba, Russia, and China, as "counter-productive and irresponsible"), *with* DOD LAW OF WAR MANUAL, *supra* note 28, § 16.1; Gary P. Corn, *Cyber National Security: Navigating Gray-Zone Challenges in and Through Cyberspace*, *in* 1 LIEBER SERIES VOL. 1 COMPLEX BATTLESPACES: THE LAW OF ARMED CONFLICT AND THE DYNAMICS OF MODERN WARFARE 345, 399–400 (Ford & Williams eds., 2019).

[31] *See* TALLINN MANUAL 2.0, *supra* note 21, at 375.

[32] *Id.* at 428; *see also* AP I, *supra* note 20, art. 51(3).

have a new player in town: the cyber domain. With the evolution of technology, warfare has entered an era where typing on a keyboard can be as destructive as dropping bombs.[33] While civilians getting into the mix of warfare is nothing new and existed way before anyone knew what a ".com" was, barriers that once made it hard for civilians to participate in war have disappeared.[34] After all, it's far easier to possess a computer with an active internet connection than a BGM-109 Tomahawk Land Attack Cruise Missile.[35] To put it simply, it's like a door that was once locked is now wide open, and anyone can walk through it.[36]

As traditional war tactics shift, we face new challenges in determining when civilians, who are now capable of operating in and through cyberspace, are directly involved in conflict. Think of it like you were playing a game of chess, but suddenly the pieces could move in ways they never could before. You'd have to figure out new strategies to keep up with the changing game. In response to this new reality, some big thinkers in the global community persisted in their efforts to establish a legal framework for addressing civilians' involvement in cyber hostilities. It was time for a system update for the old rulebook in the digital age.

But governments are not making it any easier.[37] In addition to independent civilians taking part in cyber hostilities, countries are incorporating more civilians into their military cyber forces due to their technical expertise and access to software and equipment.[38] These civilians are now directly involved in conflicts, often performing mission-critical support functions for modern armed forces.[39] It's like adding a Michael Jordan to your intermural recreational

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[33] *See* Colton Matheson, *From Munitions to Malware: A Comparative Analysis of Civilian Targetability in Cyber Conflict*, 7 J.L. & CYBER WARFARE 29 (2019).
[34] *See* Susan W. Brenner & Leo L. Clarke, *Civilians in Cyberwarfare: Conscripts*, 43 VAND. J. TRANSNAT'L L. 1011 (2010) (explaining how civilians can be constitutionally conscripted to participate in cyberwarfare).
[35] *See* Roger W. Barnett, *A Different Kettle of Fish: Computer Network Attack*, 76 J. INT'L. L. STUD. 21, 22 (2002).
[36] *See* MARCO ROSCINI, CYBER OPERATIONS AND THE USE OF FORCE IN INTERNATIONAL LAW 202 (2014) (allowing civilians to easily conduct cyber operations due to "low cost and ease of access to technology").
[37] *See generally* Laura A. Dickinson, *Military Lawyers, Private Contractors, and the Problem of International Law Compliance*, 42 N.Y.U. J. INT'L L. & POL. 355–88 (2010) (exploring the increasingly inherent military functions of private contractors); Heather Harrison Dinniss, *Cyber Warriors, Patriotic Hackers and the Laws of War*, *in* INTERNATIONAL HUMANITARIAN LAW & THE CHANGING TECHNOLOGY OF WAR 269 (Dan Saxon ed., 2013) (noting the increasing involvement of civilian contractors in cyber hostilities).
[38] *See* Wenger & Mason, *supra* note 2, at 835–52; SUSAN BRENNER, CYBERTHREATS, THE EMERGING FAULT LINES OF THE NATION STATE 197 (2009) ("[I]ntegration of civilians into military efforts can create uncertainty as to whether someone is acting as a 'civilian' (noncombatant) or as a military actor (combatant).").
[39] *See* KING, *supra* note 1, at 175–77.

basketball team. Sure, you'll win the championship that year, but when your team rolls up in a double decker team bus wearing special edition Nike's, no one will think you are there to play league ball. The integration of civilians into military efforts makes it confusing as to whether someone is wearing their "civilian" or "military" hat while they are tapping away at their keyboards.[40]

Then, there are the "patriotic hackers"—civilians with a keyboard and a cause who hack for their country.[41] They give countries a way to project power without taking the blame. It's having your cake and eating it too. Think of the 2007 cyberattacks in Estonia, carried out by a small group of Russian activists from the pro-Kremlin youth group, Nashi.[42] These patriotic hackers acted like digital "little green men," sticking it to Estonia while Russia played innocent.[43] This whole setup is like the old naval practice of using privateers—like professional pirates who plundered for the government—back in the 17th century.[44] Cyber proxies, like privateers, acted as intermediaries with minimal political or legal consequences for the countries they served.[45]

But there was a dark side to this digital swashbuckling: the "civilianization of armed conflict."[46] This alarming trend is putting ordinary folks at greater risk during war. Just look at Russia's aggression in Ukraine, where civilian hackers served as proxies in cyber operations.[47] And it's not just a Russian

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[40] *See* Cordula Droege, *Get Off My Cloud: Cyber Warfare, International Humanitarian Law, and the Protection of Civilians*, 94 INT'L REV. RED CROSS 533, 539 (2012) ("[I]t is to a large extent impossible to differentiate between purely civilian and purely military computer infrastructure.").
[41] *See* Mark Manion & Abby Goodrum, *Terrorism or Civil Disobedience: Toward a Hacktivist Ethic*, 30 COMPUTERS & SOC'Y 14 (2000).
[42] *See* Christian Lowe, *Kremlin Loyalist Says Launched Estonia Cyber-attack*, REUTERS (Mar. 13, 2009), https://reut.rs/48qNXSO ; Michael N. Schmitt, *Cyber Operations and the Jus Ad Bellum Revisited*, 56 VILL. L. REV. 569, 570, 594–95 (2011) (reviewing the 2007 cyber operations launched in Estonia); *see also* Paulo Shakarian, *The 2008 Russian Cyber Campaign Against Georgia*, 91 MIL. REV. 63 (2011) (describing the 2008 cyber-attacks in connection with the Russia-Georgia conflict).
[43] *See* Neil Buckley, Roman Olearchyk, Andrew Jack & Kathrin Hille, *Ukraine's 'little green men' Carefully Mask Their Identity*, FIN. TIMES (Apr. 16, 2014), https://on.ft.com/3RQMjVt ; Damien McGuinness, *How a Cyber Attack Transformed Estonia*, BBC NEWS (Apr. 27, 2017), https://bbc.in/4auwdYQ .
[44] *See* Tim Maurer, *Cyber Proxies and the Crisis in Ukraine*, *in* CYBER WAR IN PERSPECTIVE: RUSSIAN AGGRESSION AGAINST UKRAINE 79, 81 (Kenneth Geers ed., 2015), https://bit.ly/3v8Z2db ; Tamsin Phillipa Paige et al., *Pirates of the Cyber Seas: Are State-Sponsored Hackers Modern-Day Privateers?*, 4 L. TECH. & HUMANS 49 (2022).
[45] *But see* CHRISTOPHER M. KESSINGER, *Hitting the Cyber Marque: Issuing a Cyber Letter of Marque to Combat Digital Threats*, 2013 ARMY LAW. 4 (2013) (identifying the political improbability of applying a letter of marque concept to the cyber arena).
[46] *See* Wegner & Mason, *supra* note 2, at 836; David Wallace et al., *Direct Participation in Hostilities in the Age of Cyber: Exploring the Fault Lines*, 12 HARV. NAT'L SEC. J. 164, 167 (2021).
[47] *See* Allison Quinn, *Vladimir Putin Sent Russian Mercenaries to 'Fight in Syria and Ukraine,'* THE TELEGRAPH (Mar. 30, 2016, 7:05 PM) https://bit.ly/484iypL; Michael Connell & Sarah Vogler,

thing—countries have long used proxies in both old-school and cyber warfare to keep their hands clean and maintain "plausible deniability."[48] Unfortunately, this game isn't as fun for civilians who get caught in the crossfire with innocents getting killed and injured at much higher rates than combatants in modern armed conflict.[49] As the technology landscape of warfare evolves, the danger only grows and understanding who is a "civilian" in an increasingly complex digital world is a vital step in protecting civilians.

C. Who's in the "Civilian" Club

Imagine an action-packed blockbuster movie where the hero's mission is to save the day while avoiding harm to innocent bystanders caught in the crossfire of an epic battle. In reality, keeping non-combatants safe during times of conflict is at the heart of the law of war, which sets clear boundaries for our hero—don't target civilians. A key concept in the law of war is the principle of distinction, which puts our hero in the middle of a chaotic battle scene and requires her to separate civilians from legitimate targets like military combatants in a high-stakes game of "Where's Waldo?"[50] Combatants like our hero, from the rookie soldier to the seasoned commander, have to make split-second decisions on who is a civilian and who is not.[51] The principle of distinction comes with some ground rules. First and foremost, civilians are off-limits.[52] No aiming weapons at them or

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Russia's Approach to Cyber Warfare, CNA ANALYSIS SOLUTIONS 19–22 (Mar. 24, 2017), https://bit.ly/3v8Zecp; Andrew E. Kramer, *How Russia Recruited Elite Hackers for Its Cyberwar*, N.Y. TIMES (Dec. 29, 2016), https://nyti.ms/3th0RnP (last visited May 1, 2023); Lauren S. Cerulus, *How Ukraine Became a Test Bed for Cyberweaponry*, POLITICO (Feb. 14, 2019), https://politi.co/476p4e7; Zak Doffman, *Russia Unleashes New Weapons In Its 'Cyber Attack Testing Ground': Report*, FORBES (Feb. 5, 2020), https://bit.ly/471yzeR.

[48] *See* David Blair, *Estonia Recruits Volunteer Army of 'Cyber Warriors'*, THE TELEGRAPH (Apr. 26, 2015), https://bit.ly/484iK8t; Jordan Brunner, *Iran Has Built an Army of Cyber-Proxies*, THE TOWER (Aug. 2015), https://bit.ly/3TDdsMV.

[49] *See* Wallace et al., *supra* note 46, at 175; *see, e.g.*, Adam Roberts, *Lives and Statistics: Are 90% of War Victims Civilians?*, 52 SURVIVAL 115, 118 (2010); Neta C. Crawford, *Human Cost of the Post-9/11 Wars: Lethality and the Need for Transparency*, COSTS OF WAR (Nov. 2018), https://bit.ly/48oVvFN; Mujib Mashal, *Afghan and U.S. Forces Blamed for Killing More Civilians This Year Than Taliban Have*, N.Y. TIMES (July 30, 2019), https://nyti.ms/479HDOy; Murtaza Hussain, *It's Time for America to Reckon with the Staggering Death Toll of the Post-9/11 Wars*, THE INTERCEPT (Nov. 19, 2018), https://bit.ly/3GOpawo.

[50] MARTIN HANDFORD, WHERE'S WALDO? (1987); *see also* GARY D. SOLIS, THE LAW OF ARMED CONFLICT: INTERNATIONAL HUMANITARIAN LAW IN WAR (2d ed. 2016).

[51] *See* Corn, *supra* note 30, at 365 (asserting that uncertainty or ambiguity does not relieve the commander or their lawyers from responsibility).

[52] *See* IHL RULES, *supra* note 23, at 3 (restricting attack to "only be directed against combatants" and "must not be directed against civilians."); *see also* AP I, *supra* note 20, art. 48; AP II, *supra* note 20, art. 13(1) ("The civilian population and individual civilians shall enjoy general protections against the dangers arising from military operations.").

trying to scare them with acts of violence.[53] Second, avoid attacks that cannot tell a friendly from foe.[54] And third, when planning an attack that could unintentionally harm civilians or their property, the expected military advantage must outweigh the potential harm caused.[55] This idea is known as proportionality.[56]

To illustrate, let's consider our hero is tasked with rescuing a comrade held captive in a heavily guarded enemy compound. While planning the mission, she realizes that a daytime direct assault on the compound would likely cause significant civilian casualties due to its location in a densely populated area. In accordance with the principles of distinction and proportionality, she opts for a stealthier approach, minimizing potential harm to civilians.

During the rescue mission our hero is caught in the heat of an intense conflict and encounters a group of people whose status is unclear—some may be armed militants, while others may be innocent civilians. Struggling to accomplish her mission while upholding the principle of distinction and keeping civilians safe, how does she know who is a civilian and who is not? The law of war offers some guidance, but not a crystal-clear definition of a "civilian."[57] Instead, it tells us that if someone does not fit into the "combatant" mold, they are considered a civilian.[58] And when in doubt, treat them as a civilian.[59] In the rescue mission, our hero must exercise caution and make quick decisions based on available information. If she has doubts about someone's combatant status, she must presume they are a civilian and treat them accordingly.

To better grasp the civilian concept and its significance in the law of war, a little history lesson is in order. The commentary to the 1949 Geneva

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[53] *See* AP I, *supra* note 20, art. 51(2).
[54] *See* Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. Rep. 226, 257 (July 8, 1996) ("States must never make civilians the object of attack and must consequently never use weapons that are incapable of distinguishing between civilian and military targets.").
[55] *See* IHL RULES, *supra* note 19, at 46–50.
[56] *See* IAN HENDERSON, THE CONTEMPORARY LAW OF TARGETING 7 (2009).
[57] *See* INT'L COMM. RED CROSS, COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JULY 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, ¶ 1911 (1987) (Sandoz, Swinarski, Zimmerman eds., 1987) [hereinafter AP COMMENTARY] ("[I]t is essential to have a clear definition of each of these categories.").
[58] Ido Kilovaty, *ICRC, NATO and the U.S.—Direct Participation in Hacktivities—Targeting Private Contractors and Civilians in Cyberspace under International Humanitarian Law*, 15 DUKE L. & TECH. REV. 1 (2016–2017).
[59] *See* AP I, *supra* note 20, art. 50 ("In case of doubt whether a person is a civilian, that person shall be considered to be a civilian."); Geneva Convention Relative to the Treatment of Prisoners of War, Article 4(4), (5), Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter GC III] (including journalists and others that may accompany the armed force as those who maintain their civilian status, but are afforded prisoner-of-war status if captured).

Conventions—extra explanations on the set of rules that protect people in times of armed conflict—highlights the need for a clear definition of civilian and military personnel.[60] However, the term "civilian" remained undefined. Instead, Additional Protocol I describes a civilian as anyone who doesn't fit into one of the specific categories of persons outlined in the Conventions.[61]

Adding clarity to these labels, the ICRC issued Draft Rules for the Limitation of the Dangers Incurred by the Civilian Population in Time of War in 1956.[62] Article 4 of the Draft Rules defines civilians as "all persons not belonging to one or other of the following categories: (a) Members of the armed forces, or of their auxiliary or complementary organizations. (b) Persons who do not belong to the forces referred to above, but nevertheless take part in the fighting."[63] These legal agreements list out some example of combatants including: members of the armed forces of a party to the conflict, members of militias and organized resistance movements belonging to a party to the conflict, members of regular armed forces belonging to governments not recognized by the detaining power, and inhabitants of non-occupied territory who take up arms to fight an invading force.[64]

In international armed conflicts between two countries, individuals are either combatants or civilians.[65] Combatants can be targeted in war, but are immune from criminal prosecution under domestic law for the harm that they may cause while fighting.[66] Civilians, on the other hand, are guaranteed their life, health, dignity, and personal liberty, but face prosecution and punishment as a criminal under domestic law for the harm they cause.[67] In non-international armed

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[60] *See* AP COMMENTARY, *supra* note 57, ¶¶ 1942–45.
[61] *See* AP I, *supra* note 20, art. 43, 50; GC III, *supra* note 59, art. 4(A).
[62] *See* ICRC DRAFT RULES, *supra* note 23.
[63] *Id.* art. 4.
[64] *See* AP I, *supra* note 20, art. 43, 50; *see also* GC III, *supra* note 59, art. 4(A).
[65] *See* AP I, *supra* note 20, art. 43(2) (defining combatants generally as "members of the armed forces of a Party to a conflict," and giving them "the right to participate directly in hostilities"); INT'L & OPERATIONAL L. DEP'T, THE JUDGE ADVOC. GEN.'S LEGAL CTR. & SCH., U.S. ARMY, OPERATIONAL LAW HANDBOOK 16 (2016) ("[C]ombatants are military personnel lawfully engaging in hostilities in an armed conflict on behalf of a party to the conflict . . . . [They] also are privileged belligerents, i.e., authorized to use force against the enemy on behalf of the State.").
[66] *See* INT'L COMM. OF THE RED CROSS, INTERPRETIVE GUIDANCE ON THE NOTION OF DIRECT PARTICIPATION IN HOSTILITIES UNDER INTERNATIONAL HUMANITARIAN LAW (Nils Melzer ed., 2009), 83–85, https://bit.ly/4768tHw (May 2009) [hereinafter ICRC INTERPRETIVE GUIDANCE].
[67] *See* YORAM DINSTEIN, THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT 50 (4d ed. 2022); MICHAEL N. SCHMITT, CHARLES H.B. GARRAWAY, & YORAM DINSTEIN, THE MANUAL ON THE LAW OF NON-INTERNATIONAL ARMED CONFLICT WITH COMMENTARY 41 (International Institute of Humanitarian Law 2006); Kenneth Watkin, *Warriors Without Rights? Combatants, Unprivileged Belligerents, and the Struggle over Legitimacy*, HARV. PROGRAM ON HUMANITARIAN POL'Y & CONFLICT RES. (OCCASIONAL PAPER SERIES NO. 2) 1, 12–

conflicts, which involve violence and fighting between different groups sometimes within a country's borders, the situation becomes more complex.[68] The law does not clarify the meaning of "civilian," and combatant status does not apply.[69] However, the notion of "civilian" is still recognized.[70] This is evident in the provisions of Part IV of Additional Protocol II, which protect individual civilians and the civilian population during such conflicts.[71] The treaty uses "parties to the conflict" to include both the state's armed forces and non-state organized armed groups, and they are all mutually exclusive categories.[72] This means that protections for civilians do not extend to members of armed forces or organized armed groups.[73]

Essentially, if you are part of an armed group or the military, you are not a civilian, and the protections offered by the law of war to civilians do not apply to you. It is important to remember that civilians do not necessarily need to be holding a white flag or wearing a special badge to be considered off-limits.[74] Our hero must navigate this complex web of rules and obligations, striving to protect civilians while simultaneously achieving her mission objectives.

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13 (Winter 2005) (recognizing a combatant's immunity "for killing carried out in accordance with the law."); Al Baker, *An 'Iceberg' of Unseen Crimes: Many Cyber Offenses Go Unreported*, N.Y. TIMES (Feb. 5, 2018), https://nyti.ms/3vdPVrq.

[68] *See* Michael N. Schmitt, *The Status of Opposition Fighters in a Non-International Armed Conflict*, 88 INT'L L. STUD. 119, 120 (2012) [hereinafter Schmitt, *Status*] ("Unfortunately, Additional Protocol II, in contrast to its international armed conflict counterpart, offers no definition of the term 'civilian.'").

[69] *But see* SOLIS, *supra* note 50, at 169 ("On the battlefield, individual status may determine your life, in a literal sense. It determines if you are a lawful target or not; a POW or a spy, a combatant or a noncombatant. On the battlefield, no one is without a LOAC status . . . ."); Sean Watts, *Combatant Status and Computer Network Attack*, 50 VA. J. INT'L L. 391, 414–23 (2010).

[70] *But see* DOD LAW OF WAR MANUAL, *supra* note 28, § 4.8.1.5 (defining civilian as "a member of the civilian population, i.e., a person who is neither part of nor associated with an armed force or group, nor otherwise engaging in hostilities."); U.K. MINISTRY OF DEF., THE JOINT SERVICE MANUAL OF THE LAW OF ARMED CONFLICT § 5.3.1 (2004) [hereinafter U.K. MANUAL] (defining civilians as "persons who are not members of the armed forces.").

[71] *See* AP II, *supra* note 20, art. 13.

[72] *Id.* art. 1(1); AP COMMENTARY, *supra* note 57, ¶ 4441 (excluding armed forces or armed groups from protections); *see also* Sean Watts, *Present and Future Conceptions of the Status of Government Forces in Non-International Armed Conflict*, 88 INT'L L. STUD. 145 (2012).

[73] *See* ICRC INTERPRETIVE GUIDANCE, *supra* note 66, at 28; DOD LAW OF WAR MANUAL, *supra* note 28, § 5.8.2.1; Stephen Pomper, *Toward a Limited Consensus on the Loss of Civilian Immunity in Non-International Armed Conflict: Making Progress Through Practice*, 88 INT'L L. STUD. 181, 193 n.22 (2012); Schmitt, *Status*, *supra* note 68, at 127.

[74] *See* SOLIS, *supra* note 50, at 251–57.

D. Getting Kicked Out of the "Civilian" Club

Civilians have always contributed to war efforts, like backstage crewmembers at a rock concert. So long as their support is indirect and away from the mainstage of the battlefield, they maintain their protected status under the law of war. However, if they pick up arms and join the fight, they risk losing that protection and might be engaged as combatants.[75] This tricky area of the law of war is where the concept of "direct participation in hostilities" comes into play, and it's as complex as a Jimi Hendrix guitar solo.[76]

The objective behind this principle is to protect civilians from the direct attacks of armed forces, like a digital force field in a sci-fi flick. If civilians don't directly participate in hostilities, they're considered non-combatants and should not be targeted.[77] This core principle of the law of war has been shaped by historical documents and publicists of international law.[78] The 1949 Geneva Conventions, like the original Star Wars trilogy, do not specifically mention DPH. But the ICRC persisted, and like a long-awaited sequel, DPH was finally codified in the 1977 Additional Protocols.[79] While the protection of civilians is an important principle in international law, it is not absolute. Civilians only enjoy this protection as long as they don't directly participate in hostilities.[80]

But knowing when a civilian's actions cross the line into DPH is a tough call. It's obvious when a civilian is shooting at enemy forces or planting an improvised explosive device.[81] But other situations are less clear-cut, like when a

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[75] *See, e.g.*, DOD LAW OF WAR MANUAL, *supra* note 28, § 5.8.3.1 (listing examples where an individual is taking a direct part in hostilities); *see also* Pomper, *supra* note 73, at 190.
[76] *See* Wayne Pernu, *Star Spangled Banner–Jimi Hendrix at Woodstock: Anthem of a Generation*, https://bit.ly/3GTr4vP (Aug. 24, 2021) ("As a summing up of one of the most volatile eras in the nation's history, [Jimi Hendrix's] adaptation of our national anthem has entered our cultural lexicon as perhaps the most powerful musical touchstone of the era, a zeitgeist of expressiveness."); CHARLES SHAAR MURRAY, CROSSTOWN TRAFFIC 194 (1989) ("Defiant and courageous in its ambition, deadly serious in its intent and passionately inspired in its execution, the Woodstock performance of 'The Star Spangled Banner' is Hendrix's key to the kingdom.").
[77] *See* DOD LAW OF WAR MANUAL, *supra* note 28, § 5.4.3.2 (stating the U.S. position that "[u]nder customary international law, no legal presumption of civilian status exists for persons or objects, nor is there any rule inhibiting commanders or other military personnel from acting based on the information available to him or her in doubtful cases.").
[78] Christopher Greenwood, "Scope of Application of Humanitarian Law," *in* THE HANDBOOK OF INTERNATIONAL HUMANITARIAN LAW 37, 48 (Dieter Fleck ed., 2d ed. 2009).
[79] *See* AP I, *supra* note 20, art. 51(3); AP II, *supra* note 20, art. 13(3).
[80] *See* AP I, *supra* note 20, art. 51(3); DINSTEIN, *supra* note 67, at 121 (noting that "[i]f civilians directly participate in hostilities, and for such time as they do so, they are assimilated to combatants by being susceptible to attack.").
[81] *Compare* TALLINN MANUAL 2.0, *supra* note 21, at 121 (affirming the causal link for someone who plants and detonates an improvised explosive device, or a cyber equivalent), *with* ICRC

civilian only drives an ammunition vehicle during an armed conflict.[82] That's where the ICRC comes in with their *Interpretive Guidance*, a document often used as the go-to framework for making this call.[83] It's like the instruction manual for figuring out DPH, but the conclusions drawn from this guidance can be controversial and have faced criticism from various academic and official government perspectives.[84] In the end, the *Interpretive Guidance* is like sheet music for a rock concert—sometimes it provides clarity, and other times it's open to interpretation and spontaneous drum solos.

One of the main issues with the concept of DPH is that the definition of what constitutes direct participation is not universally agreed upon, like different fans arguing about the all-time best Beatles album.[85] Different actors, like military commanders and legal experts, may have different interpretations of what actions fall under DPH, leading to potential disagreements in the heat of the moment.[86] This uncertainty can make it challenging for both civilians and armed forces to navigate the battlefield, especially online.

Moreover, the concept of DPH raises ethical and moral questions about the value of human life and the responsibility of civilians during armed conflicts.[87] While it is essential to protect civilians from the violence of war, it is equally important to hold individuals accountable for their actions when they willingly engage in hostilities.[88] While holding individual bad actors who choose not to

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INTERPRETIVE GUIDANCE, *supra* note 66 (contrasting planting with someone who assembles, stores, purchases, or smuggles an improvised explosive device).

[82] *See* DOD LAW OF WAR MANUAL, *supra* note 28, § 5.8.3.2.

[83] *See* Michael N. Schmitt, *The Interpretive Guidance on the Notion of Direct Participation in Hostilities: A Critical Analysis*, 1 HARV. NAT'L SEC. J. 5 (May 5, 2010) [hereinafter Schmitt, *Analysis*].

[84] *See* ICRC INTERPRETIVE GUIDANCE, *supra* note 66; *see also* Pomper, *supra* note 73, at 186 ("[The United States] made clear that it did not regard the study as an authoritative statement of law."); *Al-Bihani v. Obama*, 590 F.3d 866, 885 (D.C. Cir. 2010) (Williams, J., concurring) ("The work itself explicitly disclaims that it should be read to have the force of law . . . . Even to the extent that Al Bihani's reading of the Guidance is correct, then, the best he can do is suggest that we should follow it on the basis of its persuasive force.").

[85] *See, e.g.*, THE BEATLES, SGT. PEPPER'S LONELY HEARTS CLUB BAND (Parlophone Records 1967).

[86] *See generally* Peter Pascucci, *Distinction and Proportionality in Cyber War: Virtual Problems with a Real Solution*, 26 MINN. J. INT'L L. 419 (2017) (relying on the subjective decision-making of military commanders in the absence of thresholds of reliability of intelligence or certainty standards).

[87] *See* Brian J. Bill, *The Rendulic "Rule": Military Necessity, Commander's Knowledge, and Methods of Warfare*, 2009 Y.B. INT'L HUMANITARIAN L. 119, 128 ("Human life is no less valuable in war than in peace, but the need to resolve the contention between states through recourse to armed conflict has been permitted to outweigh that value in certain circumstances. In other circumstances . . . the balance remains tipped towards humanitarian concerns.").

[88] Geoffrey S. Corn et al., *Belligerent Targeting and the Invalidity of a Least Harmful Means Rule*, 89 INT'L L. STUD. 536, 569 (2013).

follow the laws of war accountable for their actions can be a strong motivation, it is important to remember that confirming status of lawful targets is the goal. The concept of DPH aims to strike a balance between these two objectives, but the lack of a universally accepted definition leaves room for debate and even potential misuse.[89] While the concept of DPH is undeniably complicated, it plays a vital role in protecting civilians and upholding law of war principles during times of conflict. While it's hard to draw a curtain between "Civilian" and "Target," it's essential to know when to stay behind the scenes and when to take center stage.

III. CHEAT CODE FOR DPH: ICRC'S INTERPRETIVE GUIDANCE

So, you've heard of the term "direct participation in hostilities" (DPH) and are curious about what it means, huh? Well, civilians are usually protected from being attacked during armed conflicts, but sometimes they decide to jump into the mix. When this happens, they are said to be directly participating in hostilities and, unfortunately for them, can become fair game for military attacks.

Now, you might be wondering, "Where do I start to decide if a civilian is directly participating in hostilities?" Great question! Enter the International Committee of the Red Cross (ICRC), an organization that, among other things, tries to make sense of this messy situation. They spent years studying the issue and came up with some guidelines, known as the *Interpretive Guidance*, in 2009.[90] The *Interpretive Guidance* basically says, "Hey, not everything a civilian does during an armed conflict is considered DPH." So, they provided three criteria to help figure out when civilians are directly participating in hostilities.

According to the ICRC, for a civilian's act to constitute DPH, it must meet all three cumulative requirements, often simplified as: (1) Threshold of harm; (2) Direct causation; and (3) Belligerent nexus.[91] First, the act has to be likely to cause some real damage. We're not talking about minor inconveniences here, like blocking a military parking spot. Instead, think along the lines of actions that hurt military operations, cause death, injury, or destroy stuff that's supposed to be protected. Second, there's got to be a clear link between the civilian's action and the harm it causes. For example, if a drone flies too close to an enemy radar and triggers an anti-aircraft missile, the drone pilot cannot be held responsible for the resulting explosion when the missile hits the ground. The link just isn't direct

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[89] *See* YORAM DINSTEIN, THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT 16 (1d ed. 2004) ("[The laws of war are] predicated on a subtle equilibrium between two diametrically opposed impulses: military necessity and humanitarian considerations.").
[90] *See* INT'L COMM. OF THE RED CROSS, *Overview of The ICRC's Expert Process (2003-2008)*, https://bit.ly/3GQA4lj (last visited May 1, 2023).
[91] ICRC INTERPRETIVE GUIDANCE, *supra* note 66, at 6, 13.

enough. Third, the civilian's action needs to support one side of the conflict and hurt the other. If someone's actions are unrelated or purely accidental or aren't meant to favor any side, it doesn't count as DPH.

The *Interpretive Guidance* is kind of like a cheat code for where to start in understanding when civilians are considered to be directly participating in hostilities, but is not universally accepted.[92] For example, the U.S. government takes a broader view on what constitutes DPH.[93] While the *Interpretive Guidance* has been influential as a starting point in shaping discussions around the concept of DPH, it is crucial to remember that the *Interpretive Guidance* is not without its critics, and only following these rules is no guarantee you won't get shot.[94]

Let's explore the *Interpretive Guidance* in the context of a DPH security system, as seen in heist movies. In the heist, thieves need to bypass a sophisticated security system to steal the coveted secrets in the vault. The DPH security system is designed with three layers of protection, and only when all three criteria are met will the alarm turn off, causing the thief to lose their "civilian immunity" and become fair game for attacks. If the thieves manage to open the safe without triggering at least one alarm, then they're not considered directly participating in hostilities, even if they get the loot.

A. Threshold of Harm

The "Threshold of Harm" serves as the layer of the DPH security system that determines when civilians are considered to be directly participating in hostilities, based on whether their actions do enough damage to trigger the alarm.

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[92] *See* Kenneth Watkin, *Opportunity Lost: Organized Armed Groups and the ICRC 'Direct Participation in Hostilities' Interpretive Guidance*, 42 N.Y.U. J. INT'L L. & POL. 641–93 (2010); Michael N. Schmitt, *Deconstructing Direct Participation in Hostilities: The Constitutive Elements*, 42 N.Y.U. J. INT'L L. & POL. 697 (2010) [hereinafter Schmitt, *Elements*]; William H. Boothby, *"And For Such Time As": The Time Dimension to Direct Participation in Hostilities*, 42 N.Y.U. J. INT'L L. & POL. 741 (2010); W. Hays Parks, *Part IX of the ICRC "Direct Participation in Hostilities" Study: No Mandate, No Expertise, and Legally Incorrect*, 42 N.Y.U. J. INT'L L. & POL. 770 (2010).

[93] *See* NILS MELZER, THIRD EXPERT MEETING ON THE NOTION OF DIRECT PARTICIPATION IN HOSTILITIES: SUMMARY REPORT 35 (2005) ("Since, currently, the qualification of a particular act as direct participation in hostilities often depends on the particular circumstances and the technology or weapons system employed, it is unlikely that an abstract definition of direct participation in hostilities applicable to every situation can be found.").

[94] *See* DOD LAW OF WAR MANUAL, *supra* note 28, § 5.8 (laying out direct participation in hostilities considerations similar to the ICRC's three criteria); U.K. MANUAL *supra* note 70, § 5.3.3; Schmitt, *Elements*, *supra* note 92, at 738 ("Of the three major foci of the notion of direct participation, the constitutive elements of direct participation set forth in the Interpretive Guidance prove the most satisfactory."); Pomper, *supra* note 73, at 190 (suggesting that any decision-maker making a direct participation in hostilities analysis must take into account nature of harm, causation, and nexus).

To help us draw the line for an act that has reached the threshold of harm and triggered the alarm, the *Interpretive Guidance* offers two tests.

First, the act must be likely to cause death, injury, or destruction on persons or objects that should be safe from direct attack.[95] This scenario is comparable to a member of the heist's crew planting a bomb to destroy a vault door or kill the guards standing watch. Each case is assessed objectively, meaning it should be based on reasonable expectations and not just the intent of the actor. The objective likelihood of death, injury, or destruction is pretty clear, but what about affecting operations or capacity? Well, that's the trickier part.

Second, the act must be objectively likely to adversely affect the military operations or capacity of a party to the armed conflict.[96] In other words, the action must have a significant negative impact on the enemy's ability to fight. It's like the member of the heist's crew back in the van who remotely disables security cameras to prevent the guards from seeing their moves. They aren't there, but their actions have a direct effect. Again, objective assessment is key.

According to the ICRC, this threshold is crossed when a civilian's act is expected to cause some military harm, no matter how big or small.[97] But we're not just talking about physical damage here.[98] This harm can also include anything that messes with the targeted party's military operations or capacity.[99] For example, if a civilian sabotages a military vehicle, that is harmful. If they intercept and decode secret messages meant for the enemy, that is harmful too. Even if they jam military communication networks, they have crossed the line.[100] Basically, if it is objectively likely to make life harder for one side's military operations or capacity in an armed conflict, it is probably harmful enough to meet the threshold.[101]

For the ICRC, if the attack does not go after one party's military operations or capacity, it might still trigger the alarm if it is objectively likely to

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[95] *See* SOLIS, *supra* note 50, at 191.
[96] *See id.* at 191–192.
[97] *See* ICRC INTERPRETIVE GUIDANCE, *supra* note 66, at 47.
[98] *See id.* at 48 (recognizing that objective likelihood, even without physical harm, would satisfy the criteria).
[99] *See* ROSCINI, *supra* note 36, at 204.
[100] *See* ICRC INTERPRETIVE GUIDANCE, *supra* note 66, at 48.
[101] *See, e.g.*, David E. Sanger, *Obama Order Sped Up Wave of Cyberattacks Against Iran*, N.Y. TIMES (June 1, 2012), https://nyti.ms/4as520y; Peter Beaumont & Nick Hopkins, *US Was 'Key Player in Cyber-Attacks on Iran Nuclear Programme*, THE GUARDIAN (June 1, 2012), https://bit.ly/3Rx4RbB; Kim Zetter, *How Digital Detectives Deciphered Stuxnet, the Most Menacing Malware in History*, WIRED (July 11, 2011), https://bit.ly/3tty9Qz.

cause death, injury, or destruction.[102] Although it is unlikely that a narrowly tailored individual cyber-attack would cause that kind of damage, it might still be possible with destructive cyber-attacks against critical infrastructure, such as hospitals and power plants.[103]

B. Direct Causation

Now let's turn to the layer of the DPH security system that is triggered when a civilian's actions meet the criteria of "Direct Causation." This layer of the alarm requires a direct causal link between a specific act and the harm likely to result from that act, or from a coordinated military operation of which that act constitutes an integral part.[104] Think of it as the "one-step rule"—the action must be one causal step away from the harm caused.[105]

Imagine the thieves are trying to crack open a safe containing valuable secrets. In the hacker world, this is like trying to break into an enemy's computer system to steal information or plant malware. Let's say the hacker writes a piece of malware, without targeting anyone specific. If the hacker shares this software online without targeting any specific enemy, their actions would not be considered direct participation in hostilities—they haven't triggered the alarm.[106] However, if the hacker is recruited to create a program specifically designed to exploit a distinctive vulnerability in the system of a particular enemy, their actions would be viewed as an integral part of directly causing harm because they enable a specific attack.

It is important to note that direct causation does not mean a civilian's actions need to be the sole cause of harm.[107] Sometimes, several civilian actions work together in collective operations, like a team of hackers in a crowded van, each playing a part in the overall operation performing functions like identifying targets or analyzing tactical intelligence. In these cases, actions might meet the direct causation requirement if they are an integral part of a concrete and coordinated operation.[108]

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[102] *See* ICRC INTERPRETIVE GUIDANCE, *supra* note 66, at 47.
[103] *See* Scott A. Newton, *Can Cyberterrorists Actually Kill People?*, SANS INST. INFOSEC READING ROOM (Jan. 30, 2002), https://bit.ly/3GQOuSl; ROSCINI, *supra* note 36, at 53 ("Physical damage to property, loss of life and injury to persons, then, are never the primary effects of a cyber operation: damage to physical property can only be a secondary effect, while death or injury of persons can be a tertiary effect of a cyber operation.").
[104] *See* ICRC INTERPRETIVE GUIDANCE, *supra* note 66, at 51.
[105] *See id.* at 53.
[106] *See* TALLINN MANUAL 2.0, *supra* note 21, at 565.
[107] *See* ICRC INTERPRETIVE GUIDANCE, *supra* note 66, at 53.
[108] *See id.*

Let's not forget about indirect participation in hostilities, which doesn't make civilians targetable. Indirect participation in hostilities, on the other hand, involves activities that generally support the war effort and war-sustaining activities.[109] For example, if a civilian works in a factory that provides weapons and other goods for a party in an armed conflict, but the factory is not near military operations, that is considered indirect participation.[110] So, while they are indirectly helping their side win the war, there is no direct link to harm.

In today's fast-paced world of cyber operations and remote warfare, civilians can be miles away from the battlefield but still directly participate in hostilities.[111] This is a common feature of modern battlefields, where combatants use mines, booby traps, malware, unmanned aerial vehicles, and long-range missile systems deployed remotely in time or distance, like a puppet masters pulling the strings from behind the scenes, causing chaos without being physically present.[112] So does the "one-step rule" for direct causation still apply if a hacker is a continent away from the target or if the harm occurs long after the initial action?[113]

Direct Causation is all about causal proximity—the connection between the action and the harm—rather than time-related or geographic proximity.[114] So, if the member of the heist's crew accesses a target's computer system to steal valuable information halfway around the world, instead of back in the van, their actions can still be considered direct participation in hostilities due to the causal link, even though they are nowhere near the target. The same goes for temporal proximity.[115] If a hacker plants a piece of code to disable security cameras at a specific time or under certain conditions, the time that passes between planting

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[109] *See* DOD LAW OF WAR MANUAL, *supra* note 28, § 5.8.3.
[110] *See* ICRC INTERPRETIVE GUIDANCE, *supra* note 66, at 53; DOD LAW OF WAR MANUAL, *supra* note 28, § 5.8.3.2. *But see* Shane R. Reeves & Ronald T.P. Alcala, *Five Legal Takeaways from the Syrian War*, HARV. NAT'L SEC. J. ONLINE, 1–2 (Sept. 30, 2019), https://bit.ly/48qnVPS (contrasting "war sustaining" with "war supporting" objects under the United States approach to the law of targeting).
[111] *See* Michael N. Schmitt, *The Law of Cyber Warfare: Quo Vadis?*, 25 STAN. L. & POL'Y REV. 269, 288–89 (2014) (observing that operations are often "launched far from the active battlespace" and can be "from any location where connectivity to the target cyber system can be established.").
[112] *See* ICRC INTERPRETIVE GUIDANCE, *supra* note 66, at 55; *see also* William H. Boothby, *Methods and Means of Cyber Warfare*, 89 INT'L L. STUD. 387, 397 (2013).
[113] *See* Claire Finkelstein & Kevin Govern, *"Introduction: Cyber and the Changing Face of War," in* CYBER WAR: LAW AND ETHICS FOR VIRTUAL CONFLICTS x–xi (Jens David Ohlin, Kevin Govern, & Claire Finkelstein eds., 2015),https://bit.ly/3TPsrDB.
[114] *See* Matheson, *supra* note 33, at 39.
[115] *See* ICRC INTERPRETIVE GUIDANCE, *supra* note 66, at 55.

the malware and the actual harm does not negate the direct causation.[116] Just like in a movie, they've still set off the alarm. So, let's make it clear: direct causation is not about being geographically or temporally close to the conflict. If a civilian's actions are directly linked to the harm, regardless of geographical or temporal considerations, they could be targeted if the other requirements are satisfied.[117]

C. Belligerent Nexus

The "Belligerent Nexus" is the third and final layer of the DPH security system, and it requires that the act must be specifically designed to directly cause harm in support of one party to the conflict and to the detriment of another.[118] Basically, it separates acts that are part of the conflict from those that just happen to occur in the same time and place, like an unfortunate coincidence.[119] Acts that lack a belligerent nexus include self-defense or defense of others. If a civilian is defending themselves from an unlawful attack by an enemy soldier during an armed conflict, their actions would not be considered as taking a direct part in hostilities, and they would not lose their immunity from attack.[120]

If our thieves exchange gunfire with combatants during an armed conflict, their actions may cross the threshold of harm and even directly cause the harm, but they will only trigger the alarm if the heist is related to the armed conflict itself. If they are only in it for the money, then there is no belligerent nexus.[121] In this case, the thieves could not be targeted as directly participating in hostilities, but they would face the wrath of normal law enforcement instead.[122]

Now, let's say our thieves are coerced into committing the heist by one party to the conflict. In this case, the thieves would be lawfully targetable. Bummer for them, right? However, it is important not to confuse the belligerent nexus with subjective or hostile intent.[123] Belligerent nexus is an objective standard that focuses on the purpose and design of the act, not the intent

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[116] *See, e.g.*, Shane Quinlan, *Jam. Bomb. Hack? New U.S. Cyber Capabilities and the Suppression of Enemy Air Defenses*, GEO. SECURITY STUD. REV. (Apr. 7, 2014), https://bit.ly/3GS2H1w (profiling the use of a cyber-attack by Israel to disable aerial defense systems and avoid detection to bomb a Syrian nuclear reactor).
[117] *See* KING, *supra* note 1, at 176.
[118] *See* ICRC INTERPRETIVE GUIDANCE, *supra* note 66, at 58.
[119] *See* Jay C. Jackson, *Applying the U.S. and ICRC Standards for Direct Participation in Hostiles to Civilian Support of U.S. Military Operations*, 79 A.F. L. REV. 53, 67 (2018).
[120] *See* ICRC INTERPRETIVE GUIDANCE, *supra* note 66, at 61.
[121] *Cf.* SOLIS, *supra* note 50, at 192; Schmitt, *Elements*, *supra* note 92, at 735. *But see* TALLINN MANUAL 2.0, *supra* note 21, at 430–31 (siding with the existence of a belligerent nexus when the proceeds of a cybercrime are linked to the funding of a particular military operations).
[122] *See* ICRC INTERPRETIVE GUIDANCE, *supra* note 66, at 83–85.
[123] *See* Matheson, *supra* note 33, at 40; Jackson, *supra* note 119, at 69.

concerning the state of mind of the person performing the act.[124] In assessing whether an act meets the belligerent nexus requirement, military commanders need to look only at the purpose and design of the act, not the mindset of the individual involved.[125] So, even if they are only in it for the money, a heist that negatively affects one side to the benefit of the other might still meet the requirement.

Identifying the belligerent nexus in a situation can be quite challenging. Commanders must consider the information reasonably available to them, deducing the belligerent nexus from objectively verifiable factors. The ultimate question is whether the civilian's conduct, given the circumstances at the time, can reasonably be seen as an act designed to support one party in the conflict by directly causing harm to another party.

Cyber-attacks are an example where establishing the belligerent nexus can be particularly difficult. These attacks can occur both inside and outside of armed conflict, and determining whether a cyber-attack in the context of an armed conflict meets the belligerent nexus requirement may be challenging. The attack might fulfill the threshold of harm and direct causation requirements, but connecting it to the ongoing conflict could prove tricky.

IV. PATCHES OR EXPLOITS: ALTERNATIVE APPROACHES TO DPH

The *Interpretive Guidance* drafted by the International Committee of the Red Cross (ICRC) provides a valuable starting point for understanding "direct participation in hostilities" (DPH), but just like updating software to patch security vulnerabilities, it's essential to understand how different countries the international community continue refining the concept and establishing clearer guidelines.

A. United States v. Perspective

In an actual armed conflict, civilians are the ones who find a golden ticket in their Wonka Bar, meaning they are protected from being targeted for attack by the combatants doing the shooting.[126] But, if they decide to jump into the action, they might lose that protection. The United States Department of Defense has its own rulebook called the *Law of War Manual*, which provides guidance on how to conduct warfare, including how to determine when civilians take a direct part in

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[124] *See* ICRC INTERPRETIVE GUIDANCE, *supra* note 66, at 59.
[125] *See* Matheson, *supra* note 33, at 40.
[126] *See* ROALD DAHL, CHARLIE AND THE CHOCOLATE FACTORY 18 (First Omnibus ed. 2003) (1964); WILLY WONKA & THE CHOCOLATE FACTORY (Warner Bros. Pictures 1971).

hostilities.[127] The DoD rulebook has developed its own standard for determining when DPH occurs, which is different from the ICRC's criteria.

To provide more flexibility to those involved in armed conflicts, the DoD is like a street-smart detective who appreciates flexibility in order to get the job done, while the ICRC is more like a by-the-book investigator, sticking to strict rules. The DoD has a broader definition of direct participation in hostilities, which contrasts with the ICRC's more restrictive approach.[128] In a similar approach to the three basic requirements for a civilian to be considered a direct participant in hostilities in the *Interpretive Guidance*, *Law of War Manual* outlines the following five criteria to consider when determining if a civilian is joining the fight.

Harm-O-Meter: The *Law of War Manual* states that decision-makers should consider "the degree to which the act is likely to affect adversely the military operations or military capacity of the opposing party."[129] Just like in a video game, where causing more damage gets you more points, the more harm a civilian's actions cause to the enemy, the more likely it is considered DPH. It's like leveling up on the "you're in trouble" scale. This is similar to the ICRC's "threshold of harm" element.

The Connection Test: The manual instructs us to examine "degree to which the act is connected to the hostilities . . . ."[130] Picture the tangled mess of wires behind your desktop computer monitor right now. Some are super important, while others might just be there for show. The DoD wants to know how closely connected a civilian's act is to the ongoing hostilities. If it is like that crucial power cable, then it is more likely to be seen as DPH. This differs from the ICRC's "direct causation" element, as it allows for varying degrees of connectedness.

The "Whose Side are You on Anyways?" Question: The DoD wants us to look at "whether the activity is intended to advance the war aims of one party to the conflict to the detriment of the opposing party."[131] The DoD wants to know the specific purpose of the civilian's act. Did it help one party's war goals while hurting the other? If so, that civilian might have landed in DPH territory. This is sort of similar to the ICRC's "belligerent nexus" element, which requires that a

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[127] *See* DOD LAW OF WAR MANUAL, *supra* note 28.
[128] *See id.* §§ 5.8.3.1–5.8.3.2 (providing a non-exhaustive list of behaviors that would or would not qualify as directly participating in hostilities).
[129] *See id.* § 5.9.3.
[130] *See id.*
[131] *See id.*

civilian's hostile act be integral to the hostilities for them to lose their protection against direct attack.

The Military Significance Scale: The manual asks us to consider "the degree to which the act contributes to a party's military action against the opposing party."[132] Imagine a party's war effort as lines of code for a computer program. Some parts of the code that make that program are important, while others are just minor details. The DoD wants to know how significant a civilian's activity is to the war effort. If it's like that critical line of code, it's more likely to be considered DPH. This factor is not addressed by the ICRC. The ICRC views acts from a binary perspective, either as "one causal step" or not, rather than considering the degree of contribution to the war effort.

The "Is This a Military Thing?" Inquiry: According to the *Law of War Manual*, we should take into account "the degree to which the activity is viewed inherently or traditionally as a military one . . . ."[133] You know how some things just scream "military"? Like camouflage, dog tags, and Top Gun references? The DoD wants to know if the civilian's activity feels like one of those military-esque things. If it does, it is more likely to be seen as DPH.

Although the *Law of War Manual*'s approach provides more specific guidance for military operations, it is important to recognize that it fundamentally differs from the views presented by the ICRC, which has their own set of requirements for classifying a civilian as a direct participant in hostilities.[134] In this tale of two perspectives, the *Law of War Manual*'s and the *Interpretive Guidance* are like characters with differing opinions on how to navigate the complex landscape of armed conflict. Balancing different factors in determining "who's in and who's out," the DoD's approach might mean more people lose protection, while the ICRC's rules could let some bad actors avoid being targeted.[135]

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[132] *See id.*
[133] *See id.*
[134] W. Hays Parks, *Air War and the Law of War*, 32 A.F. L. REV. 1, 134 (1990) (arguing that customary international law supports a more expansive definition that would preclude civilians from providing functionally important, though less immediate, support to the military effort).
[135] Michael N. Schmitt, *"'Direct Participation in Hostilities' and 21st Century Armed Conflict," in* CRISIS MANAGEMENT AND HUMANITARIAN PROTECTION: FESTSCHRIFT FUR DIETER FLECK 505, 509 (Horst Fischer et al. eds., 2004) ("Gray areas should be interpreted liberally, i.e., in favor of finding direct participation.").

B. Once Upon a Time in Tallinn

Once upon a time in Tallinn, Estonia, a group of international legal scholars and experts got together to unravel the mysteries of the cyber warfare universe. They were on a mission to create the *Tallinn Manual*, a non-binding set of rules aimed at understanding how international law should be applied to cyber activities and hostilities.[136] They were led by the NATO Cooperative Cyber Defense Centre of Excellence, and together, they worked tirelessly to help countries navigate the complex world of cyber warfare.[137] You see, the *Tallinn Manual* was designed to be the first major document of its kind to discuss the issue of conflict in cyberspace and then became the first one to directly address the question of civilians directly participating in hostilities through cyber means.[138] It's like a recipe book for cyber warfare, but instead of teaching you how to make a soufflé, it helps explain the rules of the road for armed conflict in cyberspace.[139]

Specific rules in the *Tallinn Manual* apply the golden rule of DPH to cyber: "civilians enjoy protection against attack unless and for such time as they directly participate in hostilities."[140] The experts agreed on three cumulative criteria for qualifying an act as direct participation: the threshold of harm, direct causation, and belligerent nexus.[141] If you thought these criteria look a lot like the DPH secret sauce created by the ICRC that makes everything click, you're right! As it turns out, the ICRC contributed to the development of the *Tallinn Manual* and generally agrees with the rules developed, with some exceptions.[142]

To break down these exceptions, let's start at the beginning with the threshold of harm criterion. The *Interpretive Guidance* applies an "objective likelihood" standard, meaning the act must have a high probability of causing harm to be considered DPH.[143] For the *Tallinn Manual*, however, it's all about

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[136] *See* TALLINN MANUAL 2.0, *supra* note 21, at xxiv ("[T]he book will serve as a road-map for governments as they seek greater clarity regarding their rights and obligations in cyberspace.").
[137] *See* NATO, *supra* note 25.
[138] *See* TALLINN MANUAL 2.0, *supra* note 21, at xxiv (arguing that the Tallinn Manual will be useful in identifying extant cyber norms and promulgating new ones).
[139] *See generally* GÉRARD IDOUX, SOUFFLÉS!: TOUS LES SECRETS POUR RÉUSSIR LA RECETTE MYTHIQUE DE LA CUISINE FRANÇAISE (Marabout ed. 2019); Sarah Fritsche, *Recipe: Cafe Jacqueline's Lemon Souffle*, THE SAN FRANCISCO CHRONICLE (Feb. 16, 2018), https://bit.ly/3RNyPcY.
[140] TALLINN MANUAL 2.0, *supra* note 21, at 428; *see also* Commentary of 1987 to AP I, *supra* note 20, art. 51(3); AP II, *supra* note 20, art. 13(3). *See also* DOD LAW OF WAR MANUAL, *supra* note 28, § 5.8.
[141] *See* TALLINN MANUAL 2.0, *supra* note 21, at 429–30.
[142] *See id.* at xii–xx.
[143] *See* ICRC INTERPRETIVE GUIDANCE, *supra* note 66, at 47.

intent. They decided to shake things up a bit by using the phrase "intended or actual effect" for the threshold of harm, which means they are more interested in the intent behind an action than the likelihood of harm.[144] Under the *Tallinn Manual* approach a civilian intending to cause sufficient harm with a cyber-attack, even if it fails to affect the targeted adversary, could qualify as DPH so long as the act still meets the other two criteria, direct causation and belligerent nexus.

In simpler terms, think of it this way: if you're a civilian hacker and you've got your heart set on messing with an enemy's military operations, even if your plan has a slim chance of working or you're just not a very good hacker, the *Tallinn Manual* says you're directly participating in hostilities and can be targeted for attack.[145] The *Interpretive Guidance*, on the other hand, would take a step back and say, "Hold on, buddy. Is your plan actually likely to cause harm?" And if the answer is no, you're off the hook.

The *Tallinn Manual* extends its intent standard to direct causation as well, requiring a "direct causal link between the act in question and the harm intended or inflicted . . . ."[146] Cyber-attacks and actions that directly contribute to the intended harm, such as conducting a cyber-attack or designing malware with a specifically intended use, would meet this requirement.[147] If a civilian designs malware and makes it available on the internet without intending its specific use, it would not satisfy direct causation.[148] However, the divide between direct and indirect causation is not always clear, and the group was divided on some circumstances, leaving who is allowed to be the target of attacks to be determined on a case-by-case basis.[149]

Another major difference lies in the treatment of cyber operations. Both the *Tallinn Manual* and *Interpretive Guidance* agree that cyber operations can be considered DPH. They both recognize the potential for computer network attacks (CNA) or computer network exploitations (CNE), and even wiretapping or transmitting tactical targeting information for an attack.[150] But when the attack is not against the military, the ICRC dismisses any cyber-attack involving mere manipulation without being objectively likely to cause death, physical damage, or

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[144] *See* TALLINN MANUAL 2.0, *supra* note 21, at 429.
[145] *See* Collin Allan, Note, *Direct Participation in Hostilities from Cyberspace*, 54 VA. J. INT'L. L. 173, 182 (2013).
[146] *See* TALLINN MANUAL 2.0, *supra* note 21, at 429.
[147] *See id.* at 415, 430 ("A cyber-attack is a cyber operation, whether offensive or defensive, that is reasonably expected to cause injury or death to persons or damage or destruction to objects.").
[148] *See id.* at 430.
[149] *See* HEATHER HARRISON DINNISS, CYBER WARFARE AND THE LAWS OF WAR 166 (2012).
[150] *See* ICRC INTERPRETIVE GUIDANCE, *supra* note 66, at 48; TALLINN MANUAL 2.0, *supra* note 21, at 335.

destruction.[151] The *Tallinn Manual* in contrast clarifies that there is no requirement for physical damage to objects or harm to individuals.[152] Imagine a cyber-attack that significantly disrupts the operation of non-military network without causing physical damage to servers, data, or computers. According to the *Tallinn Manual*, that could be enough to meet the threshold of harm, while the *Interpretive Guidance* would need more concrete consequences to consider the act as direct participation in hostilities.

Aligning with the *Interpretive Guidance* in many aspects, the *Tallinn Manual* applies a lower standard for the threshold of harm and emphasizes the intent standard for direct causation.[153] The *Tallinn Manual* provides a fresh perspective on the direct participation in hostilities criteria in the realm of cyber warfare, marking a significant departure from the *Interpretive Guidance*. This approach may help to clarify when civilians lose their protection from attack in cyber operations, but some aspects still require a case-by-case determination.[154] These unique perspectives on the application of direct participation in hostilities in and through cyberspace require ongoing analysis and interpretation, highlighting the complex and evolving nature of cyber warfare in international law.

V. 404 ERROR. THE LEGAL STANDARD YOU REQUESTED COULD NOT BE FOUND.

A. "You Got Pwned." Attribution and Intent in Cyber

Venturing further down the cyber conflict rabbit hole, let's explore the role of attribution in the context of "direct participation in hostilities" (DPH). Attribution is the process of identifying the mastermind behind a cyber operation.[155] In the digital realm, hackers often don anonymity, making it nearly impossible to pinpoint their exact location or identity.[156] This is as challenging as finding the proverbial needle in a haystack or deciphering the true identity of a masked vigilante like Batman. One can think of the hacker community as a digital "Fight Club," where members operate under the radar, hidden from the watchful

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[151] *See* ICRC INTERPRETIVE GUIDANCE, *supra* note 66, at 50.
[152] *See* TALLINN MANUAL 2.0, *supra* note 21, at 429.
[153] *See* Kilovaty, *supra* note 58, at 16; Allan, *supra* note 145, at 184.
[154] *See* Schmitt, *Analysis*, *supra* note 83, at 38 ("The better approach is one whereby a civilian who directly participates in hostilities remains a valid military objective until he or she unambiguously opts out of hostilities through extended non-participation or an affirmative act of withdrawal.").
[155] *See generally* Collin S. Allan, *Attribution Issues in Cyberspace*, 13 CHI.-KENT J. INT'L & COMP. L. 55 (2013).
[156] *See* David A. Wallace & Christopher W. Jacobs, *Conflict Classification and Cyber Operations: Gaps, Ambiguities and Fault Lines*, 40 U. PA. J. INT'L L. 643, 682–84 (2019).

eyes of the authorities.[157] In this covert and clandestine world, it can be challenging to attribute responsibility for a cyber-attack, especially when time-delayed tactics are used. This makes it all the more difficult to determine when DPH begins and ends, leaving military commanders and legal experts scratching their heads.

Furthermore, cyber operations often transcend national borders, making the picture of the actor even fuzzier.[158] In the world of hacking, there are no borders or checkpoints, only endless streams of data and networks to traverse. This borderless environment further complicates the issue of DPH, bringing into play the delicate balance of international relations and sovereignty by shrouding an actor's location in mystery making it nearly impossible to discern.[159]

So you think you're a brilliant military commander who has solved this riddle and narrowed in on the identity of and location for the source of an ongoing attack. Before you pull the trigger, let's consider individuals who have their computer hijacked, without their knowledge or consent, as part of a botnet attack.[160] Picture a situation where a hacker has taken remote control of an innocent civilian's computer and is using it as part of a botnet attack without the owner's knowledge or consent. A botnet, like a digital zombie army, is a network of compromised computers remotely controlled by hackers, often used to launch distributed denial of service (DDoS) attacks that can result in significant harm.[161] Can a civilian's computer still be targeted for attack in cases where civilians are unaware of their role in an attack?[162]

If you are reading the *Tallinn Manual*, then the answer is easy. No intent by the civilian, no targeting.[163] Because the civilian remains oblivious to their computer's participation in the botnet attack, they cannot be the target of attacks.

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[157] FIGHT CLUB (20th Century Fox 1999) ("The first rule of Fight Club is you do not talk about Fight Club.").
[158] *See* Kenneth Watkin, *The Cyber Road Ahead: Merging Lanes and Legal Challenges*, 89 INT'L L. STUD. 472, 485 (2013).
[159] *See* Eric Talbot Jensen, *Sovereignty and Neutrality in Cyber Conflict*, 35(3) FORDHAM INT'L L.J. 815, 816 (2012) ("Longstanding notions of sovereignty fall apart when it comes to cyber operations.").
[160] *See* Janine S. Hiller, *Civil Cyberconflict: Microsoft, Cybercrime, and Botnets*, 31(2) SANTA CLARA HIGH TECH. L.J. 163, 167 (2014) (describing a 'botnet' as a network of computer systems infected with malware that permit hackers to remotely control them).
[161] *See* TALLINN MANUAL 2.0, *supra* note 21, at 565 (defining the depth and scope of a Distributed Denial of Service attack).
[162] *See* David Turns, *Cyber Warfare and the Notion of Direct Participation in Hostilities*, 17(2) J. CONFLICT & SEC. L. 279, 288 (2012); TALLINN MANUAL 2.0, *supra* note 21, at 328, 564–65 (arguing that civilian is targetable while he or she is engaged in the DDoS attack).
[163] *See* TALLINN MANUAL 2.0, *supra* note 21, at 440.

But remember that for the ICRC the objective likelihood of the act, not the intentions of the actor determined who could be targeted.[164] Using the criteria put out by the ICRC, look to belligerent nexus—harm in support of one party in a conflict and to the detriment of another—and ignore intent. But, the *Interpretive Guidance* does have an exception to their "no intent" policy. The *Interpretive Guidance* clarifies that a civilian's mental state should be considered only in exceptional situations, such as when they are completely unaware of their role in hostilities or when they "are completely deprived of their physical freedom of action."[165] For example, a driver unknowingly transporting a remote-controlled bomb. In these extreme circumstances, civilians cannot be regarded as performing an action in any meaningful sense, and as a result, they remain protected against direct attack despite the belligerent nexus of the military operation. The complexities of attribution and the borderless nature of cyber operations, coupled with the potential for civilians to be unknowingly involved in cyber hostilities, make complying with the principle of distinction an immensely challenging task for military commanders and legal experts alike.[166]

B. Logic Bombs Over Baghdad

One of the main challenges when discussing direct participation in hostilities in the context of cyber operations is the prolonged effects of certain types of attacks. These temporal limitations present a significant challenge for military commanders identifying lawful targets in cyberspace. Imagine you're a detective trying to catch a notorious pickpocket. The act of pickpocketing may only last a few seconds, but the effects on the victim can last much longer.

Now, let's talk about "logic bombs." No, not some futuristic weapon, but a piece of sneaky code that hides in a computer system and goes off when specific conditions are met.[167] It's like setting a booby trap that only springs when the temperature drops below freezing. These attacks can cause chaos long after the hacker has moved on to their next project.

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[164] *See* ICRC INTERPRETIVE GUIDANCE, *supra* note 66, at 47.
[165] *Id*. at 60.
[166] *See* Michael W. Meier, *Emerging Technologies and the Principle of Distinction: A Further Blurring of the Lines between Combatants and Civilians?*, *in* LIEBER SERIES VOL. 2: THE IMPACT OF EMERGING TECHNOLOGIES ON THE LAW OF ARMED CONFLICT 226–30 (Eric T. Jensen & Ronald T.P. Alcala eds., 2020) (weighing the challenges presented by the principle of distinction in cyber operations).
[167] *See* Benjamin Weitz, *Updating the Law of Targeting for an Era of Cyberwarfare*, 40(3) U. PA. J. INT'L L. 735, 746 (2019) (describing a logic bomb as malicious code that activates once a specific condition is met or at a certain time); TALLINN MANUAL 2.0, *supra* note 21, at 432, 566.

To better understand the complexities of possible temporal limitations in responding to cyber operations, let's imagine two types of cyberattacks. The first type is like a relentless marching band, with the attack code running continuously and causing ongoing effects. In this case, our hacker is fair game for targeting "for such a time" as the code keeps playing. The second type is more like a firework display that causes effects that are not directly linked to an ongoing cyber operation. In this case, our hacker can only be targeted during the rocket's red glare, while the operation lasts.

The ICRC drafted *Interpretive Guidance* that says once a hacker uploads malicious code, they are no longer a threat, like a bee that has lost its stinger.[168] But others argue that this is like saying a venomous snake is not a threat until it actually bites someone. If our hacker still has the power to activate their malicious code, they are definitely still a threat. The *Interpretive Guidance* views a hacker's "engagement" in a hostile act to include actions taken before and after the actual act, like planting a tree before it bears fruit and then harvesting the fruit after it ripens.[169]

The *Tallinn Manual* has another take on the subject, a more encompassing approach.[170] They say that a hacker loses their civilian protection as long as there's a causal link between their actions and the hostile act, like a series of dominoes falling one after the other.[171] This means that the *Tallinn Manual* gives military commanders a broader window to target hackers, like adding extra time to a game of tag. It's especially useful for dealing with sneaky time-delayed cyberattacks, like our logic bomb friends from earlier.

To further illustrate these concepts, let's consider a hypothetical scenario: A hacker, uploads a logic bomb into a power grid control system. This logic bomb is programmed to disable the power grid when the system detects a specific pattern of electricity usage. A military commander becomes aware of the logic bomb's existence but doesn't know the identity of the hacker. Under the *Interpretive Guidance*, the hacker would only be targetable during the time she was actively involved in the cyber operation, such as while uploading the logic bomb. Once the code is in place, the hacker would no longer be considered a military threat because she's not directly participating in hostilities. However, this interpretation might underestimate the threat she poses. Under the *Tallinn Manual*'s interpretation, the hacker could be targeted from the moment she starts probing the power grid for vulnerabilities until the time when the logic bomb is

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[168] *See* Matheson, *supra* note 33, at 55, 60–61.
[169] *See* ICRC INTERPRETIVE GUIDANCE, *supra* note 66, at 34.
[170] *See* TALLINN MANUAL 2.0, *supra* note 21, at 431–32.
[171] *See id.* at 429.

neutralized, as long as a causal link exists between her actions and the hostile act. This approach would give the commander a broader temporal scope to target the hacker, even when she is not actively engaging in the cyber operation.

Let's consider another hypothetical scenario: a hacker gains access to a military communication system and monitors sensitive information without altering or disrupting the system. Unbeknownst to him, a military commander is aware of his presence and wants to target him for his actions. In this case, the *Interpretive Guidance* would argue that the hacker is only targetable during the time he is actively engaged in the cyber operation. Once he stops monitoring the communication system, he would no longer be considered a military threat. However, the *Tallinn Manual* might suggest that the hacker could still be targetable as long as there's a causal link between his actions and potential harm to the military's communication system.

In both hypothetical scenarios, the *Tallinn Manual*'s approach offers a more pragmatic solution for addressing the difficulties of targeting cyber actors. However, it is essential to consider the nuances of each case and strike a balance between military necessity and the protection of civilians in the context of cyber operations.[172] The *Tallinn Manual*'s approach might make targeting a little easier, but it is crucial to strike a balance between military targeting of an adversary and protecting innocent civilians.[173]

C. Tech Support by Day, Hack by Night

Civilians can cause chaos on the digital battlefield from anywhere at any time. These civilians, whether part of organized armed groups or lone wolves operating from their nonna's basement, pose a challenge to military forces and international law.[174] As countries grapple with how and when to target civilians who directly participate in hostilities during armed conflicts, three main players have emerged with distinct approaches: the *Law of War Manual*, the *Interpretive*

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[172] *See* David A. Wallace & Shane R. Reeves, *Protecting Critical Infrastructure in Cyber Warfare: Is it Time for States to Reassert Themselves?*, 53 U.C. DAVIS L. REV. 1607, 1618 (2020) ("These two broad, often times called 'meta,' principles are weighed against each other throughout the entirety of the law of armed conflict with every rule or norm—whether treaty- or custom-based—considering both military necessity and the dictates of humanitarian aims.").

[173] *See* Boothby, *supra* note 92, at 753 ("[The ICRC] narrows excessively the class of those who lose protection on a continuous basis and the result is a distortion of the balance [between military necessity and humanity] inherent in international law.").

[174] *See* Droege, *supra* note 40, at 550 ("For a group to qualify as an organised armed group that can be a party to a conflict within the meaning of [International Humanitarian Law], it needs to have a level of organisation that allows it to carry out sustained acts of warfare and comply with IHL.").

Guidance, and the *Tallinn Manual*. A key issue at stake is the so-called "revolving door" of civilian protection in the cyber realm.

The ICRC, known for its humanitarian focus, adopts the "revolving door" approach, where civilian hackers lose and regain protection as they engage and disengage in cyber hostilities. According to the *Interpretive Guidance*, "civilians lose and regain protection against direct attack in parallel with the intervals of their engagement in direct participation in hostilities."[175] This approach aims to protect civilians who do not pose a military threat at a particular moment, avoiding erroneous or arbitrary attacks. The ICRC stands firm on this stance, despite the operational difficulties it might present to armed forces making split-second targeting decisions.

Let's consider a hypothetical scenario where a civilian hacker occasionally launches cyberattacks against military targets. Under the ICRC's revolving door approach, the hacker would lose her civilian protection only during the time she is actively engaging in a cyberattack, regardless of how long the active engagement might be. Once she ceases her hostile activity, she regains her civilian protection, shielding her from being targeted by military forces.

However, the ICRC makes an exception for civilians who assume a "continuous combat function" in an organized armed group, suspending their protections until they leave the group or cease the hostile acts.[176] Moreover, not all hackers or hacktivist groups fall under this narrow definition, complicating matters further.[177] The ICRC fails to define when persistently recurring engagement in combat functions triggers membership in an organized armed group as a continuous combat function. While this distinction may seem good for protecting civilians, it can tip the balance in favor of the hackers, giving them an unfair advantage over armed forces.[178]

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[175] ICRC INTERPRETIVE GUIDANCE, *supra* note 66, at 70, 83 ("When civilians cease to directly participate in hostilities, or when members of organized armed groups belonging to a non-State party to an armed conflict cease to assume their continuous combat function, they regain full civilian protection against direct attack . . . .").

[176] *See id.* at 27–28 (outlining the parameters of the concepts of continuous combat function and an organized armed group).

[177] *See* E. Corrie Westbrook Mack & Shane R. Reeves, *Tethering the Law of Armed Conflict to Operational Practice: "Organized Armed Group" Membership in the Age of ISIS*, 36(3) BERKELEY J. INT'L L. 355, 369–76 (2018) (comparing approaches to determining membership in an organized armed group); MARCO SASSOLI ET AL., HOW DOES LAW PROTECT IN WAR 171 (2011).

[178] *See* DOD LAW OF WAR MANUAL, *supra* note 28, § 5.8.3 ("[I]ndividuals who are formally or functionally part of a non-State armed group" are subject to attack); Watkin, *supra* note 92, at 691–92 ("Someone who provides logistics support as a member of an organized armed group, including cooks and administrative personnel, can be targeted in the same manner as if that person was a member of regular State armed forces.").

In contrast, the *Tallinn Manual* takes a unique approach to the "revolving door."[179] Instead of relying on the ICRC's interpretation, it focuses on hackers' intentions. The *Tallinn Manual* specifies that when a hacker clearly indicates they are done with their cyber mischief, they regain their civilian protections.[180] By considering the intentions of civilian hackers and allowing for anticipatory self-defense, the *Tallinn Manual* aims to strike a balance between humanity and military necessity.[181]

Returning to our hypothetical scenario, under the *Tallinn Manual*'s approach, if the hacker were to publicly announce that she has stopped her cyberattacks and has no intention of engaging in future hostilities, she would regain her civilian protection. However, if military forces have credible information that she still intends to launch cyberattacks, they could potentially target her in anticipatory self-defense before she strikes again.

Meanwhile, the *Law of War Manual* straight up rejects the "revolving door" approach, emphasizing military necessity.[182] The Manual states that "[p]ersons who take a direct part in hostilities . . . , do not benefit from a 'revolving door' of protection."[183] It argues that civilians who directly participate in hostilities should not be granted revolving protection, preventing them from exploiting the protections offered to civilians.[184] According to the Manual, once a civilian has shown a pattern of participating in cyber hostilities, they may be targeted even when they are not actively engaged in hostile acts.[185]

In the case of the hacker, the *Law of War Manual* would likely argue that she should not be granted revolving protection. Given her pattern of engaging in cyber hostilities, she could be targeted by military forces even when she is not in the midst of launching a cyberattack. The Manual aims to prevent civilians like the hacker from hiding behind their civilian status to avoid the consequences of their actions, thereby maintaining military necessity.

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[179] *See* TALLINN MANUAL 2.0, *supra* note 21, at 531.
[180] *See id.* at 432 ("[I]n the absence of a clear indication that the hacktivist would no longer engage in such attacks, he or she would have remained targetable . . . .").
[181] *See* Leo Van den hole, *Anticipatory Self-Defence Under International Law*, 19 AM. U. INT'L. L. REV. 69, 104 (2003) ("If, however, the threat or the attack in question consisted of a number of successive acts, and there is sufficient reason to expect a continuation of acts from the same source, the international community should view the requirement of the immediacy of the self-defensive action in the light of those acts as a whole.").
[182] *See* DOD LAW OF WAR MANUAL, *supra* note 28, § 5.9.4.
[183] *Id.*
[184] *See* Boothby, *supra* note 92, at 743 ("[I]n deciding what actions constitute direct participation, the ICRC interprets the concepts of preparation, deployment, and return too restrictively.").
[185] *See* TALLINN MANUAL 2.0, *supra* note 21, at 531.

As the cyber realm evolves and hackers can launch attacks with increasing speed and efficiency, the question of whether a country can strike first becomes more pressing. The concept of anticipatory self-defense, or acting to eliminate a threat before an attack occurs, clashes with the ICRC's revolving door approach. While the *Tallinn Manual* and the *Law of War Manual* argue for the continuous targetability of civilians who repeatedly engage in cyber hostilities, the ICRC believes that a civilian's past behavior cannot predict their future actions.[186] Each approach has its merits and drawbacks, ultimately depending on the values and priorities of the observer. If you are a firm believer in protecting civilians and adhering to humanitarian principles, you might side with the ICRC.[187] However, if you believe that a civilian hacker's actions should have lasting consequences and that military necessity takes precedence, then you would probably lean towards the *Law of War Manual* or the *Tallinn Manual*.[188]

VI. CONCLUSION

Technology progressed in cool new ways to create a highly interconnected global community at a level no one expected. The ability to reach out and touch someone in and through cyber can bring us closer together, but it also opens the door to inflict harm in increasingly damaging ways.[189] It is no longer sufficient to think of warfare solely in terms of boots on the ground or bombs through the air. This increased connectivity, while offering countless benefits, has also invited new challenges and threats, including the potential for civilians to become unwittingly entangled in armed conflicts.[190]

The framework for "direct participation in hostilities" (DPH) was originally intended to mainly address civilians physically participating in

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[186] *See* ICRC INTERPRETIVE GUIDANCE, *supra* note 66, at 71 ("Even the fact that a civilian has repeatedly taken a direct part in hostilities, either voluntarily or under pressure, does not allow a reliable prediction as to future conduct.").
[187] *See* Schmitt, *Analysis*, *supra* note 83, at 6.
[188] *See* DOD LAW OF WAR MANUAL, *supra* note 28, § 2.2 ("Military necessity may be defined as the principle that justifies the use of all measures needed to defeat the enemy as quickly and efficiently as possible that are not prohibited by the law of war."); *see also* Lieber Code, *supra* note 12, at 250.
[189] *See* Secretary Leon Panetta on Cybersecurity, C-SPAN (Oct. 11, 2012), https://bit.ly/3toOKFg ("The cyber-attack perpetrated by nation states [or] violent extremists groups could be as destructive as the terrorist attack on 9/11.").
[190] *See, e.g.*, Michael N. Schmitt & William Casey Biggerstaff, *Ukraine Symposium—Are Civilians Reporting With Cell Phones Directly Participating In Hostilities?*, Posting to *Articles of War*, LIEBER INST. W. POINT (Nov 2, 2022), https://bit.ly/3tsRRfl; *see also* Luke James, *Military Information Sharing by Ukrainian Citizens in the Digital Environment: DPH?—Blurring of Lines Between Civilian and Military Actors in Ukraine*, OPINIOJURIS (Dec. 9, 2022), https://bit.ly/4as6Kz0.

hostilities close in time and space to the battlefield.[191] But as boundaries in the physical world matter less and less, it is more important than ever for everyday internet users to understand the left and right parameters of actions that can rise to the level of DPH.[192] More than simply for the sake of legal clarity, it is vital to ensure that civilians can make informed decisions about their involvement and protect themselves from becoming a target in an armed conflict.

For everyday internet users who wish to do more in favor of one party involved in an armed conflict, it is essential to know the legal and ethical boundaries of their actions.[193] This understanding must begin with a deep dive into the concept of DPH to make more informed decisions. Successfully running a civilian's actions through the boxes of a DPH checklist does not necessarily mean that he will be targeted. One of the key challenges in this area is the haziness around the notion of DPH and effects that, although inconvenient, may not be considered direct participation in hostilities.

While the act of hacking into a military system to gather intelligence or disrupt operations may rise to the level of DPH, the dissemination of propaganda or logistical support, even if highly inconvenient, may not be considered DPH. What regular users think of as participation needs to be reexamined to include new types of harms that might trigger the forfeiture of civilian status. By adopting a narrow definition of direct participation, the International Committee of the Red Cross (ICRC) seeks to protect as many civilians as possible from the dangers of armed conflict. Conversely, by taking a broad approach, the United States seeks to allow targeting of actors engaged in military operations who are embedded within the civilian population, thereby balancing between effective combat operations and protection of civilians and civilian objects.

The *Interpretive Guidance*, *Tallinn Manual*, and *Law of War Manual*'s uses of ambiguous and broad terms and concepts to address cyber warfare reveals that even the professionals have not solved these riddles. That they strive for a workable DPH framework assists in creating norms for behavior pertaining to civilians in the context of an armed conflict in and through cyberspace. Threading the needle will involve refining pragmatic rules that countries can follow in carrying out their military operations, while making sure those same rules are

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[191] *See* DINNISS, *supra* note 149, at 164 ("[G]eographic proximity to the battle lines has also been used as a rough guide to ascertaining the status of the civilian concerned . . . .").
[192] *See* Shaun Watenan, *Civilian 'Hacktivists' Could be Lethal Targets in Cyberwar, NATO Study Says*, WASH. TIMES (Mar. 20, 2013), https://bit.ly/41tijSs.
[193] *See, e.g.*, Evgeny Morozov, *An Army of Ones and Zeroes: How I Became a Soldier in the Georgia-Russia Cyberwar*, SLATE (Aug. 14, 2008), https://bit.ly/3th5eiJ (profiling an ordinary Russian citizen's path to "sign up for a cyberwar"); Ann Väljataga, *Cyber Vigilantism in Support of Ukraine: A Legal Analysis*, NATO CCDCOE (2021), https://bit.ly/3TsaAlP.

protecting civilians. If the rules are too obstructive, countries will throw out the rulebook or pick the rules they want to follow.[194] If the rules do not limit the impact of armed conflict enough, then the internet will be reduced to a stifled Orwellian domain void of the openness, collaboration, innovation, or freedom of expression it was founded on. Regardless of the internet we find ourselves in tomorrow, ordinary users relying on today's internet need to be careful with their actions to keep from getting pulled into a war online.

[194] *See* Shane R. Reeves & Jeffrey S. Thumher, *Are We Reaching a Tipping Point? How Contemporary Challenges Are Affecting the Military Necessity-Humanity Balance*, HARV. NAT'L SEC. J. ONLINE (2013), https://bit.ly/41x0qT5 ("[W]hen humanitarian concerns become dominant state military actions are unrealistically restricted by burdensome regulations diminishing the likelihood of compliance."); Schmitt, *Analysis*, *supra* note 83, at 6 ("[N]o state likely to find itself on the battlefield would accept norms that place its military success, or its survival, at serious risk.").

FROM TALLINN MANUAL "LAW-TALKING" TO LAW MAKING: HOW EXPERT-WRITTEN MANUALS INFORM THE DEVELOPMENT OF STATE PRACTICE ON CYBER DUE DILIGENCE OBLIGATIONS

Lieutenant Commander Omer Duru, JAGC, USN*

States' activities in cyberspace are oftentimes shrouded in mystery. This unknown extends to the legal status of actions taken in cyberspace and the concomitant responsibilities of States to behave responsibly. The Tallinn Manual on the International Law Applicable to Cyber Operations was innovatively developed to provide non-binding legal guidance to govern States' duties and responsibilities vis-à-vis cyberspace, including their obligation to exercise due diligence to ensure their territory and cyber infrastructure are not used for malign cyber activity that significantly affects other States.

Although the Tallinn Manual is neither authoritative nor an independent source of law, the publication of Tallinn 2.0 spurred States to begin a robust dialogue on the application of international law to cyber activities, providing transparency and fueling discourse that will serve as evidence for the formation of customary rules. Although a thorough analysis of state practice on cyber due diligence finds that insufficient evidence currently exists to reflect a crystallized cyber due diligence rule, the ongoing discourse amongst States on the applicability of international law to cyber activities gives the Tallinn Manual a powerful "law-talking," as opposed to law making, effect, and States are encouraged to participate in this discourse.

I. INTRODUCTION

"Cyber conflict remains in the gray area between war and peace, an uneasy equilibrium that often seems on the brink of spinning out of control."[1]

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States' activities in cyberspace are oftentimes shrouded in mystery, and this unknown extends to the legal status of actions taken in cyberspace, as well as the concomitant responsibility of States to behave responsibly. In the absence of responsible behavior, there is a significant probability that low-level cyber conflict escalates into a larger kinetic engagement.

Over the past decade, the world has experienced a significant increase in malign cyber activity.[2] Cyberattacks are no longer emanating solely from States' military or intelligence services, as transnational criminal organizations are increasingly leveraging cyberspace as a vector for malign activities.[3] Malign cyber activities often target States' critical infrastructure and information networks and are becoming increasingly complex, implicating the cyber infrastructure of multiple States.[4] A harrowing example of how malign cyber activities can have dramatic transboundary effects is the Emotet botnet; created in 2014 when Eastern European hackers disseminated malware via infected emails that compromised machines across the world.[5] This network of infected computers, known as a botnet, was then used by various transnational criminal organizations to engage in data theft as well as extortion through the use of ransomware.[6] In 2021, Emotet malware was used to target over 140,000 victims across 149 countries, with victims in the government, military, manufacturing, and healthcare sectors, amongst others.[7] Botnets such as Emotet are especially difficult to police because they are so dispersed, utilizing cyber infrastructure

staff for their support during the publication process. Most importantly, the author would like to thank his wife, Maya Duru, for improving everything he does, to include writing this Article.

[1] DAVID E. SANGER, THE PERFECT WEAPON: WAR, SABOTAGE, AND FEAR IN THE CYBER AGE New York: Crown Publishers, p. xi (2018).
[2] Center for Strategic and International Studies, *Significant Cyber Incidents Since 2006* (Mar. 28, 2023, 10:12 AM), available at: https://bit.ly/48ogDw2 (chronicling the dramatic increase in state- and transnational criminal organization-sponsored cyberattacks over the past decade).
[3] *See* Office of the Director of National Intelligence, *Annual Threat Assessment of the U.S. Intelligence Community* Feb. 7, 2022, at 8, 12, 15, 17, 24 (identifying Russia, China, North Korea, and Iran as major threats for state-sponsored malign cyber activity, and an increasing threat from transnational criminal organizations engaging in cybercrimes).
[4] *See, e.g.*, Office of the Deputy Attorney General, *U.S. Department of Justice, Comprehensive Cyber Review*, July 2022, at 28 [hereinafter U.S. Comprehensive Cyber Review] (detailing the multinational coalition efforts to stop the Emotet malware that infected computer networks in over 50 countries).
[5] *See* Crowdstrike, Cybersecurity 101 (Mar. 28, 2023, 10:14 AM) available at: https://bit.ly/3v99AJj (explaining that botnets are a network of infected computers through which malicious cyber actors can command and control the botnet to launch malicious cyberattacks, such as data theft, injection of malware, and ransomware).
[6] *See* Avertium, *An In-Depth Look at the Emotet Botnet* (Mar. 28, 2023, 10:17 AM) available at: https://bit.ly/48nFLCR (describing how Emotet was initially spread via infected Word documents embedded as email attachments, Emotet malware offers malign cyber actors a backdoor into infected networks).
[7] Checkpoint, Trickbot Rebirths Emotet: 140,000 Victims in 149 Countries in 10 Months (Mar. 28, 2023, 10:28 AM) available at: https://bit.ly/3RPyoil.

across different sectors around the globe; support and coordination across borders and between governments is required to address these threats.

A. Due Diligence in International Law

In international law, the concept of due diligence is commonly invoked to establish a State's legal responsibility for the actions of private actors that cannot be directly attributed to a State.[8] As articulated in the International Court of Justice (I.C.J.)'s *Corfu Channel* decision, States are obligated "not to allow knowingly [their] territory to be used for acts contrary to the rights of other States."[9] Additionally, the principle of due diligence has long been respected by States' domestic courts.[10] As it relates to harm to other States, a State must exercise diligence in proportion to the potential risks that may result from inaction.[11] Though no court or arbitral tribunal has yet assessed the meaning and effect of a due diligence requirement vis-à-vis cyber activities, there is historical precedent for applying due diligence to situations of conflict between States, especially in situations where there is risk of transboundary harm.

In 2016, the International Law Association (ILA) published a Study Group Report that summarized the core of the due diligence principle in three elements: (1) "A sovereign State is obligated to ensure"; (2) "That in its jurisdiction (which includes all those spaces where the sovereign exercises formal jurisdiction or effective control)" (footnote omitted); (3) "Other States' rights and interests are not violated" (parenthetical omitted).[12] Though the ILA Study Group Report did not directly address the applicability of due diligence to cyberspace, the core of due diligence as articulated by the ILA is reflected in Tallinn 2.0. The United Nations (U.N.) Group of Government Experts (GGE)'s Report contained a provision that appears to apply the due diligence requirement from the I.C.J. decision in *Corfu Channel* to cyber activities, but couched due diligence in cyberspace as a permissive norm, rather than an obligation.[13] The Tallinn 2.0

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[8] Max Planck Encyclopedia of Public International Law, *Due Diligence*, Timo Koivurova (Aug. 2022), ¶ 2.
[9] *Corfu Channel* (U.K. v. Alb.), Merits, 1949 I.C.J. Rep. 4, 10 (Apr. 9).
[10] *See, e.g.*, *United States v. Arjona*, 120 U.S. 479, 484 (1887) ("The law of nations requires every national government to use 'due diligence' to prevent a wrong being done within its own dominion to another nation.").
[11] *Alabama Claims of the United States of America against Great Britain (U. S. v. Gr. Brit.)*, Award, 29 R.I.A.A. 125, 129 (Trib. Arb. Sep. 1872).
[12] INTERNATIONAL LAW ASSOCIATION STUDY GROUP ON DUE DILIGENCE IN INTERNATIONAL LAW (2016), at 5–6,available at: https://bit.ly/3RyFFBT (summarizing the core of the due diligence principle that is widely applicable, subject to specific primary rules that may alter the due diligence obligation for specific areas of law) [hereinafter ILA Study Group Report].
[13] *Compare Corfu Channel* (U.K. v. Alb.), Merits, 1949 I.C.J. Rep. 4, 10 (Apr. 9), *with* U.N. Secretary-General, *Developments in the Field of Information and Telecommunications in the Context*

drafters identified the applicability of international law to cyber activities as an interstitial space in the law where international law obligations existed, but their applicability to cyber activities was not supported by treaty or custom.

Tallinn 2.0 is the result of a multi-year effort by the North Atlantic Treaty Organization (NATO) Cooperative Cyber Defence Centre of Excellence (CCDCOE) International Group of Experts (IGE), led by Professor Michael N. Schmitt, to publish an objective restatement of the *lex lata* on cyber activities.[14] The IGE reflects a diverse group of military and civilian legal experts, practitioners, and academics from universities and military war colleges around the world.[15] A common critique of international law making and law interpreting bodies is that they fail to be representative of the international community; the Tallinn IGE takes a positive step towards a representational body convening to interpret legal norms that are applicable to the global community, but notably absent is representation from Latin America or Africa.[16]

While the IGE may be representative of many nationalities and areas of the globe, IGE members did not act as representatives of their States. In fact, it may be argued that the *raison d'etre* of their work is borne of the inability of States to establish a clear legal framework to govern cyber activities.

States have a two-fold interest in understanding how the Tallinn Manual informs their international legal obligations. First, it is imperative to understand whether the provisions of the Tallinn Manual reflect the *lex lata* of international law currently applicable to cyber activities. Second, States' increased discourse on the applicability of international law to cyber activities, as well as direct engagement with the Tallinn Manual drafting process, can greatly influence the ongoing development of cyber norms and obligations. Subsequent to the 2017 publication of Tallinn 2.0, the dramatic increase in States releasing official statements on the applicability of international law to cyberspace is testament to

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of International Security, ¶ 13(c), U.N. Doc. A/70/174 (July 22, 2015) (applying *Corfu Channel* due diligence dicta to guidance on cyber activities).

[14] Michael N. Schmitt et al., *Tallinn Manual 2.0 on the International Law Applicable to Cyber Operations*, 3 (2017) [hereinafter Tallinn 2.0]. The Tallinn Manual first published in 2013 focused on the applicability of international law to cyber conflict and cyber warfare. Tallinn 2.0 refined this discussion, and also examined how general principles of international law, such as sovereignty and due diligence, apply to cyber activities.

[15] *See id.*, at xii–xviii (detailing that legal experts and legal peer reviewers serving on the IGE represented universities in North America, Europe, and Australia, as well as universities in China, South Korea, Japan, and India).

[16] *See* Dire Tladi, *Representation, Inequality, Marginalization, and International Law-Making: The Case of the International Court of Justice and the International Law Commission*, 7 UCI J. of INT'L, TRANSNAT'L, AND COMP. L. 60, 80–81 (2022) (finding that the regional seat allocation applied to the International Law Commission favors less-populous areas, such as the Western European and Other Groups bloc, to the detriment of other regional groups).

the "law-talking" effect that the Tallinn Manual has on the formation of international norms. Powerful States able to employ mature offensive and defensive cyber capabilities, as well as smaller States seeking to develop a clear, reliable legal regime to protect their interests in state sovereignty, should seek to engage in the development of Tallinn 3.0 and the future development of cyber legal norms and due diligence requirements.

This Article will examine the current international legal framework governing cyber activities and whether the Tallinn Manual's due diligence rule reflects *lex lata* by reviewing the body of state practice relevant to cyber due diligence.

B. Tallinn 2.0 Due Diligence Requirements

Tallinn 2.0 applies the due diligence principle to cyber activities through two integrated rules. Rule 6 is the aforementioned due diligence principle that obligates a State to not allow its "territory or cyber infrastructure under its governmental control to be used for cyber operations that affect the rights of, and produce serious adverse consequences for, other States." Rule 7 clarifies the scope of the due diligence principle by articulating how States comply: a State is required "to take all measures that are feasible in the circumstances to put an end to cyber operations that affect a right of, and produce serious adverse consequences for, other States."

Due diligence as applied to cyber activities does not obligate a State to prevent all harm to other States emanating from its territory, but rather it is an obligation of conduct applicable to States. The NATO CCDCOE, citing to the Tallinn 2.0 Commentary, offers instructive guidance on the elements required for a territorial State to breach its due diligence obligation:[17] acts of a non-State actor or third-State that are contrary to the rights of a victim State,[18] which emanate from or are conducted through the territory or cyber infrastructure of a potentially responsible territorial State,[19] which would have been unlawful if conducted by that territorial State,[20] which have serious adverse consequences for the victim

[17] NATO CCDCOE, INTERNATIONAL CYBER LAW: INTERACTIVE TOOLKIT, DUE DILIGENCE, available at: https://bit.ly/3Tkl4Ul (last visited January 16, 2023).
[18] Tallinn 2.0, *supra* note 14, Rule 6, ¶ 15 (clarifying that 'contrary to the rights' entails a breach of international legal obligations, not necessarily an act that violates domestic law, although such an act may implicate international legal obligations).
[19] *Id*., Rule 6, ¶ 8 (applying the obligation of due diligence throughout the sovereign territory of the territorial State, to include cyber infrastructure as well as the people carrying out cyber operations).
[20] *Id.*, Rule 6, ¶¶ 18–20 (asserting that actions that violate customary international law, as well as treaty obligations, are considered unlawful conduct for the purposes of cyber due diligence).

State,[21] of which the territorial State has actual or constructive knowledge,[22] and upon which the territorial State failed to take all feasible measures to address the source of the malign cyber activity.[23]

There is no consensus amongst States on whether the cyber due diligence principle requires States to monitor and prevent harm before it occurs, nor what the knowledge standard is that serves as the precedential triggering condition for States' due diligence obligations.[24] The lack of state consensus is reflected in the Tallinn Manual, as the majority of IGE members found that due diligence obligations apply to cyber operations that have not yet been launched, though a minority of IGE members found this would impose an unreasonable burden on States.[25] Some States assert that if a cyber due diligence obligation applies to States, then it is only triggered when States have actual knowledge of malign cyber activities emanating from their territory.[26] As a requirement for actual knowledge directly conflicts with the constructive knowledge position asserted in Tallinn 2.0, additional discourse from States to discern the standards applicable to cyber due diligence is required.[27]

[21] *Id.*, Rule 6, ¶¶ 25–26 (recognizing that the precise threshold of harm required to implicate that due diligence principle is unsettled, but asserting that actions that merely affect the interests of a target State, such as cyber activities that result in inconvenience, minor expense, or minor disruption, such as defacing the official website of a State's Ministry of Sports, do not satisfy the requirement for serious adverse consequences).

[22] *Id.*, Rule 6, ¶¶ 39–41 (ascribing constructive knowledge to States who may not have had actual knowledge that their territory or cyber infrastructure was being employed for malign cyber activity, but should have known of these actions due to the nature of the cyber activity or the usage of governmental cyber infrastructure).

[23] *Id*., Rule 6, ¶ 16 (determining that the feasible measures required for a State to comply with due diligence are driven by reasonableness and the technical institutional capacity of the territorial State, and thus due diligence compliance does not create an overly burdensome requirement for States that lack technical capacity).

[24] *See, e.g*., Eric Talbot Jensen and Sean Watts, *Due Diligence and the US Defend Forward Cyber Strategy*, Hoover Working Group on National Security, Technology, and Law, Aegis Series Paper No. 2006, at 2 (Oct. 15, 2020), available at: https://bit.ly/3Ryfhb0 (identifying the lack of clarity on whether due diligence requires States to take affirmative action *ex ante* to address cyber threats, and what is the threshold of harm to establish a breach of due diligence).

[25] Tallinn 2.0, *supra* note 14, Rule 7, Commentary, ¶¶ 3 and 4.

[26] *See, e.g*., New Zealand Foreign Affairs and Trade, The Application of International Law to State Activity in Cyberspace, at 3 (Dec. 1, 2020), available at: https://bit.ly/48eq153 [hereinafter New Zealand Position] (asserting that actual knowledge of malicious activity is required to trigger a State's cyber due diligence duties).

[27] Tallinn 2.0, *supra* note 14, at Rule 6, ¶ 39 (finding that a State is in breach of cyber due diligence obligations if it is unaware of malign cyber activity emanating from its territory, but "objectively should have known that its territory was being used for the operation").

II. IS THE DUE DILIGENCE PRINCIPLE IN TALLINN 2.0 REFLECTIVE OF LEX LATA?

The drafters assert that the Tallinn Manual is *lex lata,* and does not represent "progressive development of the law."[28] However, the Manual does not explicitly state how it is representative of *lex lata*. The drafters do not assert that the Tallinn Manual's cyber due diligence rule is reflective of customary international law (CIL), but instead catalog the rule as a general principle.[29] This distinction is critical for analyzing the Tallinn Manual's claim to reflect *lex lata*, and for understanding the language used by States to support or oppose the establishment of a cyber due diligence principle.

Article 38 of the Statute for the I.C.J., widely referred to as the doctrine of sources, offers an authoritative and ambiguously hierarchical recitation of the various sources of international law.[30] Article 38 articulates three primary sources of international law: (a) international conventions, (b) international custom, often referred to as CIL, and (c) general principles of law.[31] Additionally, "judicial decisions and the teachings of the most highly qualified publicists" are included as an interpretive tool for determining rules of law.[32] Here, this analysis focuses on whether Tallinn reflects CIL, as well as general principles of international law. The importance of this distinction is exemplified by the terminology that States use to articulate their positions on the applicability of the due diligence principle to cyber activities: States that are supportive of the application of due diligence employ broad language recognizing States' due diligence obligations, while States seeking to not be bound by a cyber due diligence principle use the terms associated with the formation of CIL rules.[33] The scope of this Article seeks to examine whether the Tallinn 2.0 due diligence rule reflects *lex lata*, not a robust analysis of whether the Tallinn 2.0 manual reflects *lex lata*.

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[28] *Id.* at 3 (asserting the Tallinn Manual is *lex lata* and does not "represent 'progressive development of the law'"). *But see* Jack Goldsmith and Alex Loomis, *"Defend Forward" and Sovereignty*, Hoover Working Group on National Security, Technology, and Law, Aegis Series Paper No. 2102, at 1, 13 (Apr. 29, 2021), available at: https://bit.ly/4asdGw2 (criticizing the Tallinn Manual's failure to explain why "known state practice and the 'sparse' *opinio juris* should not be relevant to the content of customary international law").

[29] Tallinn 2.0, *supra* note 14 at Rule 6.

[30] James Crawford, *Brownlie's Principles of Public International Law* 19 (9th ed. 2019) [hereinafter *Crawford*] (explaining that while no express hierarchy exists amongst sources of international law, treaty law and customary international law are the most important for analysis of international law obligations).

[31] United Nations, Statute of the International Court of Justice, 18 Apr. 1946, art. 138, ¶ 1 (a)–(c) [hereinafter I.C.J. Statute].

[32] *Id*. at art. 38, ¶ 1(d).

[33] *See* discussion *infra* Sec. II.A.2.a.

A. Does Tallinn 2.0 Reflect Customary International Law?

The Tallinn drafters claim that the manual reflects *lex lata* and that the due diligence rule is based on the general international law principle encompassing the notion of *sic utere tuo ut alienum non laedas* ('Use your own property so as not to injure that of another.').[34] To test the validity of this claim, this Article will first analyze whether the Tallinn 2.0 due diligence rule reflects CIL. This analysis requires a thorough review of evidence to satisfy the two constituent elements for the formation of a CIL rule: (a) the general practice of States, (b) that is adhered to out of legal obligation—often referred to as *opinio juris*.[35] For the Tallinn drafters' claim to be true, there must be sufficient evidence to show that States' actions reflect the provisions of Tallinn, and that States take these actions out of a legal obligation to do so.

1. State Practice

To satisfy the state practice prong for the formation of a CIL rule, there is no requirement that all States conform to the practice, but substantial conformity is required.[36] State practice, to include the practice of specially-affected States, should be "extensive and virtually uniform."[37] Further, there is no express temporal requirement that States engage in specific practice for an extended period of time; though more uniformity of practice may be required if the States' actions have only been undertaken for a short period of time.[38]

The International Law Commission (ILC) offers additional guidance on the identification of CIL that is applicable to the cyber context.[39] State practice can take many forms, to include, but not limited to, statements of government officials, legislative acts, and executive branch conduct, such as policy statements and operational conduct.[40] Importantly, whatever the form of state practice, classified or confidential practice does not have bearing on the determination of whether a CIL rule can be identified.[41] The ILC further elaborates that the consideration of "specially affected States" should not focus on the relative power

[34] Tallinn 2.0, *supra* note 14, at 3, 30.
[35] Crawford, *supra* note 30, at 19.
[36] Fisheries Case (U.K. v. Norway), Judgment, 1951 I.C.J. 116, 131 (Dec. 18) (failing to find a rule of general practice where there are two separate rules adopted by different groups of States).
[37] North Sea Continental Shelf Cases (Ger./Den.; Ger./Neth.), Judgment, 1969 I.C.J. 3, 43 ¶ 74 (Feb. 20) [hereinafter North Sea Continental Shelf].
[38] *Crawford*, *supra* note 30, at 20–21 (offering a summary of I.C.J. cases that synthesize a rule requiring significant uniformity of State practice that will increase given an absence of adherence to the practice over an extended temporal period).
[39] Int'l Law Comm'n, Rep. on the Work of Its Seventieth Session, U.N. Doc. A/73/10 (2018) [hereinafter ILC Draft Conclusions on CIL Identification].
[40] *Id.* at 43 (Conclusion 6, ¶ 2).
[41] *Id.* at 38 (Conclusion 5, Commentary ¶ 5).

of States, but rather on the likelihood that an established rule would affect some States more than others.[42]

2. Identifying State Practice in the Context of Cyber Due Diligence

In determining whether state practice supports formation of a CIL rule, there must be sufficient evidence to show that States are "not allowing [their] territory or cyber infrastructure under its government control to be used for cyber operations that affect the rights of, and produce serious adverse consequences for, other States."[43] Although a number of scholars have addressed the difficulties with accurately ascertaining state practice due to the classified nature of both cyber operations and the means to detect the source of malign cyber activity, government statements on the applicability of international law to cyber activities as well as national cyber policy statements offer a robust body of publicly-available evidence to analyze.

a. Government Statements on the Applicability of International Law to Cyber Activities

As part of the U.N. GGE effort to determine how international law applies to cyber activities, U.N. General Assembly Resolution 73/266 invited all Member States to provide their opinions and recommendations regarding the application of international law to cyber activities.[44] Published in July 2021, the GGE produced a document referred to as the Official Compendium that includes the voluntary national contributions of fifteen States on how international law applies to cyberspace.[45] Of the ten States that provided opinions regarding the application of the due diligence principle to cyber activities, seven States declared to the global community that due diligence applies to cyber activities.[46] Although 70 percent of commenting States supported the premise of cyber due diligence, three States took this opportunity to publicly question the applicability of due

[42] *Id.* at 136 n.716 (Conclusion 8, Commentary ¶ 4).
[43] Tallinn 2.0, *supra* note 14, Rule 6.
[44] G.A. Res. 73/266, U.N. Doc. A/RES/73/266 (Jan. 2, 2019). States' submissions were compiled and presented in a document referred to as the Official compendium of voluntary national contributions on the subject of how international law applies to the use of information and communications technologies by States submitted by participating governmental experts in the Group of Governmental Experts on Advancing Responsible State Behaviour in Cyberspace in the Context of International Security established pursuant to General Assembly resolution 73/266 [hereinafter Official Compendium].
[45] *Id.* at 1–2.
[46] *See id.* at 23, 31, 44, 54, 65, 75, 85 (noting the similar positions of Estonia, Germany, Japan, The Netherlands, Norway, Romania, and Switzerland).

diligence to cyber operations.[47] Notably, the United Kingdom and the United States both declared that there is insufficient state practice to find that a binding cyber due diligence rule of CIL exists.[48]

Separate from the government statements compiled in the Official Compendium, many States have publicized official policy positions on the existence of a cyber due diligence obligation. A number of States have recited near-verbatim the due diligence principle in Tallinn 2.0: that States should not allow their territory or cyber infrastructure to knowingly be used for acts that are contrary to the rights of other States.[49] Some States, such as Germany and Italy, have not directly transposed the Tallinn Manual into their official policy statements, but nevertheless clearly articulate that the due diligence principle is widely recognized in international law and applies to cyber activities.[50] Other States have taken a stronger position, articulating a legal obligation for States to act against malign cyber activity emanating from their territory.[51] Notably, there are a vocal minority of States—with varying degrees of forcefulness—whose comments reflect a non-concurrence in the belief that a due diligence customary rule applies to cyber activities.[52]

France's official position on due diligence applicability to cyber activities is one of the most forceful—and relevant for an analysis of state practice—in that it connects how France's governmental operations are informed

[47] *See id.* at 84 (describing Singapore's position of seeking more clarity form the international community regarding the scope and application of cyber due diligence obligations).
[48] *See id*. at 117, 141 (detailing the positions of the United Kingdom and United States).
[49] *See* AUSTRALIAN GOVERNMENT, ANNEX B: AUSTRALIA'S POSITION ON HOW INTERNATIONAL LAW APPLIES TO STATE CONDUCT IN CYBERSPACE, https://bit.ly/47XDdLY; GOVERNMENT OF CANADA, INTERNATIONAL LAW APPLICABLE IN CYBERSPACE, ¶ 26, https://bit.ly/3NzmrL0 [hereinafter Canada Position].
[50] *See* GERMAN FEDERAL GOVERNMENT, ON THE APPLICATION OF INTERNATIONAL LAW IN CYBERSPACE, at 3, (Mar. 2021), https://bit.ly/4aneqCD (highlighting the particular relevance of due diligence to cyber issues due to "the vast interconnectedness of cyber systems and infrastructures"); ITALY, ITALIAN POSITION PAPER ON 'INTERNATIONAL LAW AND CYBERSPACE,' at 6, https://bit.ly/3v4xZPW; GOVERNMENT OFFICES OF SWEDEN, POSITION PAPER ON THE APPLICATION OF INTERNATIONAL LAW IN CYBERSPACE, at 4 (July 2022), https://bit.ly/47VZZUB (sourcing a State's obligation of cyber due diligence from *Corfu Channel*).
[51] *See, e.g.*, CZECH REPUBLIC, STATEMENT BY RICHARD KADLČÁK, SPECIAL ENVOY FOR CYBERSPACE (Feb. 13, 2020), https://bit.ly/3TypIy2 [hereinafter Czech Position]; FINLAND, INTERNATIONAL LAW AND CYBERSPACE: FINLAND'S NATIONAL POSITIONS, at 4, https://bit.ly/3RS4UAt [hereinafter Finnish Position].
[52] *See* Roy Schöndorf, Israel's Perspective on Key legal and Practical Issues Concerning the Application of International Law to Cyber Operations, 97 INT'L L. STUD. 395, at 404 (2021) [hereinafter Israeli Position] (finding that cyberspace is ill-suited for a binding due diligence obligation because it is mostly private and decentralized, whereas due diligence more aptly applies to areas where the State exercises extensive control and oversight); *see also* New Zealand Position, *supra* note 26, at 3 ("New Zealand is not yet convinced that a cyber-specific 'due diligence' obligation has crystallised in international law.").

by the "customary obligation" to abide by the "due diligence requirement," clearly articulating that France's compliance with the principle ensures that its territory will not be used for malign cyber activity.[53] France's official position further articulates that States are prohibited from using proxies to commit malign cyber activity, and that States must ensure that non-state actors are unable to use their territory or infrastructure for these ends.[54] This official state position is unique in that it is evidence of France's state practice by way of official government statement, as well as its recitation of France's operational parameters for its own cyber conduct and expectations of other States.

China's position on the applicability of international law to cyber activities was not submitted to the Official Compendium, nor has China robustly engaged in multilateral discussions regarding international norms applicable to cyber activities. Nevertheless, China's Ministry of Foreign Affairs released a 2021 position paper on international rules making in cyberspace that articulated its views on the development of cyber legal norms.[55] Highlighting the need to "develop universally accepted norms, rules and principles within the framework of the UN," China appears to strongly support continued efforts to identify customary rules that will foster an open, secure, and deeply interconnected cyberspace.[56] Though it fails to explicitly state that it supports the applicability of the due diligence principle to cyberspace, this position is implicit in China's statement that "[t]he principle of sovereignty applies in cyberspace. States should exercise jurisdiction over the [information and communication technologies (ICT)] infrastructure . . . as well as ICT-related activities within their territories"; this position is a near-restatement of the U.N. Group of Governmental Experts Report (GGE Report) in 2015 urging—but not requiring—States to observe due diligence as it relates to cyber activities emanating from their territories.[57] Further, China links the exercise of jurisdiction over cyber infrastructure in its territory to the principle of sovereignty. This position is shared by other countries, and was most recently articulated by Poland which asserted that the obligation to not allow a State's territory to be used for malign acts flows directly from the sovereignty States exert over their territory.[58]

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[53] FRANCE, INTERNATIONAL LAW APPLIED TO OPERATIONS IN CYBERSPACE, at 2 (Sep. 9, 2019), https://bit.ly/3ROXBcF [hereinafter French Position].
[54] *Id.*
[55] MINISTRY OF FOREIGN AFFAIRS OF THE PEOPLE'S REPUBLIC OF CHINA, CHINA'S POSITIONS ON INTERNATIONAL RULES-MAKING IN CYBERSPACE (Oct. 20, 2021), https://bit.ly/479XTiJ.
[56] *Id.* ¶ II.
[57] *Id.* ¶ II(ii); *see also* U.N.G.A. A/70/174 [hereinafter GGE 2015 Report] (issuing a report on agreed upon norms, rules, and principles governing States' cyber activities).
[58] *Compare id.*, *with* THE REPUBLIC OF POLAND'S POSITION ON THE APPLICATION OF INTERNATIONAL LAW IN CYBERSPACE, at 4 (Dec. 29, 2022), https://bit.ly/48haSjG (establishing an obligation under international law by linking cyber due diligence to the principle of sovereignty).

Some States have chosen to engage in regional discourse regarding the applicability of due diligence to cyberspace. The Organization of American States' Inter-American Juridical Committee posed a number of questions to Member States regarding the applicability of international law to cyber operations.[59] In response, Chile, Ecuador, Guatemala, Guyana, and Peru determined that "the due diligence principle is a part of international law that States must apply in cyberspace."[60] Of this bloc, Chile provided the most forceful support for the application of due diligence to cyber activities.[61] This inter-state discourse on the applicability of international law to cyberspace is especially relevant as it may serve as a *cri de couer* for Global South States to increase their engagement and attention to the formation stages of international legal norms and obligations.[62]

An interesting facet of how regional organizations are engaging in legal discourse on the applicability of international law to cyber operations is when the organization itself, and not the Member States, makes public pronouncements regarding the obligation to perform cyber due diligence. In response to malign cyber activity threatening critical healthcare infrastructure during the early days of the COVID-19 global health pandemic, the High Representative of the European Council, speaking for all European Union Member States, called upon all nations to "exercise due diligence and take appropriate actions against actors conducting such activities from its territory, consistent with international law."[63]

It is noteworthy that some States have been extremely active in the public discourse regarding the applicability of due diligence to cyber activity, and their statements have matured over time to more forcefully reflect a position that supports the creation of a CIL rule for cyber due diligence. In 2019, Estonian President Kersti Kaljulaid delivered a detailed speech at the 11th International Conference on Cyber Conflict. In it, she briefly addressed the importance of States making "reasonable efforts to ensure that their territory is not used to adversely

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[59] Organization of American States [OAS], Inter-American Juridical Committee [IAJC], *Improving Transparency, International Law and State Cyber Operations: Fourth Report*, OEA/Ser.Q, CJI/doc. 603/20 rev. 1 corr. 1 (Mar. 5, 2020), https://bit.ly/4855U9Y [hereinafter OAS Report].

[60] *Id.* ¶ 58.

[61] *Id.* (quoting Chile's response: "[f]rom a cyber-operations standpoint, a state must exercise due diligence to prevent its sovereign territory, including the cyber infrastructure under its control, from being used to carry out cyber operations that affect another state's rights or could have adverse consequences for them.").

[62] *Cf.* Kevin J. Heller, *Specially-Affected States and the Formation of Custom*, 112 AMER. J. OF INT'L LAW 2, 243 (2018) (arguing that Global South States may be able to harness the specially-affected State doctrine to strengthen the bloc's CIL rule-making powers).

[63] *See* Council of the European Union, *Declaration of High Representative Josep Borrell, on behalf of the European Union, on malicious cyber activities, exploiting the coronavirus pandemic*, (Apr. 30, 2020), https://bit.ly/4871eQO (highlighting the need for a cooperative framework to address malicious cyber activities and the work of the United Nations' GGE to strengthen international cooperation towards a "secure cyberspace where . . . the rule of law fully appl[ies].").

affect the rights of other states."[64] Just two years later, Estonia's position in the Official Compendium more clearly reflected that the due diligence obligation is based in "existing international law and [it] applies as such in cyberspace."[65] Estonia's position as articulated in the Official Compendium, and supported by the majority of States taking official positions on due diligence, may reflect state practice crystallizing to confirm the formation of a CIL rule.

b. National Cyber Strategies and Operational Conduct

The drafters of Tallinn 2.0 recognized that there are significant difficulties associated with the identification of cyber rules of CIL due to the fact that States' cyber practices are mostly classified.[66] For state practice to contribute to the analysis of whether a CIL rule has formed, the practice of States must be known to other States.[67] However, cyber due diligence differs from cyber rules regarding the lawfulness of targets or other norms that seeks to regulate cyber operations in that due diligence is focused on actions vis-à-vis States that may reflect comity and cooperation regarding cyber threats. In this sense, operational conduct may be reflected in the practice of States taking unclassified actions that conform to the notion that a State must exercise due diligence to not allow its territory or cyber infrastructure to be used in a way that results in significant adverse consequences for other States.[68] With this in mind, States' national cyber strategies and public statements regarding cyber-related international cooperative efforts may serve as fertile ground for identifying relevant state practice.[69]

Estonia is one of the world leaders in advocating for the applicability of international law principles, to include due diligence, to cyber activities. This position is borne out in Estonia's National Cyber Strategy (NCS) objective to serve as a "credible and strong partner in the international arena."[70] Though not explicitly referenced, Estonia's adherence to the cyber due diligence principle can be directly inferred from its stated interest "to ensure the successful resolution of cyber-attacks, including ensuring rapid and effective obtaining of procedural

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[64] *President Kaljulaid at CyCon 2019: Cyber attacks should not be easy weapon*, ERR NEWS (May 5, 2019).
[65] Official Compendium, *supra* note 44, at 26.
[66] Tallinn 2.0, *supra* note 14, at 3–4.
[67] ILC Draft Conclusions on CIL Identification, *supra* note 39, at 37 (Conclusion 5, Commentary ¶ 5) (asserting that States must have knowledge of relevant state practice—even if it is not publicly known—for the practice to have bearing on an analysis of CIL rule identification).
[68] Tallinn 2.0, *supra* note 14, Rule 6.
[69] The International Telecommunication Union, the United Nations' specialized agency for information and communication technologies, maintains a database of States' National Cyber Strategies. *National Cybersecurity Strategies Repository*, INTERNATIONAL TELECOMMUNICATION UNION, https://bit.ly/3v7EPnU.
[70] REPUBLIC OF ESTONIA, MINISTRY OF ECONOMIC AFFAIRS AND COMMUNICATIONS, CYBERSECURITY STRATEGY, at 56, https://bit.ly/3uPYDMn [hereinafter Estonian NCS].

information from other countries and strengthening general exchange of information and cooperation."[71] This language directly reflects the information- and assistance-sharing required by cyber due diligence to address transboundary cyber threats.[72] More so than other States, Estonia's NCS highlights its efforts to further develop the field of "cyber norms, trust measures and international law."[73]

Italy's NCS offers a clearer example of how a State's cybersecurity initiatives are informed by its stated adherence to a due diligence principle.[74] Recognizing that cyber threats are evolving and government policy must adapt accordingly, Italy's NCS seeks to leverage "best practices on cyber-resilience and due diligence" to counter these new threats.[75] Adherence to a cyber due diligence principle can be seen in Italy's planned actions to enhance its own ability to detect malign cyber activity emanating from its own territory and infrastructure, and develop a corresponding information-sharing mechanism to coordinate threat reduction efforts with other States.[76]

At its heart, cyber due diligence aims to ensure that States do not permit their territory or infrastructure to be used to facilitate malign cyber activities—especially vital in this context due to the transnational nature of cyber activities. Thus, actions that reflect States' multinational cooperation to deny malign cyber actors the infrastructure to launch their attacks are relevant to determining whether a rule has crystallized.

In January 2021, a multinational coalition conducted operations to disrupt the Emotet Botnet: an inter-connected type of malware that infected host computers to coopt them into a larger network of bots that malicious cyber actors could control to target critical industries, such as banking, healthcare, and government.[77] The nature of Emotet and similar malware is especially relevant to cyber due diligence because every computer infected by Emotet is integrated into the Emotet network, thus implicating the cyber infrastructure of any State where Emotet is active. Led by the U.S. Federal Bureau of Investigation, a multinational coalition of law enforcement agents discovered that approximately 1.6 million

[71] *Id.* at 58.
[72] *See* Tallinn 2.0, *supra* note 14 at Rule 7, cmt. 1 (requiring a State to take all reasonably available measures to stop malign cyber operations emanating from its territory once it acquires knowledge of the operation).
[73] Estonian NCS, *supra* note 70, at 59.
[74] ITALY, NATIONAL CYBERSECURITY AGENCY, NATIONAL CYBERSECURITY STRATEGY, https://bit.ly/3v8Jmqg.
[75] *Id.* at 11.
[76] *Id.* at 18–20.
[77] OFFICE OF THE DEPUTY ATTORNEY GENERAL, U.S. DEP'T OF JUST., COMPREHENSIVE CYBER REVIEW 28 (July 2022), https://bit.ly/4889eRQ [hereinafter U.S. Comprehensive Cyber Review] (detailing the multinational coalition efforts to stop Emotet, including the U.S., Canada, France, Germany, the Netherlands, the United Kingdom, Lithuania, Sweden, and Ukraine).

computers worldwide had been infected with Emotet malware.[78] The United States coordinated with other States to access distribution servers overseas to effectively disable the network. Additionally, authorities were notified in over 50 countries where IP addresses that had been infected with Emotet were located.[79] Efforts to disable the Emotet network required collective action by multiple States, and notification to the States where Emotet-infected IP addresses were located satisfied the knowledge requirement that is condition precedent to the activation of the cyber due diligence principle.[80] Here, States were able to identify and take actions to confront cyberattacks emanating from their territories, seemingly in compliance with a notional cyber due diligence principle.

Additional state practice that is relevant to an analysis of adherence to a cyber due diligence principle is the extradition or expulsion of alleged cyber criminals from a State's borders. By extraditing or expelling alleged cyber criminals, States are able to ensure that their territory and infrastructure cannot be used by the alleged cyber criminal to undertake malign cyber activity. Solely using extradition and expulsion requests made by the United States as an example, since 2018, twenty-three States have complied with these requests in connection with malign cyber actors.[81] That numerous countries in Asia, Africa, Europe, and North America complied with extradition and expulsion requests may be taken as additional evidence that States are complying with due diligence requirements to not allow their territories to be used as safe havens for malign cyber actors.

c. Specially-Affected States Regarding Cyber Due Diligence

The practice of specially-affected States is given favorable treatment when analyzing the formation of CIL rules. In *North Sea Continental Shelf*, the I.C.J. articulated that the participation of States in a particular practice "whose interests were specially affected" should be considered particularly informative when determining whether practice has crystallized into custom.[82] This dicta created a high standard for CIL rule formation requiring concordant practice from specially-affected States.[83] Preferential treatment for the positions of specially-affected States stems from the I.C.J.'s belief that the creation of a norm or obligation will resonate most with those States given their close engagement with

[78] *Id.*
[79] *Id.*
[80] *See* Tallinn 2.0, *supra* note 14 at Rule 6, cmt. 37 (requiring the territorial State to have actual knowledge that its territory or infrastructure is being used for malign cyber activity).
[81] U.S. Comprehensive Cyber Review, *supra* note 77, at 31 (detailing that 44 alleged cyber criminals from 23 countries were extradited or expelled pursuant to U.S. request between 2018-2021).
[82] North Sea Continental Shelf, *supra* note 37, ¶ 73.
[83] Crawford, *supra* note 30, at 20–21.

the issue.[84] Rightfully so, there is concern amongst scholars that the specially-affected state doctrine simply offers a custom formation veto to powerful States in the Global North, though the doctrine has been invoked sparingly.[85]

Although the I.C.J. has failed to clarify the requirements to be considered a specially-affected State, subsequent I.C.J. jurisprudence appears to reject the concept that a specially-affected State is merely one that enjoys access to a restricted or closely-held weapon or military capability.[86] In fact, States may be considered specially-affected in relation to a particular norm or principle depending on whether they are positively or negatively affected by the establishment of customary rules.[87] Further, in *Marshall Islands*, the I.C.J. appears to imply that a State's suffering of actual or threatened harm may be cause for special status.[88] Though the case did not reach the merits stage, the I.C.J. noted in its Preliminary Objections judgment that the Marshall Islands "has special reason for concern" regarding nuclear disarmament and the actions of nuclear powers such as the United Kingdom, India, and Pakistan, given that the people of the Marshall Islands suffered from extensive nuclear testing programs in the Pacific.[89]

In the cyber context, it remains an open question whether any States qualify as specially-affected and what would be the functional effect of that distinction. Depending on the metric used to determine whether a State is designated as specially-affected, very different States could be granted enhanced CIL-rule making authority.

If a State's ability to wield cyber power—both domestically and in the international domain—is the preferred metric for determining specially-affected

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[84] *See* Michael N. Schmitt and Liis Vihul, *The Nature of International Law Cyber Norms*, 23, International Cyber Norms: Legal Policy& Industry Perspectives, (Anna Maria Osula & Henry Roigas, eds., 2016) at 41–42 (articulating that specially-affected States' opposition to norm creation may be of paramount importance).

[85] *See* Heller, *supra* note 62, at 192 (addressing the concern that the specially-affected States doctrine allows for Global North powerful States to control formation of custom, though only three States have ever invoked the doctrine: the United States, United Kingdom, and Germany).

[86] *See* Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. Rep. 226 (July 8) (failing to base its ruling on the contention by the United States and United Kingdom that they qualify as specially-affected States due to the fact that they control nuclear weapons).

[87] *See* Fisheries Jurisdiction (UK/Ice.; Ger./Ice.), Judgment, 1974 I.C.J. Rep. 90 (July 25), at 29, ¶ 66 (recognizing that the establishment of a rule of custom may have positive effects on one community while concurrently resulting in negative effects for a separate community, and implying that both groups are specially-affected by the establishment of custom).

[88] *See* Heller, *supra* note 62, at 198–99 (comparing the I.C.J.'s treatment of nuclear testing in *Marshall Islands* and *Nuclear Weapons Advisory Opinion*, and how the positions of specially-affected states are treated).

[89] Obligations Concerning Negotiations Relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marsh. Is./UK), Preliminary Objections, ¶ 44 (Int'l Ct. Just. Oct. 5, 2016).

State status, then the Harvard Kennedy School Belfer Center's National Cyber Power Index (NCPI) is an appropriate gauge.[90] The NCPI employs a holistic, whole-of-nation approach to measuring the cyber power of States.[91] Using eight cyber policy national objectives to measure a State's cyber capabilities, the NCPI focuses on capabilities across the cyber domain, to include surveillance, competency for defensive and destructive cyber operations, intelligence collection, and control of the information environment.[92] The 2022 NCPI indicates that the United States, China, and Russia, in that order, are the States enjoying the greatest cyber power aspirations and the attendant capabilities to achieve their goals.[93]

Given that cyber due diligence is implicitly about the ability and obligation to prevent malign cyber activity from occurring, a better metric for specially-affected State status may be based on a State's capacity to engage cyber threats and manage cyber incidents. In such a case, the National Cyber Security Index (NCSI) based out of Estonia may be the most instructive resource for determining which States have the most robust cyber defense preparedness.[94] The NCSI identifies the following three main cyber threats to States: denial of e-services, data integrity breaches, and data confidentiality breaches.[95] A State's cyber capacity to confront these threats is then measured using publicly-available evidence, such as relevant legislation, established government organizations and units dedicated to cybersecurity, intergovernmental and international cooperation agreements, and the outcomes of these efforts.[96] Using cyber defense preparedness as the metric for determining which States are to be considered

[90] Belfer Center for Science and International Affairs, National Cyber Power Index 2022, September 2022, available at: https://bit.ly/48gUgbM.
[91] *See id*. at 4 (listing the following measurement factors as relevant to the NCPI: "government strategies, capabilities for defensive and destructive operations, resource allocation, private sector capabilities, within a country such as technology companies, workforce, and innovation.").
[92] *See id*. at 4–6 (highlighting the following eight cyber objectives of States: surveillance of domestic groups, strengthening national cyber defenses, controlling the information environment, foreign intelligence collection, growing national and commercial cyber competencies, disabling the enemy's cyber capabilities, defining international cyber norms, and amassing wealth through cyber operations).
[93] *See id.* at 9 (listing the top ten cyber powers as the United States, China, Russia, United Kingdom, Australia, the Netherlands, South Korea, Vietnam, France, and Iran).
[94] *See* National Cyber Security Index, https://bit.ly/48rTLfc (weighing countries' ability to manage cyber threats and correspondence capacities for cyber security, incident management, and development of general cyber security).
[95] *See id.* (outlining the main threats to digital society that "affect the normal functioning of national information and communication systems").
[96] *See id.* (awarding points according to publicly-available evidence of States' capacity to address cyber threats, with more points given to cyber-specialized government units and organizations, as well as the products of cybersecurity efforts).

specially-affected, the NCSI finds that the top ten countries all hail from Europe, with Greece, Lithuania, and Belgium topping the list.[97]

Based on the I.C.J.'s indication in *Marshall Islands* that threat of harm may play a role in determining which States are specially-affected, flipping the NCSI to measure the least-prepared States in the world to address cyber threats may be informative. South Sudan, Tuvalu, and the Solomon Islands are deemed to be the States least-prepared to confront cyber threats.[98]

If specially-affected State considerations are to be applied to cyber CIL rule-making, it is evident that determining the methodology for specially-affected State designation will be critical in determining which States' voices are magnified by this doctrine. Given the varied results based on using the NCPI, NCSI, or possibly other tools for measuring which States have robust cyber capabilities, the determination of which methodological tool to employ will have significant implications for which States' interests are given special consideration when forming CIL rules.

3. Opinio Juris

Per article 38 of the Statute of the I.C.J., the formation of CIL requires that state practice be "accepted as law."[99] The normative acceptance of a state practice as flowing directly from a legal obligation is at the crux of the formation of CIL.[100] Further, a State's expression of *opinio juris* is the positivist element that forms the basis for the binding nature of CIL obligations; similar to how States positively accede to treaty obligations, expressions of *opinio juris* reflect the binding nature of customary obligations on States.[101] When inferring the existence of *opinio juris* based solely on a State's practice, it is of utmost importance to discern whether a particular action is taken out of legal obligation, as opposed to an operational or policy choice.[102] Through *opinio juris*-reflective statements, States play a direct role in guiding the emergence and interpretation of evolving

[97] *See* Index, National Cyber Security Index Rankings, https://bit.ly/4adz3Bn (listing the most cyber prepared States as Greece, Lithuania, Belgium, Estonia, Czech Republic, Germany, Romania, Portugal, Spain, and Poland).
[98] *Id.*
[99] I.C.J. Statute, *supra* note 31, art. 38(1)(b).
[100] Crawford, *supra* note 30, at 21.
[101] *See* North Sea Continental Shelf, *supra* note 37, ¶ 77 ("Not only must the acts concerned amount to a settled practice, but they must also be such, or carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it.").
[102] *See* Schmitt & Vihul, *supra* note 84, at 24 (citing to a letter from John B. Bellinger, III to the International Committee of the Red Cross, available at: https://bit.ly/3Rudwf8, expressing concern that the ICRC's methodology for determining the existence of customary international law unduly subsumes a separate analysis of *opinio juris* into a determination of whether sufficient state practice exists to support rule creation).

legal norms—so-called Grotian Moments—while protecting and advancing their own national interests.[103]

An express public statement made by a State to articulate that a particular practice was undertaken pursuant to CIL is "the clearest indication" that a practice is taken out of a legal duty or obligation.[104] Meeting this requirement is especially difficult in the cyber due diligence context due to the classified nature of cyber operations, as well as the fact that the observation of due diligence is essentially a negative practice that States observe to ensure their territory and cyber infrastructure are not used to the detriment of other States. In the absence of express public statements linking specific practices to legal obligations, official policy statements, either published individually by States or made in connection with multilateral discussions, serve as strong evidence of *opinio juris*. Additionally, published opinions of government legal advisers and official publications such as States' national cyber strategies may serve as evidentiary support for the existence of *opinio juris*.[105]

a. Public Statements on Cyber Due Diligence Legal Obligations

The U.N. GGE Report of 2015 initiated global discourse on the existence of a cyber due diligence legal obligation from a place of weakness and ambiguity. According to the U.N., "States should not knowingly allow their territory to be used for internationally wrongful acts using ICTs;" by using the word "should" the U.N. frames this provision as a voluntary, non-binding norm—a mere suggestion of preferred conduct.[106] However, in the years since the publication of the GGE Report, the majority of official international law policy statements, as well as statements in multilateral settings, have dropped the equivocal nature of the GGE Report and appear to support the notion that cyber due diligence is an obligatory standard of conduct based in international law.

States' opinions on the existence of *opinio juris* in support of a cyber due diligence principle range from strong support to equally strong non-concurrence. States are not uniform across this dimension. Of the 24 States that have articulated

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[103] *See* Michael N. Schmitt & Sean Watts, *State Opinio Juris and International Humanitarian Law Pluralism*, 91 Int'l L. Stud. 171, 176–77 (2015) (warning that States who fail to utilize opportunities to provide expressions of *opinio juris* risk missing Grotian Moments where States have a heightened ability to shape the formation of legal norms through radical development of emergent new CIL rules).

[104] ILC Draft Conclusions on CIL Identification, *supra* note 39, at 141 (Conclusion 10, Commentary ¶ 4).

[105] *Id*. (Conclusion 10, Commentary ¶¶ 5–6).

[106] GGE 2015 Report, *supra* note 57, ¶ 13(c).

a clear position on the existence of a cyber due diligence principle, 17 support its existence and find it based on international legal obligations.[107]

France most clearly articulates the position of States adhering to a cyber due diligence principle out of legal obligation.[108] France notes that its cybersecurity operations are informed by the obligation to "ensure that its territory is not used for internationally wrongful acts using ICTs," and connects this principle to a "customary obligation for States, which must [] use cyberspace in compliance with international law."[109]

The vast majority of States that find an international legal obligation exists for cyber due diligence base their position on the seminal due diligence case, *Corfu Channel*, as well as other relevant cases from the I.C.J. and arbitral tribunals.[110] Other States, such as Estonia, articulate that the due diligence principle has its "legal basis in existing international law and applies as such in cyberspace," though it does not cite to specific cases or legal precedent.[111] Although it signaled its position that due diligence has its basis in international legal obligations and that it applies in cyberspace, the Netherlands also recognizes there are States that do not concur with the position that due diligence "constitutes an obligation in its own right under international law."[112]

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[107] *See generally* Official Compendium, *supra* note 44 (Estonia, Germany, Japan, The Netherlands, Norway, Romania, and Switzerland recognizing the due diligence principle as based in international law and applicable to cyber activities); OAS Report, *supra* note 59, at 20 (Chile, Ecuador, Guyana, Guatemala, and Peru "took the position that the due diligence principle is a part of the international law that States must apply to cyberspace").

[108] French Position, *supra* note 53, at 2; *see supra* Section II.A.2.a (evidencing that the Czech Republic, Finland, France, Italy, and Sweden find cyber due diligence rooted in international law obligations).

[109] French Position, *supra* note 53, at 2.

[110] *See* Official Compendium, *supra* note 44, at 48 (Japan finds due diligence obligations derive from *Corfu Channel*, Alabama Arbitral Award, and *Genocide Convention*, and that due diligence has significance to cyber operations), 33 (Germany finds the " 'due diligence principle', which is widely recognized in international law" applies in the cyber context, and cites *Corfu Channel* and *Island of Palmas* for support), 71 (Norway sources the customary international law obligation of due diligence to *Corfu Channel*, and applies it in situations where there is risk of transboundary harm, to include cyber operations), 76 (Romania finds that *Corfu Channel* enunciates the due diligence obligation of States, and finds that it requires a State to take action to address non-State actor malign cyber activities emanating from its territory); Finnish Position, *supra* note 51, at 4 (framing the due diligence issue as one of transboundary harm and citing to legal precedent, to include *Corfu Channel* and the International Tribunal for the Law of the Sea, that supports application of the due diligence principle to issues of transboundary harm).

[111] *See*, Official Compendium, *supra* note 44, at 26; Czech Position, *supra* note 51 (finding a legal obligation for States "to act against unlawful and harmful cyber activities emanating from their territory or conducted through cyber infrastructure under their governmental control").

[112] *See* Official Compendium, *supra* note 44, at 59 (The Netherlands relies on *Corfu Channel* as the source for the international legal obligation to exercise due diligence).

States that do not support the existence of a binding legal obligation to exercise cyber due diligence occupy a minority position.[113] The "Five Eyes" States are split on whether a cyber due diligence binding legal obligation exists. Two of the five, Canada and New Zealand, articulated positions that do not support the existence of a cyber due diligence legal obligation, but are continuing to monitor legal discourse to determine whether a rule crystallizes.[114] The United States and United Kingdom offer the clearest rejection of the principle, stating that state practice and concomitant *opinio juris* do not exist to support rule formation.[115] The United Kingdom premises its position on the GGE 2015 Report that articulated the consensus of States viewed due diligence as a non-binding voluntary norm. However, the United Kingdom fails to acknowledge that its position does not comport with the majority of States' positions on due diligence published alongside its own in the Official Compendium.[116] Notably, despite rejecting the cyber due diligence principle, the United States and Australia support the position that "if a State is notified of harmful activity emanating from its territory it must take reasonable steps to address such activity;" language that comports with the Tallinn 2.0 due diligence rule.[117]

Based solely on the official public statements of States, it is unclear whether a sufficient number of States support the position that state practice adhering to a cyber due diligence principle is undertaken out of legal obligation. Though the majority of States support the existence of a due diligence principle that is applicable in cyberspace and based in international legal obligations, there are a number of vocal opponents. What is clear, however, is that from the time the GGE Report was published in 2015 to circulation of the Official Compendium in 2021, a majority of States were willing to publicly declare that cyber due diligence is more than simply a non-binding voluntary norm.[118]

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[113] *See id.* at 84 (Singapore seeks "more clarity on the scope and practical applications, if any, of due diligence in cyberspace"); Israeli Position, *supra* note 52, at 404 (finding only voluntary cooperation amongst States in support of due diligence-related actions, and no corresponding *opinio juris* to obligate conduct).

[114] *See* Canada Position, *supra* note 49, fn. 20 (interpreting the 2015 GGE Report articulating the non-binding, voluntary norm of due diligence to not necessarily exclude the existence or formation of a binding legal rule of due diligence); New Zealand Position, *supra* note 26, at 3 (viewing the existence of a binding legal obligation to exercise cyber due diligence to be an unsettled matter).

[115] *See* Official Compendium, *supra* note 44, at 141 (disagreeing with "a few States" that have publicly voiced support for the existence of a cyber due diligence principle).

[116] *See id.* at 117 (citing to UN GGE Norm 13(c) as the basis for its continued belief that there is "not yet State practice sufficient to establish a specific [CIL] rule of 'due diligence' applicable to cyberspace").

[117] Compare *id.* at 141, *with* Tallinn 2.0, *supra* note 14, Rule 7, Commentary, ¶ 1 (asserting that States must take "all reasonably available measures" to stop malign cyber activity emanating from their territory about which the State has knowledge).

[118] *Compare* Schmitt & Vihul, *supra* note 84, at 24 (stating that Estonia engages in preventive cyber activities out of security and operational considerations opposed to a sense of legal obligation) *with*

b. National Cyber Security Strategies and Official Policies

Some scholars have argued that in situations where state practice is underdeveloped, or often classified in the case of cyber activities, strong evidence of *opinio juris* is necessary to form customary rules.[119] In such an instance, it may be insufficient to solely rely on the public pronouncements made by States that traditionally qualify as expressions of *opinio juris*. Some scholars suggest that national cyber security strategies (NCSS) may offer insight into what legal obligations a State perceives to exist in unsettled areas; as an NCSS is the product of an inter-agency collaborative effort to distill a State's opinion on matters that likely affect international relations, commerce, and national security, they will likely be the product of significantly more deliberation than a government policy paper.[120] Although an NCSS is unlikely to clearly address legal obligations, they may offer insight into the legal norms by which a State believes itself to be bound.

Estonia's National Cyber Strategy is the strongest example of a State's adherence to legal obligations informing their cyber strategy objectives. Estonia's adherence to legal obligations and desire for other States to adopt a collective due diligence approach to cyber threats is reflected in its long-term goal to raise awareness of international law cyber issues and promote cross-border cooperation through a European Union cyber assistance network.[121]

The U.S. NCS is nearly lockstep aligned with Estonia's approach to building international cyber capacity to identify and address malign cyber threats, though stands directly counter to Estonia's belief that binding norms, such as due diligence, play a critical role in shaping responsible state behavior. Under the pillar entitled "Preserve Peace Through Strength," the U.S. NCS directly addresses the ongoing debate amongst States regarding the binding nature of international law and norms vis-à-vis cyber activities.[122] The NCS identifies the encouragement of universal adherence to "voluntary non-binding norms of responsible state behavior in cyberspace" as a priority action for the United States

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Official Compendium, *supra* note 44, at 26 (stating that Estonia's obligation to exercise due diligence in cyberspace "has its legal basis in existing international law").

[119] *E.g.*, BRIAN D. LEPARD, CUSTOMARY INTERNATIONAL LAW: A NEW THEORY WITH PRACTICAL APPLICATIONS, 111–14 (2010).

[120] *See* Ann Väljataga, *Tracing opinio juris in National Cyber Security Strategy Documents* 5, (NATO Cooperative Cyber Defence Center of Excellence 2018, https://bit.ly/3RGYu5Z (comparing national cyber security strategies to laws in that they are meant to crystallize a State's approach to a norm or practice for an extended period of time).

[121] *Cf.*, at 31 (planning to employ the Foreign Policy Development Plan 2030 to advance its objective to raise awareness of cyber international law issues).

[122] THE WHITE HOUSE, NATIONAL CYBER STRATEGY OF THE UNITED STATES OF AMERICA 20 (2018).

to support the position that a binding norm of cyber due diligence has not crystallized.[123] Moreover, the United States has indicated a plan to defend and bolster its position through the encouragement of "other nations to publicly affirm these principles and views through enhanced outreach and engagement in multilateral fora."[124] Here, the U.S. NCS, in stark contrast to Estonia's position, is a prime example of a NCS articulating a State's view on binding and voluntary legal obligations that shape a nation's cyber strategy.

Most NCSS documents discuss a need for more international cybersecurity cooperation, but take care to not implicate legal obligations or wade into a murky legal debate.[125] In 2020, Turkey published its NCSS in which it laid out its strategic objectives for the cyber domain.[126] Though Turkey's NCSS covers objectives to support international efforts in the fight against cybercrime, as well as improving international cooperation against transboundary threats, no mention is made of an overarching principle that States must exercise due diligence in not allowing their territory to be used to support malign cyber activity.[127]

Given that the majority of States choose to articulate broad, generalized strategic objectives as it relates to cyber threats, it is rare to find statements in NCSS documents that are probative on the question of whether a State's cyber activities are driven by a sense of legal obligation.

Evident in the analysis of state practice and *opinio juris* on the question of cyber due diligence is that a majority of States support the existence of a cyber due diligence principle, but that a number of vocal detractors disagree. The opponents of a cyber due diligence principle employ the analytical language associated with CIL rule formation, though supporters of cyber due diligence employ more broad language linked to international law principles.[128]

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[123] *Id.*
[124] *Id.*
[125] *See, e.g.*, THE REPUBLIC OF KENYA NATIONAL CYBERSECURITY STRATEGY 14 (2022), https://bit.ly/3GRwkQz (seeking to foster more international cooperation to address cyber threats through establishing information-sharing mechanisms and promoting the development of international laws and norms addressing cybersecurity); CANADIAN MINISTRY OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS, National Cyber Security Strategy 32 (2018), https://bit.ly/3NzsxLj (pledging to work with international partners to enhance international cooperation to combat cybercrime); MALAYSIA, CYBER SECURITY STRATEGY 78 (2020), https://bit.ly/3RujlZW (seeking to expand cybersecurity collaboration with international partners, but also engage in the development of international norms that are not contradictory to Malaysia's national interest).
[126] REPUBLIC OF TURKEY, MINISTRY OF TRANSPORT AND INFRASTRUCTURE, NATIONAL CYBER SECURITY STRATEGY (2020), https://bit.ly/3NzWGui.
[127] *See id.* at 26, 28 (failing to reference the legal principle of due diligence even though it positively complements Turkey's cyber strategy).
[128] *See* Official Compendium, *supra* note 44, at 26, 141 (Estonia finds that cyber due diligence is based in the principle of sovereignty, while the United States "has not identified the State practice

Importantly, few detailed statements existed in 2017 to analyze the question of whether cyber due diligence is an established CIL rule. Only after Tallinn 2.0's release in 2017 did States begin to publicly engage in "law-talking" and articulate their positions on cyber due diligence. It is this very ongoing debate that may lead to CIL formation in the future.

B. Tallinn 2.0 Reflects General Principles of International Law

To further evaluate the Tallinn Manual's claim that it reflects *lex lata*, it is necessary to analyze the final independent source of international legal obligations: general principles. Though often treated as a backbencher for sources of international law behind treaty and CIL, "general principles of law recognized by civilized nations" are clearly reflected in Article 38 of the I.C.J. Statute.[129] General principles are viewed as the mode through which international law is influenced and infused with the general legal reasoning of domestic legal jurisprudence.[130] The Third Restatement on Foreign Relations Law of the United States ("Restatement") offers a different approach to general principles and their status as a source of law, asserting that general principles may be "invoked as supplementary rules of international law" if not reflected in a separate rule of custom or treaty.[131] The Restatement further cautions that general principles should only be "resorted to for developing international law interstitially in special circumstances," such as when a prospective rule has not had "sufficient application in practice to be accepted as a rule."[132]

The Tallinn Manual sources the authority for the cyber due diligence rule from the "general international law principle that States must exercise due diligence in ensuring territory and objects over which they enjoy sovereignty are not used to harm other States."[133] The Tallinn 2.0 drafters posit that the broader concept of due diligence has been reflected in international law for many years—an assertion that is strongly corroborated by the ILA Study Group Report discussed *supra* in Section I.[134] As the ILA found in its 2016 Report, due diligence is widely applicable throughout various areas of international law, but subject to modification where specific rules exist.[135] In the absence of specific rules

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and *opinio juris* that would support a claim that due diligence currently constitutes a general obligation under international law.").

[129] I.C.J. Statute, *supra* note 31, art. 38(1)(c).

[130] Crawford, *supra* note 30, at 26.

[131] RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 102(4) (AM. LAW INST. 1987).

[132] *Id.* § 102 cmt. l.

[133] Tallinn Manual 2.0, *supra* note 14, Rule 6, Comment 1.

[134] *Id.*, Rule 6, Commentary ¶ 4.

[135] *See* ILA Study Group Report, *supra* note 12, at 6 (clarifying that the contents of the rule of due diligence is "defined at the international level").

modifying the due diligence principle for cyber activities, the default rule should apply. Further, applying due diligence to cyber activities would comport with the Restatement's cautionary guidance to resort to general principles interstitially where a customary rule has not yet formed.[136]

Though there is scant state practice directly referencing due diligence as a "general principle" of international law, many States refer to a due diligence principle as an obligation found in international law.[137] Some States directly tie the due diligence principle to a basis in international law through citation to *Corfu Channel*.[138] Estonia's position is noteworthy in that it finds the "due diligence obligation derives from the principle of sovereignty"; implicit in this statement is that due diligence is not a general principle in its own right.[139] Despite a State's failure to explicitly refer to due diligence as a general principle, if States view the due diligence principle as a binding obligation, applicable to cyber activities, with a basis in international law, then this position is likely utilizing the framework applicable to secondary sources of international law addressed in the Restatement.[140]

There is little consensus on whether cyber due diligence, as a general principle of international law, is binding on States. States that support the applicability of the due diligence principle to cyberspace offer broad analysis but are unable to cite to an international court that has previously applied the due diligence principle to a rapidly developing area of the law, such as cyber activities. It is instances where well-established legal principles must be applied interstitially to new areas of law that legal resources such as the Tallinn Manual are potentially most valuable.

C. Tallinn 2.0 is an Effort by Most Highly Qualified Publicists to Influence and Develop Norm Creation

Per the doctrine of sources, "teachings of the most highly qualified publicists of the various nations" are to be used as a "subsidiary means for determination of rules of law."[141] While teachings of the most highly qualified

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[136] *See* Tallinn 2.0, *supra* note 14, Rule 6, Commentary ¶ 4 (finding that "new technologies are subject to pre-existing international law absent a legal exclusion therefrom").
[137] *See, e.g.*, Official Compendium, *supra* note 44, at 59 (the Netherlands finding due diligence principle is an obligation under international law that may constitute an internationally wrongful act if a State fails to comply).
[138] *See id.* at 71 (Norway—deriving the legal basis for the due diligence principle from *Corfu Channel*).
[139] *Id.* at 26.
[140] *See id.* at 33 (Germany—finding the due diligence principle is widely recognized in international law and applicable as well as especially relevant to governing the "vast interconnectedness of cyber systems and infrastructures").
[141] I.C.J. Statute, *supra* note 31, at art. 38(1)(d).

publicists are not an independent source of law, they offer valuable "opinion-evidence as to whether some rule has in fact become or been accepted as international law."[142] Analogous to the writings of the most highly qualified publicists is the process of codification: the establishment of the *lex lata* regarding a particular set of norms and applicable rules.[143] Though codification is typically performed by an organization such as the International Law Commission, the Tallinn 2.0 drafters arguably informally codified the legal rules applicable to cyber operations through the rigorous process they used that included legal practitioners and academics, civilian and military legal advisers, and States' non-attributed opinions through the "Hague Process."[144]

The Tallinn Manual is non-binding, not an independent source of law, and is not clearly reflective of CIL, yet it is cited by States' legal advisors across the globe.[145] On one end of the spectrum, States such as Germany openly signal to the international community that the Tallinn Manual informs their official policies. This is clear evidence of an expert-written manual serving the purpose of offering clarity to States whose legal positions are still developing.[146] Despite the inclusion of a disclaimer that citations to Tallinn 2.0 "do not necessarily constitute an endorsement of the referenced text by the German government," the multiple comments and citations to Tallinn 2.0 evinces, at the very least, an implicit endorsement.[147]

On the other end of the spectrum, there are States that utilize Tallinn 2.0 as a resource but take due care to ensure that the non-binding nature of Tallinn 2.0 is communicated internally and externally. In 2020, U.S. Department of Defense General Counsel Hon. Paul C. Ney, Jr. delivered remarks at the U.S. Cyber Command Legal Conference addressing recent developments in cyber capabilities, operations, and the rules- and norm-based frameworks used to analyze the legality of States' actions in cyberspace.[148] Addressing the evolving nature of the applicability of international law to cyberspace, Mr. Ney offered that

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[142] RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW, *supra* note 131, § 102, comment *l*.
[143] Crawford, *supra* note 30, at 41.
[144] United Nations, Statute of the International Law Commission, art. 1 (Nov. 21, 1947) ("The International Law Commission shall have for its object the promotion of the progressive development of international law and its codification.").
[145] *See, e.g.*, Canada Position, *supra* note 49, nn. 15, 19, 27, 30, 31, and 32 (citing to the Tallinn Manual 2.0 as the basis for the Canadian legal position); *see also* Government of the Kingdom of the Netherlands, Appendix: International law in cyberspace, at 4–5, Sep. 26, 2019 (discussing how the Tallinn Manual directly informs Dutch cyber policy).
[146] *See* Official Compendium, *supra* note 44, at 31–44 (Germany–citing to Tallinn 2.0 thirty-seven times in its submission to the Official Compendium).
[147] *See id.* at 33 (signaling Germany's concurrence with Tallinn 2.0's rules regarding sovereignty, physical effects and harm of transboundary malign cyber activities, and the effects of cyber activities determining whether territorial sovereignty has been violated).
[148] Speech of Hon. Paul C. Ney, Jr., U.S. Cyber Command Legal Conference (Mar. 2, 2020): https://bit.ly/3GRdbOA.

publications such as the Tallinn Manual are useful for legal advisors to consider, "but they do not create new international law, which only [S]tates can make."[149] Echoing Mr. Ney's points, guidance provided by the U.S. military to its legal advisors analyzing emergent cyber issues emphasizes the non-binding nature of the Tallinn Manual and the important fact that it takes positions that are not harmonious with U.S. and NATO policy, and is not representative of binding international law.[150]

The U.S. position on the non-binding nature of the Tallinn Manual is a direct reflection of the doctrine of sources' view that the writing of publicists is merely a "subsidiary means for determinations of the law," not a source of law itself.[151] Though the fact that a clarifying statement, such as the one delivered by Mr. Ney, was necessary denotes that expert-written manuals, such as Tallinn 2.0, may occupy an interstitial space of significance somewhere between the binding rules of treaty law and CIL, and the subsidiary interpretive texts produced by the world's most highly qualified publicists. The special status and influence of the Tallinn Manual is further supported by the efforts of entities such as Cyber Law International that provide legal training on the law applicable to cyber activities.[152] Using the Tallinn Manual's research as its subject-matter basis, Cyber Law International has provided training to government officials from around the world and across all sectors of government, for both anglophone and francophone audiences.[153] Through these training efforts, more government legal advisors have been exposed to Tallinn 2.0's proposed cyber norms, and they will certainly play an outsized effect in influencing States' positions on the applicability of international law to cyber activities.

A number of legal scholars have assailed expert-written manuals for their lack of normative basis and dearth of legal authority. Anton Petrov offers a sharp critique of the increased usage of expert-written manuals that offer "black-letter rules resembling an international treaty and accompanying commentaries [which] provide a handy, allegedly authoritative instruction on contentious legal questions."[154] In the case of the Tallinn Manual, it was developed in a vacuum of binding legal authority where no treaty obligations nor clear CIL was available to

[149] *Id.* at sec. 2(B)(para. 2).
[150] *See, e.g.,* Lt Col Royal A. Davis, III, et al., *Air Force Cyber Law Primer*, Air University Press (Maxwell Air Force Base, Alabama) (Nov. 2022), at 17–18 (cautioning military legal practitioners that the Tallinn Manual "should not be adhered to as policy or guidance").
[151] I.C.J. Statute, *supra* note 31, art. 138(1)(d).
[152] Email from Liis Vihul, Chief Executive Officer, Cyber Law International, to Omer Duru of Harvard Law School, (Mar. 2, 2023, 11:07 EST) (on file with author) (explaining that Cyber Law International provides cyber-focused legal training to private and public entities across the world).
[153] *Id.*
[154] ANTON PETROV, EXPERT LAWS OF WAR: RESTATING AND MAKING LAW IN EXPERT PROCESSES 4 (2020).

guide the analytical work of legal advisors.[155] Petrov thus asks the all-important question: If States are unable to develop binding rules to govern States' duties and obligations in cyberspace, "[h]ave experts . . . taken over pushing the law ahead?"[156] The Lieber Code, 1913 Oxford Manual on Naval War, and 1923 Hague Rules of Warfare are three examples of expert-written manuals that sought to further develop legal norms by proposing *lex ferenda* rules.[157] Conversely, Tallinn 2.0 asserts that it offers "[b]lack letter rules . . . meant to reflect *lex lata"* as well as commentary on each proposed rule where "the legal rationale for finding that [a rule] represents *lex lata* is set forth."[158] However, Petrov identifies a methodological flaw with seeking to offer a restatement that addresses an area of the law marked by deep uncertainty where there are few consensus positions; curing this level of uncertainty would require "existing law whose state is simply disputed, evidenced, for instance, by contradicting practice or scholarship."[159] The Tallinn 2.0 drafters sought to address this type of criticism through its Commentary, which identified particular circumstances where the IGE members were split in their opinions and their level of support for minority opinions.[160]

While Petrov is critical of legal advisors' reflexive practice to rely on expert-written manuals as if they were espousing doctrine, he recognizes that expert-written manuals play a critical role in promoting "law-talking" discourse amongst States; that very discourse amongst States has a legal effect that is capable of steering the debate toward a crystallizing rule.[161]

Although Petrov's critiques are useful for generally analyzing the legal weight ascribed to expert-written manuals, Lianne Boer offers a methodological analysis of expert-written manuals that is more specific to the development of international law applicable to cyber activities.[162] In the debate over the applicability of existing international law to cyber activities, Boer asserts that legal scholars play an integral role in constructing international law because the resulting international norms are formed through argumentation during its

[155] *Id.* at 5.
[156] *Id.*
[157] *Id.* at 9–11.
[158] Michael Schmitt, *Tallinn Manual 2.0 on the International Law of Cyber Operations: What It Is and Isn't*, JUST SECURITY, Feb. 9, 2017: https://bit.ly/3tmTpYh.
[159] PETROV, *supra* note 154, at 87–88.
[160] Schmitt, *supra* note 158 (explaining that although Tallinn 2.0 rules required unanimity amongst the IGE, differing opinions on rule interpretation would be reflected in the commentary allowing for minority positions to be captured in the Manual).
[161] *Cf.* PETROV, *supra* note 154, at 233 (recognizing that experts "stabilize the welcome uncertainty" amongst States debating legal applications in developing areas of practice).
[162] *See generally* Lianne J.M. Boer, *International Law As We Know It: Cyberwar Discourse and the Construction of Knowledge in International Legal Scholarship* (Cambridge University Press 2021).

formative stages.[163] She cites to the declaration of Baron Descamps, President of the Committee of Jurists, amidst drafting the Statute of the Permanent Court of International Justice: "[W]hen the greater part of jurisconsults agree upon a certain rule—the presumption in favour of that rule becomes so strong, that only a person who makes a mock of justice would gainsay it."[164]

Recognizing the intrinsic value of scholarly works to the task of interpreting international law, Baron Descamps sought to highlight the value of consensus claims amongst scholars on areas of undefined applicability of existing international law. It is experts' usage of consensus, coupled with an underlying lack of representation, that rightfully gives Boer pause. She further explains that usage of majority opinions to determine the establishment of a rule, absent underlying legal analysis, potentially verges on an "*ad populum* argument, in which the only support given for a particular claim is that it is accepted by the majority of a particular group."[165] To be clear, although majority opinions of States are highly relevant and potentially dispositive of the establishment of a rule of custom, a majority opinion of scholars, absent thoughtful and convincing legal analysis, is of minimal probative value. In Tallinn 2.0's two rules and commentary addressing the due diligence obligation, there are multiple references to majority opinions of the IGE rarely accompanied by citation to underlying legal principles.[166] Moreover, the consensus positions of this particular group of experts may come into further question due to their homogeneity of geography and schools of legal thought. A review of the members of the Tallinn 2.0 IGE shows that the vast majority of legal experts, contributors, and peer reviewers hail from English-speaking States and Western Europe.[167] If consensus of "the greater part of jurisconsults" will be employed to interpret the applicability of international law to cyber activities, then the jurists consulted should be fully and proportionally representative of the international community.

The Tallinn Manual drafters' approach was harmonious with the doctrine of sources in that academics and practitioners did not try to displace States as the actors that make international law.[168] Though the Tallinn Manual's Hague Process incorporated the views of States in its text, the Manual does not claim to attribute its rules to States in an effort to create the aura of a source of international law. While the Tallinn drafters were assiduous in taking steps to not displace States as

[163] *See id*. at 6–7 (quoting Martti Koskenniemi: "The metaphor of sources aiding in 'finding' the law is premised upon a (positivist) understanding of law existing 'out there' to be found.").
[164] *Id.* at 98.
[165] *Id.* at 105.
[166] Tallinn 2.0, *supra* note 14, Rule 7, ¶¶ 3, 15, and 31.
[167] *Id.* at xii–xvii.
[168] *Cf.* Eric Jensen and Carolyn Sharp, *Non-State Commentaries: Law-Making or Law-Suggesting?*, ARTICLES OF WAR, (Apr. 8, 2021), https://bit.ly/47n1Rot (noting the Tallinn Manual drafters took appropriate steps to not elevate the manual to the level of binding international law).

the appropriate international law-making entities, the claim that the Tallinn Manual reflects *lex lata* may exceed the bounds of what is an appropriate effort by most-highly qualified publicists to summarize existing law without articulating *lex ferenda*. Based on current state practice and *opinio juris*, it does not appear that a sufficient number of States support the existence of a binding cyber due diligence principle.[169] Although for many years the principle of due diligence has been applied to other areas of international law, its application to cyber activities is nascent and it cannot yet definitively be said that this principle acts as a binding obligation that informs States' cyber activities and concomitant duties and responsibilities.[170]

III. CONCLUSION

Cyber activities often utilize secrecy to achieve a desired effect. Similarly, prior to the publication of Tallinn 2.0, States largely favored ambiguity in their official positions on the applicability of international law to cyberspace—if any statements were even released. Though States' and malign cyber actors' activities are often shrouded in mystery, the Tallinn Manual has played a significant role in shedding light on States' positions.

Although the claim that the Tallinn Manual represents *lex lata* may not be borne out, the Manual's true value is in the "law-talking" discourse that it spurred. The Tallinn drafters entered a discussion that reached a roadblock at the U.N. GGE and without a framework text, States were reluctant to issue official positions on the application of international law to cyberspace. In the years since Tallinn 2.0's publication, the dramatic increase in the practice of States articulating official positions on the existence of norms and obligations vis-à-vis cyber activities may serve as the basis for CIL rule formation and the recognition of binding general principles of international law. By facilitating States' efforts to crystallize their positions, or articulate their open questions on the matter, Tallinn 2.0 served as a framework text upon which States could base their discourse.

The "law-talking" discourse spurred by Tallinn 2.0 has led to States, such as Estonia, leading the charge in support of establishing cyber norms and legal obligations upon which the international community can base their conduct and, if necessary, actions taken in recourse.[171] This position enjoys strong support from European and Latin American States that have weighed in on the debate.[172] In response, States that oppose the existence of binding norms, such as cyber due

[169] *Supra* Section II.A.
[170] *Supra* Section II.B.
[171] *See, e.g.*, Official Compendium, *supra* note 44, at 26.
[172] *See id.* at 23, 31, 44, 54, 65, 75, and 85 (Estonia, Germany, Japan, the Netherlands, Norway, Romania, and Switzerland all articulated this position); *see also* OAS Report, *supra* note 59, ¶ 58.

diligence, have used the terminology associated with CIL rule formation to argue that insufficient state practice and *opinio juris* exist to substantiate the formation of an international law obligation.[173] Although a majority of States that have expressed an opinion on the existence of a cyber due diligence obligation have voiced their support, the dialogue must continue in order for the international community to gather sufficient evidence for a CIL rule to form; or alternatively, for States to agree upon the existence and scope of an international law general principle of cyber due diligence.[174]

Due diligence is critical to ensuring international peace and security as it plays an important role in governing conduct that occurs below the use of force threshold but could nevertheless lead to insecurity and conflict. As seen with the international response to the Emotet botnet, even the most powerful States are unable to unilaterally address dispersed cyber threats. Robust cybersecurity capabilities, as well as monitoring of malign activities, is required to effectively confront transnational threats posed by malign cyber activity. If States were to exercise due diligence in policing their territory and cyber infrastructure, it would greatly diminish the ability of transnational criminal organizations to successfully undertake malign cyber activity. Further, requiring States to exercise due diligence would effectively facilitate States' cooperative investigations into malign cyber activity. Moreover, a cyber due diligence principle would facilitate the attribution of malign cyber activity to States who have knowledge of transboundary harm emanating from their borders but choose not to address it–a major component of the rules-based order that helps to maintain international peace and security.

In the absence of binding treaty obligations, and facing the slim chance of the U.N. GGE process producing a framework upon which the international community could progressively develop international law applicable to cyberspace, the Tallinn Manual drafters—so-called "norm entrepreneurs"—offered a well-researched and -reasoned proposal for norms and rules to govern cyber activities.[175] States were left to concur with the Tallinn Manual's proposed rules, or articulate why their position differed from the proposed text.

As international law continues to progressively develop to apply well-known principles to a world of rapid technological innovation, expert-written manuals such as Tallinn will continue to play a key role in stimulating the difficult "law-talking" in which States must engage. As the Tallinn 3.0 project gets underway, *all* States should take heed of the drafting and post-publication

[173] *See* Official Compendium, *supra* note 44, at 117 (United Kingdom), 141 (United States).
[174] *Supra* Section II.B.
[175] Goldsmith and Loomis, *supra* note 28, at 1, 13.

discourse in order to best influence the development of international legal obligations.

LUNAR SURFACE OPERATIONS AND THE LAW: AN OPPORTUNITY TO SHAPE DUE REGARD IN OUTER SPACE

Lieutenant Commander Georgia Blair Kuplic, JAGC, USN*

This Article, informed by the political realities of the Great Power Competition, examines the requirement to "conduct all activities in outer space, including the Moon and other celestial bodies, with due regard to the corresponding interests of all other States Parties" contained in Article IX of the Outer Space Treaty. "Due regard" is not defined in the Treaty or generally in international law, and States have failed to cite the requirement even in response to destructive anti-satellite weapons tests that generate massive amounts of debris in low-earth orbit, threatening the International Space Station and the satellites of other States, and making it increasingly difficult to operate in Earth's orbit.

While States have been able to get by in outer space without an understanding of the requirement to operate with due regard until now, the new Moon race highlights the need for law that does a better job of governing State behavior in outer space. Because of the nature of lunar operations and the topography of the Moon, States are likely to be operating in close proximity to one another, including the United States and China, Great Power competitors who are each currently racing to establish sustained human operations on the Moon.

This Article identifies the start of a shift in state practice that suggests some States, with the United States in the foreground, view the due regard provision as requiring elements of notice and cooperation or de-confliction. States should lean into developing this understanding by linking their practice, on the Moon and elsewhere, with the due regard requirement contained in Article IX. Any incentives space powers have had to avoid contributing to the development of the

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due regard requirement are now outweighed by the need for a rules-based order in outer space, and on the Moon in particular.

I. INTRODUCTION

The Moon is about to get busy. The United States and People's Republic of China are in a Moon race. Both space powers have the goal of establishing an enduring presence on the surface of the Moon in the next decade. The People's Republic of China (PRC) aims to displace the United States as the dominant global space power in economic, diplomatic, and military spheres by 2045, and sees space dominance as a means to advance its global standing and erode U.S. influence.[1] In turn, China's moon ambitions have helped galvanize bipartisan support for a U.S. return to the Moon via the Artemis program, the first lunar human exploration campaign to withstand an administration change since Apollo.[2]

But it is not just the United States and PRC who have their sights set on the Moon. In 2019, the same year the PRC landed the first ever spacecraft on the far side of the Moon, both Israel and India made failed attempts at lunar landings.[3] In December 2022, South Korea placed a spacecraft in lunar orbit.[4]. On April 25, 2023, the Japanese company ispace became the first private company to attempt to land a spacecraft on the Moon when its Hakuto-R Lander, carrying the United Arab Emirates' Rashid Rover, suffered a software glitch and crashed into the lunar surface.[5] On August 20, 2023, Roscosmos, the Russian space agency, attempted and failed its first moon mission in 47 years, crashing into the lunar surface with its Luna-25 spacecraft.[6] Three days later, an India's Chandrayaan-3 spacecraft became the first to successfully land on the lunar south pole, making India the fourth country to land on the moon.[7] On September 7, 2023, JAXA, Japan's national space agency, launched its "Smart Lander for Investigating the Moon" or

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[1] OFFICE OF THE DIR. OF NAT'L INTELLIGENCE., ANNUAL THREAT ASSESSMENT OF THE U.S. INTELLIGENCE COMMUNITY 8 (2023); JOHN M. OLSON ET AL., STATE OF THE SPACE INDUSTRIAL BASE 2022: WINNING THE NEW SPACE RACE FOR SUSTAINABILITY, PROSPERITY, AND THE PLANET 1 (Aug. 2022).

[2] Christian Davenport, *Lunar Relations: The U.S., China and a New Brand of Space Race*, WASH. POST (Jan. 14, 2023), https://bit.ly/4790BVH.

[3] Maria Temming, *China Stuck its Moon Landing This Year. Others Weren't As Lucky*, SCIENCENEWS (Dec. 16, 2019), https://bit.ly/3NvR4Ry.

[4] Park Si-soo, *South Korean Spacecraft Enters Lunar Orbit with Deceleration Maneuver*, SPACENEWS (Dec. 19, 2022), https://bit.ly/3GLFDS9.

[5] Sally Boyani, *The Rashid Rover didn't make it to the Moon, but it's a success for science*, WIRED (May 3, 2023), https://bit.ly/41BnU9C; Kenneth Chang, *Japanese Moon Lander Crashed Because It Was Still Three Miles Up, Not on the Ground*, NY TIMES, (May 26, 2023), https://bit.ly/3RxheEC.

[6] Guy Faulconbridge, *Russia's first lunar mission in 47 years smashes into the moon in failure*, REUTERS (Aug. 21, 2023), https://reut.rs/3tg9hvL.

[7] Nivedita Bhattacharjee, *Chandrayaan-3 spacecraft lands on the moon in 'victory cry of a new India*,' REUTERS (Aug. 23, 2023), https://reut.rs/4apwlJ4.

"SLIM" in hopes of becoming the fifth country to land on the moon.[8] In the final quarter of 2023, Spanish-German startup, Plus Ultra Space Outposts, plans to launch one of its Harmony satellites into geostationary transfer orbit with plans to reach lunar orbit from there via onboard electric propulsion.[9] The Harmony satellites aim to eventually provide "continuous high-speed communications" between Earth and any location on or around the Moon.[10]

Additionally in 2023, Pittsburgh-based Astrobotic plans to land NASA payloads on the western part of the Moon's near side, and Houston's Intuitive Machines aims to launch TRIDENT, The Regolith and Ice Drill for Exploring New Terrain, as part of the Polar Resources Ice Mining Experiment.[11] Both U.S. companies are part of NASA's Commercial Lunar Payload Services (CLPS) in support of the Artemis Program.[12] Lastly, SpaceX plans to take Japanese billionaire Yusaku Maezawa along with a "crew" of eight others, including DJ Steve Aoki, to the Moon in late 2023.[13] The race back to the moon is not just motivated by the desire to *win*.

Although the Moon's surface area is approximately 14.6 million square miles, or 38 million square kilometers,[14] factors like access to sunlight, nearby "permanently shadowed regions (PSRs)" that may contain water ice deposits, navigable terrain, and persistent line-of-sight to Earth for communications make desirable locations extremely limited.[15] On April 19, 2023, NASA Administrator Bill Nelson told Congress that NASA is not returning to the moon simply to beat China.[16] He testified that NASA and its partners need to be first to the lunar south pole and its deposits of water ice before the PRC can claim them, warning: "If you let China get there first . . . what's to stop them from saying 'We're here, this is our area, you stay out.' That's why I think it's important for us to get there on

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[8] Kantaro Komiya, *Japan launches 'moon sniper' lunar lander SLIM into space*, REUTERS (Sep. 7, 2023), https://reut.rs/3RmMOFa.
[9] *Plus Ultra – Satellite Constellation*, NEWSPACE INDEX, https://bit.ly/3NxMjad.
[10] Jason Rainbow, *Plus Ultra's Lunar Comsats to Hitch Rides on ispace Moon Landers*, SPACENEWS (Jan. 21, 2022), https://bit.ly/3TOJhm3.
[11] David Dickinson, *Space Missions to Watch in 2023*, SKY & TELESCOPE (Jan. 3, 2023), https://bit.ly/3GO4XXp.
[12] Jatan Mehta, NASA *CLPS Moon Landing Missions*, THE PLANETARY SOCIETY, https://bit.ly/3GQA2Kf.
[13] Katharina Buchholz, *The Race for the Moon Continues*, STATISTA (Nov. 17, 2022), https://bit.ly/3NyqNlA; DEARMOON, https://bit.ly/3v7Mz9y.
[14] Tim Sharp & Daisy Dobrijevic, *How Big is the Moon?*, SPACE.COM (Feb. 7, 2022), https://bit.ly/487bmJA.
[15] GABRIEL SWINEY & AMANDA HERNANDEZ, NAT'L AERONAUTICS & SPACE ADMIN., LUNAR LANDING AND OPERATIONS POLICY ANALYSIS 65 (2022) [hereinafter LUNAR LANDING AND OPERATIONS POLICY ANALYSIS].
[16] Jeff Foust, *Nelson Supports Continuing Restrictions on NASA Cooperation with China*, SPACENEWS (Apr. 21, 2023), https://bit.ly/4794D0h.

an international mission and establish the rules of the road."[17] The characteristics of the moon also mean that once presence is established, there is potential for space actors, including Great Power competitors, to be operating in very close proximity on the Moon. On top of this, when conducting a lunar landing, the force of the lander's engine kicks up dust, rocks, and other surface material in what is called a "plume-surface interaction," posing risk to other objects and operations in the vicinity.[18]

Given the above, we are at the precipice of a new era in human space activity in which the law that governs activities in outer space has the potential to be either helpful or harmful. Previously undefined or loosely defined principles contained in Article IX of the Outer Space Treaty, entered into force in 1967,[19] will meet new levels of friction. The recent rapid increase in number and nature of space actors and activities, especially on the surface of the Moon, renders a shared understanding of the rules governing activity in outer space – and the legal terms that underpin them – critical to the development of outer space in a way that is secure, predictable, and sustainable.

This Article, informed by the political realities of the Great Power Competition, abstains from a journey into *lex ferenda*, endeavoring to provide pragmatic proposals for how to move forward with the law in outer space in the near and medium-term future. It examines the due regard requirement contained in Article IX of the Outer Space Treaty with a view to lunar operations. While many lament the ineffectiveness of due regard in outer space, particularly with respect to its seeming inability to prevent massive debris-generating events like destructive anti-satellite weapons (ASAT) tests,[20] this Article asserts that there has been a measurable shift in State practice as it relates to due regard, and there is an opportunity to further that process as States begin to operate in even closer proximity on the Moon. State practice in the past two decades indicates a trend toward an understanding that due regard in outer space is an obligation separate from the requirement to consult regarding harmful interference, and serves as a floor even when the duty to consult is not triggered. Specifically, State practice suggests that the due regard requirement may carry notification and coordination or de-confliction requirements when operations are likely to have an impact on the activities of other States. Lunar operations present an opportunity to cement the due regard requirement in the Outer Space Treaty as a practical provision that governs responsible State interactions on the Moon and in outer space generally.

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[17] *Id*.
[18] LUNAR LANDING AND OPERATIONS POLICY ANALYSIS, *supra* note 15, at 22.
[19] Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies, Jan. 27, 1967, 18 U.S.T. 2410, 610 U.N.T.S. 205. [hereinafter Outer Space Treaty].
[20] *See infra* Part II.B.

Part II of this Article provides a brief introduction to the Outer Space Treaty with a more in-depth look at Article IX and the due regard requirement. It then provides an overview of the Vienna Convention on the Law of Treaties (VCLT) rules for treaty interpretation, with a focus on subsequent State practice as a supplementary means of interpretation under Article 32. Part III discusses the challenges with identifying State practice on due regard in outer space: the limited number of actors and nature of activity in outer space; the fact that exercises of due regard are often not outwardly visible; and, State reluctance to talk about due regard. Part IV examines recent examples of State practice on due regard. First, it looks at the intentional destruction of satellites in outer space, comparing the way in which States have executed those operations and how other States responded. This Article notes, as others have as well, that States have not turned to Article IX or the due regard requirement when responding to debris-generating ASAT tests. It then turns to lunar operations, specifically, the Artemis Accords and NASA's Lunar Landing and Operations Policy Analysis, which shed light on an emerging understanding of due regard as an obligation of notification and coordination or de-confliction. Part IV and the conclusion discuss leveraging that momentum to further cement this understanding of due regard as a more useful tool for regulating behavior in outer space.

II. INTERPRETING THE OUTER SPACE TREATY

A. Introduction to the Outer Space Treaty

The Outer Space Treaty was negotiated in the era of Cold War tensions and designed to prevent those tensions from escalating into outer space.[21] The Soviet launch of Sputnik in October 1957 highlighted the need for an understanding of what law, if any, applied in outer space and what gaps needed to be filled.[22] In December 1958, the United Nations General Assembly passed Resolution 1348 (XIII), which recognized the "common interest of mankind in outer space" and the "common aim that outer space should be used for peaceful purposes only."[23] This resolution established the ad hoc Committee on Peaceful Uses of Outer Space and requested it report to the General Assembly on, among other things, "the nature of legal problems which may arise in the carrying out of programs to explore outer space."[24] The UN Committee on the Peaceful Uses of Outer Space (UNCOPUOS) was established as a permanent body a year later,[25] and in 1961, the General Assembly adopted a resolution commending two

[21] United Nations Institute for Disarmament, *2021 Outer Space Security Conference Report*, 4 (Sept. 28, 2021) [hereinafter Outer Space Security Conference Report].
[22] Michael C. Mineiro, *FY-1C and USA-193 ASAT Intercepts: An Assessment of Legal Obligations under Article IX of the Outer Space Treaty*, 34 J. SPACE L. 321, 326–27 (2008).
[23] G.A. Res. 1348 (XIII) (Dec. 18, 1958).
[24] G.A. Res. 1472 (XIV), ¶ 1.b (Dec. 12, 1959).
[25] *Id*.

principles to States for their guidance in the exploration and use of outer space: (a) "International law, including the Charter of the United Nations, applies to outer space and celestial bodies;" and (b) "Outer space and celestial bodies are free for exploration and use by all States in conformity with international law and are not subject to national appropriation."[26] These two principles provided the foundation for the 1963 Declaration of Legal Principles Governing the Activities of States in the Exploration and Use of Outer Space, which ultimately gave rise to the Outer Space Treaty, entered into force in 1967.[27] While there are five treaties that comprise the core of international law in outer space, the Outer Space Treaty was the first, and is the cornerstone of space law on which the other treaties elaborate.[28]

All space-faring States are party to the Outer Space Treaty, and as of March 2023, there are 113 States Parties in total.[29] Since entry into force, no State has withdrawn from the treaty and there have been no proposed amendments.[30] The Treaty applies to all activity in outer space – military, civil, commercial actors, NGOs, and private individuals– by holding States Parties responsible for authorization and continued supervision of all national activities in outer space.[31]

Aside from procedural provisions and Article IV, which prohibits placing nuclear weapons or other kinds of weapons of mass destruction in orbit around the Earth and requires that the Moon and other celestial bodies be used exclusively for peaceful purposes, all articles of the Outer Space Treaty articulate, or even repeat verbatim, the principles adopted in the 1963 Declaration of Legal Principles Governing the Activities of States in the Exploration and Use of Outer Space.[32] Because of this, Michael Mineiro notes, the Outer Space Treaty is "primarily a treaty of principles, crafted for the purpose of *proscribing* norms to an area that was *without law*."[33]

These broad principles reflected a careful balance between the negotiators' concerns for and aspirations in outer space and therefore remained largely "technologically agnostic," leaving a wide breadth for freedom of action.[34] While the Treaty is sometimes derided or dismissed as too "vague," as many of the important terms are undefined, John Goehring points to a quote from Manfred

[26] G.A. Res. 1962 (XVIII), ¶¶ 2, 4 (Dec. 13, 1963).
[27] TANJA MASSON-ZWAAN & MAHULENA HOFFMAN, INTRODUCTION TO SPACE LAW 21 (4th ed. 2019).
[28] *Id*.
[29] Outer Space Treaty, *supra* note 19.
[30] MASSON-ZWAAN & HOFFMAN, *supra* note 27, at 40.
[31] Outer Space Treaty, *supra* note 19, art. VI.
[32] Mineiro, *supra* note 22, at 325 (emphasis in original).
[33] *Id.*
[34] Outer Space Security Conference Report, *supra* note 21, at 2.

Lachs, the first Chair of the Legal Subcommittee of UNCOPUOS, to support the argument that "evolution was part of the design" in the negotiation of the Outer Space Treaty:[35]

> These principles [of the Outer Space Treaty] may have been couched in very general and broad terms . . . Be this as it may, the provisions in question can hardly be regarded as nominal or devoid of substantive meaning . . . . It may have been premature to enter into any more detailed specification of them or of the corresponding obligations. But the need for this will grow in confrontation with practice, while adequate interpretation will be called for in concrete situations.[36]

In fact, this "vagueness" is a strength, and likely why the Outer Space Treaty endures today despite enormous advances in the activities the treaty seeks to govern.[37] The following section discusses one of the primary terms identified as poorly defined and therefore ineffective: due regard.

B. Article IX and the Due Regard Principle

Article IX of the Outer Space Treaty, included in full below, requires that States conduct activities in outer space with due regard to the corresponding interests of all other States Parties.

> In the exploration and use of outer space, including the Moon and other celestial bodies, States Parties to the Treaty shall be guided by the principle of co-operation and mutual assistance and shall conduct all their activities in outer space, including the Moon and other celestial bodies, with due regard to the corresponding interests of all other States Parties to the Treaty. States Parties to the Treaty shall pursue studies of outer space, including the Moon and other celestial bodies, and conduct exploration of them so as to avoid their harmful contamination and also adverse changes in the environment of the Earth resulting from the introduction of extraterrestrial matter and,

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[35] John S. Goehring, *Can We Address Orbital Debris with the International Law We Already Have? An Examination of Treaty Interpretation and the Due Regard Principle*, 85 J. AIR L. & COM. 309, 322 (2020) (quoting MANFRED LACHS, THE LAW OF OUTER SPACE: AN EXPERIENCE IN CONTEMPORARY LAW MAKING 108 (1972)).

[36] *Id.*

[37] Neta Palkovitz, *Exploring the Boundaries of Free Exploration and Use of Outer Space Article IX and the Principle of Due Regard, Some Contemporary Considerations*, 57 PROC. INT'L INST. SPACE L. 93, 95 (2014) (arguing that the vagueness of Article IX may serve the Treaty as it allows it to constantly be updated, making it relevant and future-proof).

> where necessary, shall adopt appropriate measures for this purpose. If a State Party to the Treaty has reason to believe that an activity or experiment planned by it or its nationals in outer space, including the Moon and other celestial bodies, would cause potentially harmful interference with activities of other States Parties in the peaceful exploration and use of outer space, including the Moon and other celestial bodies, it shall undertake appropriate international consultations before proceeding with any such activity or experiment. A State Party to the Treaty which has reason to believe that an activity or experiment planned by another State Party in outer space, including the Moon and other celestial bodies, would cause potentially harmful interference with activities in the peaceful exploration and use of outer space, including the Moon and other celestial bodies, may request consultation concerning the activity or experiment.[38]

The term due regard, however, is not defined in the treaty, nor is it defined generally in international law. Scholars do not agree on what due regard means in outer space and many assert that Article IX, and the due regard requirement in particular, is insufficient to govern today's activities in outer space.[39] These scholars often cite the fact that States are not seeking international consultations (as required by the Outer Space Treaty when there is reason to believe a planned activity in outer space would cause potentially harmful interference with activities of other States Parties) prior to conducting activities in outer space like destructive anti-satellite weapons tests.[40] As a result, there is often a push for new rules for outer space, either in the form of an additional protocol to the Outer Space Treaty or non-binding measures like codes of conduct

[38] Outer Space Treaty, *supra* note 19, art XI.

[39] *See, e.g.*, Goehring, *supra* note 35, at 320 (describing how "the due regard principle in Article IX is vague, weak, and has yet to achieve an accepted interpretation that would enable it to be applied in practice. It is, therefore, failing to live up to its potential as a guide for lawful conduct"); Mark J. Sundahl, et al., *Returning to the Moon: Legal Challenges as Humanity Begins to Settle the Solar System – Full Transcript*, 9 GLOBAL BUS. L. REV. 1, 102 (2021) (stating that the due regard principle has been ignored far more than it has been observed); Hitoshi Nasu & Michael Schmitt, *A Threat or a Warning: Russia's Weapons Testing in Space*, JUST SECURITY (July 31, 2020), https://bit.ly/3NBbMj4 ("Exactly what due regard requires of States conducting space activities is unclear.").

[40] *See, e.g.*, Matthew T. King, *Olive Branches or Fig Leaves: A Cooperation Dilemma for Great Power Competition in Space*, 12 J. NAT'L SEC. L. & POL'Y 417, 434 (2022) (describing that "[s]pacefaring States currently enjoy a great amount of freedom in space operations, capitalizing on the 'free . . . exploration and use' enshrined in the Outer Space Treaty and the lack of specificity of the "due regard" standard therein"); Goehring, *supra* note 35, at 319; P. J. Blount, *Renovating Space: The Future of International Space Law*, 40 DENV. J. INT'L L. & POL'Y 515, 526 (2011).

or expert-recommended technical standards.[41] However, given the political realities of the Great Power Competition, developing new binding law for outer space is unlikely to impossible, and non-binding measures that do not involve major space powers like Russia and the People's Republic of China are unlikely to have the desired effect.

This Article agrees with John Goehring that due regard has "untapped potential" as a tool to regulate behavior in outer space.[42] The requirement to conduct activities with due regard to the corresponding interests of all other States Parties should not be dismissed as ineffectual and insufficient for current and future space activities. The VCLT rules of interpretation shine light on the potential for the due regard requirement to do the work of regulating activity in outer space in a way that preserves free exploration and use of outer space while safeguarding the interests of all current and future space-faring nations.

C. Vienna Convention on the Law of Treaties

Articles 31 and 32 of the VCLT, entered into force in January 1980, provide rules for treaty interpretation that are applicable as customary international law to all treaties, including those entered into force before the VCLT, like the Outer Space Treaty.[43] Article 31, the "general rule of interpretation" sets forth the mandatory method of interpretation for all treaties, while Article 32 provides "supplementary" means of interpretation to which recourse *may* be had in specific circumstances.[44]

Article 31 requires interpretation be conducted in good faith, in accordance with the ordinary meaning of terms in their context and in light of the treaty's object and purpose, taking into account any subsequent agreements between the parties regarding the interpretation, any subsequent practice establishing the agreement of the parties regarding interpretation, and any relevant rules of international law.[45] Under Article 31, "context" is made up of the treaty text, including preambles and annexes, any agreements made between all parties in connection with the conclusion of the treaty, and any instrument made by one or more parties in connection with the conclusion of the treaty and accepted by

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[41] *See, e.g.*, Matthew B. Hershkowitz, *Deep Space (Treaty) Exploration: Reviving Today's Obsolete Space Treaties*, 28 MICH. ST. INT'L L. REV. 1 (2019) (arguing that parties to space treaties should amend those treaties to define ambiguous terms); Outer Space Security Conference Report, *supra* note 21, at 4–5.

[42] Goehring, *supra* note 35, at 309 (arguing that the United States shaped interpretations of legal concepts like "peaceful purposes" and "non-appropriation" via State practice and should do the same with due regard).

[43] RICHARD K. GARDINER, TREATY INTERPRETATION 13 (2nd ed. 2015).

[44] Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter VCLT].

[45] *Id*. at art. 31.

other parties as an instrument related to the treaty.[46] Article 31 is commonly referred to as the "crucible approach," as the rule is meant to be applied as a "single combined operation," with context and the treaty's object and purpose pointing to the appropriate ordinary meaning.[47]

When application of Article 31 leaves the meaning ambiguous, obscure, or leads to manifestly absurd or unreasonable results, or when the interpreter wishes to confirm a meaning resulting from application of Article 31, Article 32 permits the consideration of supplementary means of interpretation.[48] While the Article 31 rule is prescriptive, resort to supplementary means under Article 32 is optional.[49]

Article 32 does not provide an exhaustive list of supplementary means of interpretation, but rather calls out the two most common: "preparatory work" and "circumstances of conclusion."[50] Relevant to this Article, subsequent State practice, discussed in Part II.D., has been accepted as an additional supplementary means of treaty interpretation.

This Article focuses on Article 32, as application of Article 31 has at best yielded interpretation of "due regard" that requires confirmation.[51] Although referred to as "supplementary," means of interpretation under Article 32 have the potential to play an equal or even dominant role in treaty interpretation based on the relationship between Articles 31 and 32.[52] These supplementary means of interpretation are always available "to confirm" a meaning.[53] If the Article 32 process of confirmation then results in failure to confirm a meaning, Article 31 is reapplied to find a meaning that can then be successfully confirmed with

[46] *Id*.
[47] GARDINER, *supra* note 42, at 288.
[48] RICHARD K. GARDINER, THE OXFORD GUIDE TO TREATIES 471 (Duncan B. Hollis ed., 2nd ed. 2020) [hereinafter OXFORD GUIDE TO TREATIES].
[49] *Compare* VCLT, *supra* note 44, art. 31 ("A treaty shall be interpreted," "[t]he context . . . shall comprise," "[t]here shall be taken into account") *with* VCLT, *supra* note 44, art. 32 ("Resource may be had to supplementary means of interpretation . . . .").
[50] GARDINER, *supra* note 43, at 347.
[51] Mineiro, *supra* note 22, at 325 (arguing that because the Outer Space Treaty is primarily a treaty of principles, and those "proscriptive principles, by their very nature, cannot embody their object and purpose by solely reviewing their text," the Outer Space Treaty requires Article 32 of VCLT to play a prominent role in interpretation).
[52] GARDINER, *supra* note 43, at 354 (citing *Documents of the Second Part of the 17th Session and of the 18th Session Including the Reports of the Commission to the General Assembly*, [1966] 2 Y.B. Int'l L. Comm'n 220, ¶ 10, U.N. Doc. A/CN.4/SER.A/1966/Add.1 ("The fact that article [32] admits recourse to the supplementary means for the purpose of 'confirming' the meaning resulting from the application of article [31] establishes a general link between the two articles and maintains the unity of the process of interpretation.")).
[53] OXFORD GUIDE TO TREATIES, *supra* note 48, at 471.

supplementary means.[54] Additionally, confirmation using supplementary means of interpretation may uncover a previously undiscovered ambiguity in the term, which shifts use of supplementary means from confirmation to a determinative role.[55]

Supplementary means of interpretation therefore have the potential to play a key role in the interpretation of a treaty term that lacks a precise definition. This is true in the case of due regard in the Outer Space Treaty, which renders subsequent State practice an important tool for understanding—and for shaping—the meaning of due regard in outer space.

D. Subsequent State Practice as a Supplementary Means of Interpretation

The International Law Commission (ILC) has made significant contributions to the understanding of the role of subsequent practice as a means of treaty interpretation. These contributions are reflected most recently in its 2018 "draft conclusions" and commentaries thereto, which are regarded as a "clarificatory code" on this specific aspect of treaty interpretation.[56] This Article relies on the draft conclusions for an understanding of State practice as a supplementary means of interpretation under Article 32, VCLT.

For subsequent State practice to constitute a supplementary means of interpretation under Article 32, VCLT, it must be "conduct by one or more parties in the application of the treaty, after its conclusion."[57] This is distinguished from subsequent practice under Article 31, which requires evidence that all parties took a position regarding the interpretation of the treaty, whether by agreement or practice.[58] Subsequent concordant practice by all parties constitutes an authentic means of interpretation under the general rule because it reflects an unwritten agreement among all parties, fulfilling a similar function to formally recorded agreements, albeit with more evidentiary hurdles.[59] Because parties to a treaty own the treaty, when all parties have subsequently agreed on the interpretation of the treaty, it carries the same weight for purposes of interpretation as the ordinary meaning, context, and object and purpose.[60]

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[54] GARDINER, *supra* note 43, at 355.
[55] *Id*. at 355.
[56] *Id*. at 227.
[57] Int'l Law Comm'n, Rep. on the Work of Its Seventieth Session, U.N. Doc. A/73/10, at 13 (2018) [hereinafter ILC Report].
[58] *Id*.
[59] *Id*. at 13; GARDINER, *supra* note 43, at 223–24.
[60] OXFORD GUIDE TO TREATIES, *supra* note 48, at 499 (quoting J. Crawford, *A Consensualist Interpretation of Article 31(3) of the Vienna Convention on the Law of Treaties*, *in* TREATIES AND SUBSEQUENT PRACTICE 29, 31 (G. Nolte, ed., 2013).

Subsequent State practice as a supplementary means of interpretation under Article 32, however, does not require evidence of agreement by all parties, as that would pull the common understanding into the general rule under Article 31.[61] Since the VCLT was adopted in 1969, international courts and other adjudicatory bodies have recognized and used the subsequent practice of one or more States as a supplemental means of interpretation under Article 32.[62] For use under both Articles 31 and 32, subsequent practice "may consist of any conduct of a party in the application of a treaty, whether in the exercise of its executive, legislative, judicial, or other functions" and includes both acts and omissions.[63] Subsequent practice is not limited to conduct of high-ranking authorities. Conduct by a government's lower-ranking officials constitutes subsequent State practice for purposes of interpretation under Articles 31 and 32 as long as the practice is "sufficiently unequivocal" and the respective government "can be expected to be aware of this practice and has not contradicted it within a reasonable time."[64]

While subsequent practice for use under the Article 31's general rule requires a determination that the practice reflects an agreement regarding the interpretation of the treaty, identification of subsequent practice to be used as a supplementary means of interpretation requires only "a determination whether conduct by one or more parties is in application of the treaty."[65] There is no requirement that conduct be "regarding the interpretation" to be considered as a supplementary means of interpretation; any conduct in the application of the treaty that can "provide indications as to how the treaty is to be interpreted" may be used.[66] Because there is no requirement to establish agreement between the parties for use under Article 32, frequency is not a requirement for consideration of subsequent practice, and a single instance of conduct in application of the treaty may be considered.[67] Additionally, relevant conduct includes both acts and omissions.[68] Therefore, State conduct that is a direct application of the: treaty; official statements regarding the meaning of a provision or application of the treaty; official restatements of the law like military manuals, domestic judicial decisions that interpret or apply the treaty; State protests asserting violation or non-performance of the treaty; and silence, or "tacit acceptance" of Statements or acts by other parties may be used as a supplementary means of interpretation.[69] International courts and tribunals have previously used "practice denoting

[61] ILC Report, *supra* note 57, at 33.
[62] *Id*. at 33–35.
[63] *Id*. at 14, 31.
[64] *Id*. at 38.
[65] *Id*. at 14.
[66] *Id*. at 33.
[67] *Id*. at 22.
[68] *Id.*
[69] *Id*. at 37.

practically universal agreement of the Contracting Parties,"[70] technical reports that remained internal to one party,[71] national legislation and domestic administrative practices that were not necessarily uniform,[72] and State practice through domestic courts as supplementary means of interpretation under Article 32.[73] Of note, when practice is voluntary or not motivated by a treaty obligation, it is not "in the application of the treaty."[74]

As with travaux préparatoires and other supplementary means of interpretation under Article 32, subsequent State practice may always be used to confirm a meaning reached through application of Article 31, or to determine the meaning when interpretation under Article 31 leaves the meaning ambiguous or obscure or leads to a result that is manifestly absurd or unreasonable.

III. CHALLENGES WITH STATE PRACTICE ON DUE REGARD

A. Limited Actors and Activity in Outer Space

The availability of subsequent State practice to confirm or determine the meaning of due regard under the Outer Space Treaty is dependent on States having and taking some action that applies the due regard provision from Article IX. The most obvious opportunity for State practice on due regard requires that a State have a space program conducting activities in outer space, giving rise to the requirement to perform those activities with due regard to the corresponding interests of all other States Parties, or object (or refrain from objecting) to another State failing to do the same. State Parties that are not spacefaring still must have the capability to observe and understand another party's activities in outer space in such a way that they can assess whether those activities are in compliance with the due regard requirement and respond accordingly.

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[70] ILC Report, *supra* note 5, at 34 (citing *Loizidou v. Turkey* (preliminary objections) App. No. 15318/89, 310 Eur. Ct. H.R. (ser. A) ¶ 80 (1995)) (European Court of Human Rights using subsequent practice to "confirm" its interpretation).

[71] *Id*. (citing Kasikili/Sedudu Island (Bots./Namib.), Judgment, 1999 I.C.J. 1096, ¶ 80 (Dec. 13)). In *Kasikili/Sedudu Island*, the International Court of Justice declined to use a report by a technical expert commissioned by a party that had "remained at all times an internal document" as evidence of agreement of the parties under Article 31, VCLT, but held that it could "nevertheless support the conclusions" reached by other means of interpretation. *Id*.

[72] *Id*. (noting that the European Court of Human Rights has relied on national legislation and domestic administrative practice that was not necessarily uniform as a means of interpretation, and the Inter-American Court of Human Rights has similarly not restricted its use of subsequent practice to instances where uniform practice established the agreement of the parties).

[73] *Id*. (citing Prosecutor v. Jelisić, Case No. IT-95-10-T, ¶ 61 (Int'l Crim. Trib. for the Former Yugoslavia Dec. 14, 1999); Prosecutor v. Krstić, Case No. IT-98-33-T, ¶ 541 (Int'l Crim. Trib. for the Former Yugoslavia Aug. 2, 2001).

[74] *Id*. at 45 (citing the "complementary protection" granted to persons who are denied refugee status under the Convention relating to the Status of Refugees as an example).

Theoretical discussions and dialogue about activities in outer space also provide the opportunity to give official Statements regarding the meaning or application of the obligation to conduct activities with due regard, although even these instances require that States have a nuanced understanding of the technical implications of specific activities in outer space and how those activities have the potential to impact the interests of others in outer space.

Because of the amount of *space* in outer space, until recently, there have been very few known opportunities to put the due regard requirement to the test. Those instances were primarily destructive, anti-satellite weapons tests, discussed in Part IV.A. In addition to the infrequent instances of close physical proximity because of the limited number of actors in outer space, the threshold of resources required to contribute to State practice on due regard serves as a barrier to developing State practice in a pluralistic way. States with burgeoning space capabilities, or nascent ambitions for a spacefaring future, likely have a vested interest in how the common understanding of due regard develops, but limited resources to devote to participating in that evolution.

B. Due Regard Is Often Not Outwardly Visible

Observing State practice on due regard is also difficult because conducting activities with due regard to the corresponding interests of all other States parties is often an entirely internal process. In contrast to the duty to undertake consultation prior to proceeding with an activity that has the potential to cause harmful interference with activities of other States parties, there is no requirement to report or communicate what procedures a State party undertakes when complying with the obligation to conduct activities with due regard. It is entirely possible a State complies with the due regard requirement by incorporating mitigating measures into its planned operation such that the interests of other States parties have been taken into account, thereby eliminating any need to consult regarding possible harmful interference. In these instances, it is difficult to discern what measures were taken by the State, and whether they were "conduct[ed] in application of the treaty," or merely taken as a responsible best practice or out of comity.[75] We are often limited to examining observable measures taken by a State and assessing those in conjunction with any Statements that the State has made about its obligations under the treaty in order to piece together an understanding of how that State is implementing its obligations under Article IX of the Outer Space Treaty.

[75] ILC Report, *supra* note 57, at 14.

C. State Reluctance to Talk about Due Regard

The above issues are compounded by the fact that most States have not taken the opportunity to discuss their own understanding of the requirement to conduct activities with due regard, and have not explicitly linked activity in outer space with the due regard requirement. In addition to the fact that States have failed to cite due regard in response to massive debris-generating events in outer space, as discussed in Part IV.A., *infra*, there is an astonishing lack of policy Statements from spacefaring States—including the United States, People's Republic of China, and Russia—on their understanding of the due regard requirement.[76]

In January 2022, John Goehring highlighted what may be considered evidence of a concerted effort on the part of the United States to push due regard as a voluntary norm, diminishing its role as a legal obligation.[77] He points to the United States' National Submission to the United Nations Secretary General pursuant to UN General Assembly Resolution 75/36, "Reducing space threats through norms, rules and principles of responsible behaviours" as well as the Department of Defense "Tenets of Responsible Behavior in Space" as evidence that the United States is conflating the due regard requirement with a voluntary norm to operate "in a professional manner."[78]

In its UN submission, the United States listed a set of "starting points toward developing more specific voluntary, non-legally binding 'norms, rules, and principles of responsible behavior' for space operations, intended to complement the existing international legal framework."[79] The list includes: "Respect for international law"; "Communicate and make notifications"; "Operate with due regard and in a professional manner"; "Maintain safe separation and safe trajectory"; and, "Limit the purposeful generation of long-lived debris."[80] Goehring asserts that by pairing the due regard requirement with the non-legal duty to operate "in a professional manner," the United States

[76] In addition to a search of Statements put out by the national space agencies and ministries of defense of the People's Republic of China, Russia, and the United States, full transcriptions of the 2021 and 2022 sessions of the UN Committee on the Peaceful Uses of Outer Space Legal Subcommittee meetings yielded no substantive Statements on interpretations of due regard.
[77] John Goehring, *The Russian ASAT Test Caps a Bad Year of the Due Regard Principle in Space*, JUST SECURITY (Jan. 12, 2022), https://bit.ly/3TpZ5eG [hereinafter Goehring, *The Russian ASAT Test*].
[78] *Id*. *See* United States, *Reducing Space Threats Through Norms, Rules and Principles of Responsible Behaviours*, National Submission to the United Nations Secretary General Pursuant to UN General Assembly Resolution 75/36 (Apr. 29, 2021) https://bit.ly/3RtnwW2 [hereinafter *Reducing Space Threats*]; Sec. of Def., Memorandum on Tenets of Responsible Behavior in Space (July 7, 2021), https://bit.ly/4apn9V5.
[79] *Reducing Space Threats*, *supra* note 78.
[80] *Id*. at 8–9.

detracts from the legal nature of the due regard principle and can also "be read to suggest that due regard is a non-binding norm in addition to, and distinct from, the binding legal obligation that, confusingly, shares the same name."[81] The U.S. submission also includes the caveat that the "norms, rules, or principles of responsible behavior" that are the subject of these discussions "do not replace or alter States' obligations or rights under international law, but rather provide additional specific considerations on what constitutes responsible behavior related to outer space."[82] Goehring argues that if discussions on the due regard principle codified in Article IX "are somehow not considered as developments in treaty interpretation, then the due regard principle will have been divorced from its legal underpinnings."[83]

Similar to the U.N. submission, the Department of Defense's Tenets of Responsible Behavior in Space, published in 2021 and elaborated upon with "Tenet Derived Responsible Behaviors in Space" in 2023, pairs due regard with operating in a professional manner in a list of five "tenets of responsible behavior." These tenets appear to be divorced from obligations under international law, as the document States that Department of Defense Components are to conduct space operations consistent with them "unless otherwise directed."[84]

The idea that States would avoid making statements which provide clarity to legal obligations in order to preserve their own freedom of action or maneuver space is not new. Michael Schmitt and Sean Watts published an article in 2015 highlighting "*opinio juris* aversion," particularly with respect to the void of State participation in the dialogue around international humanitarian law (IHL).[85] Schmitt and Watts point out that by failing to provide the *opinio juris* to clarify when State practice is undertaken out of a sense of legal obligation, States create the risk of a "legal vacuum," which, in the case of IHL, is likely to be filled by actors who lack the authority, but have the willingness, to fill it.[86]

Opinio juris aversion also exists in newer areas of the law, although likely motivated by different considerations and carrying a different set of risks.

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[81] Goehring, *The Russian ASAT Test*, *supra* note 77.
[82] *Reducing Space Threats*, *supra* note 78, at 9.
[83] Goehring, *The Russian ASAT Test*, *supra* note 77.
[84] *Id*.; Memorandum on Tenets of Responsible Behavior in Space, *supra* note 78; Sec. of Def., Memorandum on Tenet Derived Responsible Behaviors in Space (Feb. 9, 2023), https://bit.ly/3toS17r.
[85] Michael N. Schmitt & Sean Watts, *State* Opinio Juris *and International Humanitarian Law Pluralism*, 91 INT'L L. STUD. 171, 179 (2015).
[86] *Id*. ("Over recent decades, there has been a flurry of activity by non-State actors seeking to advance views of how IHL is to be interpreted and applied, and how it should develop. Efforts by humanitarian and other non-governmental organizations, international tribunals, and academics have proved tremendously influential in this fecund normative environment, one in which States have largely remained mute.").

In emerging areas of the law where technical capabilities are concentrated among just a few States, there appears to be a reluctance on the part of those powerful States to provide clarity on how they view obligations under international law.

This phenomenon has been noted with respect to the application of international law to cyber operations, both by Schmitt and Watts,[87] and by Professor Duncan Hollis in a series of reports to the Organization of American States' Inter-American Juridical Committee. In these reports, Hollis addressed the lack of transparency in understanding how international law applies to cyber operations, despite the increasing number of such operations.[88] He noted State reluctance to invoke the language of international law in response to another State's cyber operations and that in the rare instances where international law is invoked, the admonishments lack specificity.[89] This is similar to what has occurred with operations in outer space, as discussed *infra*.

Schmitt and Watts give two reasons that may explain *opinio juris* aversion in cyber, both of which likely apply in the space domain as well. First, States may benefit from legal ambiguity in the form of greater leeway to conduct operations.[90] Additionally, in areas of the law that are still nascent, like space and cyber, States are likely conflicted on what position to take as they balance their vulnerabilities with their own unmatched capabilities.[91] Schmitt and Watts

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[87] Michael N. Schmitt & Sean Watts, *The Decline of International Humanitarian Law Opinio Juris and the Law of Cyber Warfare*, 50 TEX. INT'L L. J. 189 (2015) ("States have offered no granular expressions of *opinio juris* on the subject. On the contrary, elucidation of the particulars and details of the purported international regulation of cyber hostilities has been left almost entirely to non-State legal conjecture.") (emphasis in original).

[88] Duncan B. Hollis, *Improving Transparency: International Law and State Cyber Operations – Fifth Report*, Organization of American States, Inter-American Judicial Committee Doc. 615/20 rev.1, at 1 (Aug. 7, 2020).

[89] *Id.* at 2. Professor Hollis further explains:

> States appear just as reluctant to invoke the language of international law in making accusations about other State's cyber operations. In one notable exception, in 2018 five States (Australia, Canada, the Netherlands, New Zealand, and the United Kingdom) accused the GRU—Russia's military intelligence arm—of responsibility for a series of cyber operations, including those targeting the Organization for the Prohibition of Chemical Weapons (OPCW) and the World Anti-Doping Agency (WADA). The U.K. Foreign Secretary suggested that Russia had a "desire to operate without regard to international law or established norms" while the Netherlands suggested, more broadly, that these Russian activities "undermine the international rule of law." Unfortunately, these accusations did not delineate whether all of the GRU's alleged operations violated international law or if only some did; nor did they elaborate which international laws the accusers believed were violated.

Id. (citations omitted).

[90] *The Decline of International Humanitarian Law*, *supra* note 87, at 223.

[91] *Id.* at 224.

rightfully point out that, by failing to offer expressions of *opinio juris*, States risk losing the opportunity to shape these emerging areas the law.

Similar to the issue presented in cyber, space powers who possess unrivaled capabilities may perceive a disincentive to articulating how they view their international law obligations in outer space. They may also be disincentivized to clarify what specific actions were taken out of a sense of legal obligation. This is likely because they believe that contributing to the development of the law will restrict their own freedom of action while having little impact on the actions of others with less developed capabilities. However, this is a shortsighted approach, as peerless technological supremacy does not last forever, and a rules-based system carries more advantages than disadvantages in the long term.

IV. STATE PRACTICE ON DUE REGARD

As discussed in Part II.D., *supra*, relevant conduct for consideration as a supplementary means of interpretation under Article 32, VCLT, includes both acts and omissions. Relevant conduct may include a single instance of conduct in the application of the treaty as well as tacit acceptance of statements or acts by other parties.[92] It includes conduct in the exercise of executive, legislative, judicial, or other functions, and conduct by lower-ranking officials constitutes subsequent state practice as long as it is "sufficiently unequivocal" and the government can be expected to be aware of the practice and has not contradicted it within a reasonable time.[93] This part examines a range of state practices relating to outer space and whether they may be considered as a supplementary means of interpretation of the due regard requirement.

A. ASAT Tests

Thus far, space activity that comes the closest to triggering obligations under Article IX of the Outer Space Treaty is intentional destruction of an on-orbit satellite, commonly referred to as a destructive anti-satellite weapons test, or ASAT test. While any weapon designed to disrupt, deny, degrade, or destroy a space system can be referred to as an "anti-satellite weapon," a direct-ascent destructive ASAT test uses a high-speed missile, launched from either Earth's surface or the air, to destroy the satellite target.[94] The destructive ASAT test is relevant for purposes of Article IX because, even when a state conducts a destructive ASAT test on its own space systems, the test has the potential to

[92] *See* ILC Report, *supra* note 57, at 22, 41.
[93] *See* ILC Report, *supra* note 57, at 38.
[94] *Anti-Satellite Weapons: Threatening the Sustainability of Space Activities*, SECURE WORLD FOUNDATION (May 2022), https://bit.ly/4atouKl .

generate massive amounts of debris in Earth's orbit. This debris threatens other satellites and diminishes the usability of orbits in outer space.[95]

There are currently more than 25,000 known pieces of debris larger than 10 centimeters in Earth's orbit, and more than 500,000 particles between 1-10 centimeters.[96] In low-Earth orbit (below 2,000 kilometers), debris travels at 7-8 kilometers per second, and the average impact speed with another object is between 10-15 kilometers per second.[97] Because of the impact speed, even small fragments of debris can affect systems in outer space. Debris the size of a marble is large enough to cause damage to a satellite, and debris the size of a softball can destroy one.[98] Debris as small as a grain of sand could puncture an astronaut's space suit.[99] The higher the altitude, the longer debris remains in orbit around Earth. Debris at an orbit of 600 kilometers typically falls back to Earth within several years, while debris at 800 kilometers would continue to orbit Earth for centuries, and debris above 1,000 kilometers would remain for a thousand years or more.[100]

1. People's Republic of China in 2007

In January 2007, the PRC conducted the first post-Cold War era ASAT test by launching a land-based, medium-range ballistic missile armed with a kinetic kill vehicle, destroying one of its own defunct weather satellites in outer space.[101] No explosives were onboard the kinetic kill vehicle, but the collision occurred at a relative velocity of 32,400 kilometers per hour, completely destroying the satellite.[102] At the time of destruction, the weather satellite was in polar orbit at approximately 863 kilometers altitude.[103] This event created nearly 3,400 pieces of trackable debris and an estimated 150,000 pieces of debris that are untrackable.[104]

The impact altitude of approximately 863 kilometers means, in contrast with lower-altitude debris-generating events, much of the debris will remain in

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[95] *Id.*
[96] *Frequently Asked Questions,* ASTROMATERIALS Research & Exploration Science, NASA Orbital Debris Program Office, https://bit.ly/3RyaKVY.
[97] *Id.*
[98] *NASA's Efforts to Mitigate the Risks Posed by Orbital Debris*, NAT'L AERONAUTICS & SPACE ADMIN., OFFICE OF INSPECTOR GENERAL (Jan. 27, 2021), https://bit.ly/4apXfR0.
[99] *Id.* at 3.
[100] *See Frequently Asked Questions*, *supra* note 96.
[101] SHIRLEY KAN, CONG. RSCH. SERV., RS22652, CHINA'S ANTI-SATELLITE WEAPON TEST 1 (2007).
[102] *See Anti-Satellite Weapons,* SECURE WORLD FOUNDATION, *supra* note 94.
[103] *Id.*
[104] *See* Goehring, *supra* note 35, at 319.

low-earth orbit for decades.[105] The initial cloud of debris that formed a ring around earth now covers much of low-earth orbit, spanning altitudes from 175 kilometers to 3,600 kilometers.[106] In 2007, it was assessed that two-thirds of all payloads in Earth's orbit are operating in regimes affected by this debris, and the International Space Station has fired thrusters in "debris avoidance maneuvers" to avoid remnants from the PRC ASAT test at least three times.[107] It is predicted that 79 percent of the debris will still be in orbit in the year 2108.[108]

The PRC gave no advance notice to the international community and did not undertake international consultations prior to the ASAT test.[109] In fact, the PRC did not confirm it had conducted the test until almost two weeks after the event.[110] In response, Australia, Canada, the European Union, India, Japan, South Korea, Taiwan, the United Kingdom, and the United States quickly condemned the test, raising concerns about the debris generated therefrom.[111] However, only Japan called the test unlawful. Japanese Foreign Minister Taro Aso criticized the PRC for failure to give advance notice about the test, and Prime Minister Shinzo Abe called the test a violation of the Outer Space Treaty, but did not cite specific provisions.[112] In contrast, the United Kingdom explicitly stated the ASAT test was *not* a violation of international law. While a spokesman for Tony Blair reported that the United Kingdom complained about the lack of international consultations via diplomatic channels, the spokesman also reported that the British government did not believe the test contravened international law.[113]

As previously mentioned, this was the first post-Cold War destructive ASAT test. During the Cold War Era, with the Outer Space Treaty in place, both the United States and Russia conducted ASAT tests with no international consultations and no prior notification.[114] As Michael Mineiro points out, the PRC's practice was seemingly consistent with previous state practice on the part

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[105] *See* Mineiro, *supra* note 22, at 341.
[106] *See Anti-Satellite Weapons*, SECURE WORLD FOUNDATION, *supra* note 94.
[107] Tariq Malik, *Space Station Dodges Debris From Destroyed Chinese Satellite*, SPACE.COM (Jan. 29, 2012), https://bit.ly/3TrrJMt; James Doubek, *The International Space Station Had to Move to Dodge Space Junk*, NPR (Oct. 26, 2022), https://bit.ly/48nmt0G; Linda Hasco, *International Space Station Fires Rocket to Avoid Chunk of Space Junk From Destroyed Chinese Satellite*, PENNLIVE PATRIOT- NEWS (Nov. 11, 2021), https://bit.ly/41wzh2h.
[108] *See Anti-Satellite Weapons*, SECURE WORLD FOUNDATION, *supra* note 94.
[109] *See* KAN, *supra* note 101.
[110] *See* Mineiro, *supra* note 22, at 344.
[111] *Id.* at 341.
[112] Associated Press, *China Anti-Satellite Test Draws Global Ire*, CBS NEWS (Jan. 19, 2007), https://bit.ly/48jIqNS; Carin Zissis, *China's Anti-Satellite Test*, COUNCIL ON FOREIGN RELATIONS (Feb. 22, 2007), https://bit.ly/3RsKso9.
[113] Chris Buckley, *Concern Grows Over China's Satellite-Killing Missile Test*, REUTERS (Jan. 19, 2007), https://bit.ly/3tvLXdd.
[114] *See* Mineiro, *supra* note 22, at 345.

of the United States and Russia.[115] This could be part of the calculus most states undertook when failing to cite Article IX or call the destructive test a violation of international law.

Since the 2007 test, however, the PRC has not conducted another destructive ASAT test. In its 2015 Annual Report to Congress, the U.S.-China Economic and Security Review Commission found that the worldwide criticism of the destructive ASAT test may have resulted in the PRC gaining a "better appreciation of the diplomatic costs of debris-generating antisatellite tests as well as the long-term consequences of such tests for China's own space assets."[116] Diplomatic costs, however, are not the same as legal obligations, and aside from Japan, state practice following the Chinese ASAT test demonstrates an unwillingness to label massive debris-generating events a violation of the Outer Space Treaty.

2. United States in 2008

On February 21, 2008, the United States launched a Standard Missile 3 from a guided missile cruiser that collided with a failed U.S. satellite at an altitude of 247 kilometers.[117] A week prior to the intercept, Deputy National Security Advisor James Jeffrey, Vice Chairman, Joint Chiefs of Staff General James Cartwright, and NASA Administrator Michael Griffin held a press briefing to announce the decision to intercept the satellite.[118] In this briefing, the United States provided reasoning behind the decision to intercept the satellite, along with detailed information regarding planned measures to mitigate the debris impact. Specifically, the United States cited concerns for "death or injury to human beings beyond that associated with the fall of other satellites and other Space objects" after a determination the satellite could release much of its load of hydrazine fuel as a toxic gas upon descent to Earth's surface.[119] In making this announcement, Deputy National Security Advisor James Jeffrey cited obligations under the Outer Space Treaty, specifically noting that the treaty "calls on states to keep others informed of activities of potential concern."[120] Although he did not cite a specific provision of the Outer Space Treaty, it is possible he was referring to Article IX, which calls on States Parties "to inform the Secretary-General of the United Nations as well as the public and the international scientific community, to the

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[115] *Id.*
[116] U.S.-CHINA ECON. & SEC. REV. COMM., 2015 REPORT TO CONGRESS, 114TH CONG. 293 (Nov. 2015).
[117] Brian Weeden, *Through a Glass, Darkly: Chinese, American, and Russian Anti-Satellite Testing in Space*, SECURE WORLD FOUNDATION 26 (Mar. 17, 2014).
[118] *Mitigating a Threat: Pentagon Announces Plans to Shoot Down Falling Spy Satellite*, ARMY SPACE J., 2008 Spring Edition, at 14 [hereinafter Mitigating a Threat].
[119] *Id.*
[120] *Id.* at 15.

greatest extent feasible and practicable, of the nature, conduct, locations and results of [activities in outer space] [i]n order to promote international co-operation in the peaceful exploration and use of outer space."[121] Jeffrey did not specifically mention the Article IX requirement to conduct activities in outer space with due regard to the corresponding interests of all other States Parties, but did assert that the requirement for international consultations had not been triggered, stating:

> While we do not believe that we meet the standard of Article IX of [the Outer Space Treaty] that says we would have to consult in the case of generating potentially harmful interference with other activities in Space, we do believe that it is important to keep other countries informed of what is happening. We let many countries know at the end of January that the satellite was descending, that it would likely have hydrazine, and talked a bit about the consequences of that. Today, we're reaching out to all countries and various organizations — the U.N., some of its subordinate agencies, the European Space Agency and NATO — to inform them of the actions that we're describing to you today.[122]

In addition to distinguishing this satellite from others reentering Earth because of the hydrazine and inability to communicate with the satellite, the United States provided detailed reasoning as to why the on-orbit intercept was chosen as the course of action least likely to cause risk to space platforms, airborne platforms, civilian infrastructure, and human life.[123] Additionally, General Cartwright gave a full explanation of measures taken to reduce the debris created in outer space and reduce risk to other space objects. Specifically, he indicated an intent to intercept the satellite at a low altitude, just prior to entry into Earth's atmosphere, explaining that over 50 percent of debris would deorbit in the first two orbits, or within 10-15 hours.[124] NASA Administrator Michael Griffin elaborated on these mitigating measures, giving insight into the analysis undertaken of any risk to the International Space Station and the astronauts onboard.[125]

Immediately following the successful intercept on February 21, 2008, the United States issued a press release detailing the operation and noting that "[n]early all of the debris will burn up on re-entry within 24-48 hours and the

[121] *See* Outer Space Treaty, *supra* note 19, at art. XI.
[122] *See Mitigating a Threat*, *supra* note 118, at 15–16.
[123] *Id.* at 15–18.
[124] *Id.* at 18.
[125] *Id.* at 20.

remaining debris should re-enter within 40 days."[126] In reality, the intercept created 174 pieces of orbital debris, with half of the debris deorbited by the end of March 2008, and the rest approximately eighteen months after the impact.[127] This disconnect in debris predictions and outcome was primarily because a significant proportion of the debris generated by the impact was thrown into orbits much higher than the orbit of the satellite at the time of intercept.[128]

The United States' assertion that the duty to undertake appropriate international consultations under Article IX was not triggered is within reason, as consultation is only required when a state "has reason to believe that an activity or experiment planned by it or its nationals in outer space . . . would cause potentially harmful interference with activities of other States Parties in the peaceful exploration and use of outer space . . . ."[129] In this case, the measures planned and implemented by the United States to minimize risk to other space objects and reduce the quantity and orbital life of debris reasonably support the conclusion that the United States did not have reason to believe the intercept would cause potentially harmful interference with activities of other States Parties.[130]

The drastic differences in debris quantity and orbital longevity created by the U.S. satellite intercept demonstrate a stark difference in approach between the United States in 2008 and the PRC in 2007. While the United States made general references to "certain obligations based on treaties and other agreements related to activities in Space" and explicitly mentioned that the Outer Space Treaty "calls on states to keep others informed of activities of potential concern," the United States did not explicitly link its advance notification and mitigating measures to the duty to conduct activities in outer space with due regard.[131]

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[126] Jamie McIntyre, Suzanne Malveaux & Miles O'Brien, *Navy Missile Hits Dying Spy Satellite, Says Pentagon*, CNN (Feb. 21, 2008), https://bit.ly/41um8H4.
[127] *See Through a Glass, Darkly*, *supra* note 117, at 26.
[128] *Id.*
[129] *See* Outer Space Treaty, *supra* note 19, at art. IX.
[130] Michael Mineiro argued that the conclusion that the U.S. had "reason to believe" was with merit, but argued that the U.S. position was defendable, stating "The U.S. position is defendable because the objective evidence presented prior to the planned intercept of USA-193 does not conclusively establish whether the planned intercept would give "reason to believe" that interference would be generated that was potentially harmful to other State activities in outer space. Unlike FY-1C, the interception orbit of USA-193 would not result in a long lasting debris field of significant size and any debris generated would primarily be in a low altitude decaying orbit. It was within the discretion of the United States to conclude the planned intercept of USA-193 did not give "reason to believe" potentially harmful interference would occur because the facts did not definitely establish the U.S. should have had "reason to believe." Mineiro, *supra* note 22, at 352.
[131] Mitigating a Threat, *supra* note 118.

Despite this, the actions taken by the United States, combined with references to obligations, indicate a post-Cold War shift toward an understanding that there is a floor below the Article IX duty to consult. By making advance notifications to the international community and implementing measures to reduce or eliminate risk to others operating in outer space, both in the immediate and long-term, the United States eliminated the duty to consult regarding harmful interference, but still operated with due regard for the activities of others in outer space.

3. India in 2019

After over a decade since the last intentional destruction of a satellite in outer space, India conducted an anti-satellite weapons test on March 27, 2019, using a ballistic missile defense interceptor launched from Abdul Kalam Island.[132] The test destroyed an Indian satellite at an altitude of approximately 300 kilometers.[133]

India did not make advance notifications of the ASAT test, choosing to announce on the same day as the test after its completion.[134] India's choice of intercept altitude was much closer to the United States in 2008 than the PRC in 2007. In fact, India launched a satellite into a deliberately low altitude a few weeks prior to the ASAT test, and elected to use a smaller satellite than a typical Indian communication satellite, at about two square meters in surface area.[135]

Indian officials emphasized the low altitude, stating the debris created from the impact would deorbit within a few days, with all debris deorbited within 45 days.[136] In reality, the interception created 129 pieces of trackable debris, and some pieces were thrown to an altitude of 1000 kilometers as a result of the collision.[137] However, all but one piece of debris had deorbited by February 2022.[138]

Despite the lack of advance notification, the mitigating measures taken by India indicate a continued trend toward deliberate efforts to conduct activities in outer space in a way that minimizes the impact on the interests of other states in outer space. The international response to the test was muted, and noticeably

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[132] Ashley J. Tellis, *India's ASAT Test: An Incomplete Success*, CARNEGIE ENDOWMENT FOR INTERNATIONAL PEACE (Apr. 15, 2019), https://bit.ly/484Dhtp.
[133] Brian Weeden, *Indian Direct Ascent Anti-Satellite Testing*, SECURE WORLD FOUNDATION (May 2022), https://bit.ly/3RRfOGF.
[134] *See* Tellis, *supra* note 132.
[135] *Id.*
[136] *See Indian Direct Ascent Anti-Satellite Testing*, *supra* note 133, at 2.
[137] *Id.*
[138] *Id.*

different from the response to the PRC test in 2007.[139] The United States Department of State released a statement stating "the issue of space debris is an important concern for the United States, and . . . we took note of the Indian Government's statements that the test was designed to address space debris issues."[140] The PRC released a similarly muted response, expressing hope that all countries will uphold "peace and tranquility" in outer space.[141]

However, neither India nor states responding to the ASAT test cited obligations under international law when discussing the measures taken to mitigate debris generation or the lack of advance notification. As John Goehring points out, the international response to India's ASAT test, including a call for a legally binding ban on the intentional destruction of space objects resulting in the generation of long-lasting debris by the German delegation at the UN Committee on Peaceful Uses of Outer Space's Legal Subcommittee hearing, indicates a widely held belief that international law did not prohibit those events.[142]

4. Russia in 2021

On November 15, 2021, Russia launched a direct-ascent anti-satellite missile, striking and destroying an inactive Russian military satellite at about 500 kilometers altitude.[143] The collision created more than 1,700 pieces of orbital debris.[144] As of September 2022, about two-thirds of that debris had deorbited, while the remaining 661 pieces are predicted to remain in orbit until at least 2033.[145] Notably, the impact altitude was only 80 kilometers away from the orbit of the International Space Station, and astronauts from the International Space Station were forced to take shelter in their transport spacecraft when the station passed close to the debris in the hours following the impact.[146] Additionally, the ISS conducted a five minute, five second thruster burn to avoid a fragment of the collision in October 2022 and conducted a similar avoidance maneuver in June of 2022.[147]

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[139] Todd Harrison, et al., *Space Threat Assessment 2020*, CENTER FOR STRATEGIC & INT'L STUDIES, Mar 30, 2020 at 49.
[140] U.S. Dep't of State, Dep't Press Briefing (Apr. 2, 2019), https://bit.ly/481L5Mt.
[141] *China Reacts Guardedly to India's ASAT Missile Test; Hopes Nations will Uphold Peace in Space*, THE ECONOMIC TIMES (Mar. 27, 2019), https://bit.ly/41BvoJK.
[142] *See* Goehring, *supra* note 35, at 320.
[143] Shannon Bugos, *Russian ASAT Test Creates Massive Debris*, ARMS CONTROL ASSOCIATION (Dec. 2021), https://bit.ly/3vf3lU3.
[144] Jeff Foust, *Majority of Tracked Russian ASAT Debris has Deorbited*, SPACENEWS (Sept. 29, 2022), https://bit.ly/47aN1B4.
[145] *Id.*
[146] Meghan Bartels, *Space Debris Forces Astronauts on Space Station to Take Shelter in Return Ships*, SPACE.COM (Nov. 15, 2021), https://bit.ly/3NALr4u .
[147] Jackie Wattles & Katie Hunt, *International Space Station Swerves to Avoid Russian Space Debris, NASA Says*, CNN (Oct. 25, 2022), https://bit.ly/3v6mveZ ("The ISS typically has to shift its

The international response to the Russian ASAT test was one of general condemnation, with the United States Department of State calling the test "dangerous and irresponsible."[148] General James Dickinson, commander of United States Space Command, called the test a "deliberate disregard for the security, safety, stability, and long-term sustainability for the space domain for all nations," stating it was "simply irresponsible."[149] The United Kingdom defense secretary echoed those same words, stating the test showed "a deliberate disregard for the security, safety, and sustainability of the space domain for all nations."[150] Japan and Germany called the test "irresponsible,"[151] and Australia called it "provocative."[152] The PRC stayed silent on the Russian test, even after the China National Space Administration issued a warning of an "extremely dangerous encounter" between its Tsinghua Science satellite and debris from the Russian ASAT test.[153]

While many called for the development of new "norms" or "principles" of responsible behavior in outer space, no state called the test unlawful.[154] Only Russia referenced the Outer Space Treaty, asserting that the test did not violate the Treaty, and that "[t]he debris it produced did not create any threat and does not pose any obstacles or difficulties to the functioning of orbital stations and spacecraft, or to other space activities."[155] The facts of this assertion are debatable, given the immediate and longer-term impact on the International Space Station

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orbit to avoid space junk around once a year, maneuvering away from the object if the chance of a collision exceeds one in 10,000").

[148] Chelsea Gohd, *Russian anti-satellite test a 'dangerous and irresponsible' act that threatens astronauts, US says*, SPACE.COM (Aug. 10, 2022), https://bit.ly/3TrtWrf.

[149] U.S. SPACE COMMAND PUBLIC AFFAIRS OFFICE, *Russian Direct-Ascent Anti-Satellite Missile Test Creates Significant, Long-Lasting Space Debris* (Nov. 15, 2021).

[150] Tereza Pultarova, *Space Debris from Russian Anti-Satellite Test Will Be a Safety Threat for Years*, SPACE.COM (Nov. 17, 2021), https://bit.ly/3Tzf5ei.

[151] Press Release, Ministry of Foreign Affairs of Japan, An Anti-Satellite Test Conducted by the Government of Russia (Statement by Press Secretary Yoshida Tomoyuki) (Nov. 18, 2021).

[152] Joint Media Release, Australian Government Defence Ministers, Russian Anti-Satellite Weapons Testing (Nov. 17, 2021).

[153] Andrew Jones, *Chinese Satellite in Near Miss with Russian ASAT Test Debris*, SPACENEWS (Jan. 20, 2022), https://bit.ly/41KHiRH.

[154] Press Release, Council of the European Union, Statement by the High Representative of the Union for Foreign Affairs and Security Policy on Behalf of the EU on the Russian Anti-Satellite Test (Nov. 19, 2021) ("European Union calls on all States, including the Russian Federation, to refrain from further such tests and to contribute in a constructive manner to ongoing efforts in the United Nations on the development of norms, rules and principles of responsible behaviour in outer space."); Joint Media Release, *supra* note 152 ("Australia continues to work in close partnership with Canada, Germany, France, New Zealand, the United Kingdom and the United States, as well as other space faring nations to advance the development of international norms and responsible behaviour in space.").

[155] *Russian Anti-Satellite Missile Test Causes U.S. Concern*, WARSAW INSTITUTE (Nov. 30, 2021), https://bit.ly/3GNvJzg.

and other satellites. However, implicit in the statement is the understanding that the creation of a threat or posing obstacles or difficulties to the functioning of orbital stations and spacecraft, or to other space activities, may be a violation of the Outer Space Treaty.

5. Moratorium on ASAT Tests

Five months after the Russian ASAT test, the United States became the first state to announce a moratorium on testing destructive direct-ascent anti-satellite missiles. This announcement was made by Vice President Kamala Harris on April 18, 2022.[156] Vice President Harris stated the Biden administration is "working to establish new rules and norms for the challenges of the 21st century" and the United States plans to "continue to be a leader in order to establish, to advance, and to demonstrate norms for the responsible and peaceful uses of outer space."[157] Specifically calling out the 2021 Russian and 2007 PRC ASAT tests, and the debris generated therefrom, Harris stated that although the United States has consistently condemned the ASAT tests and called them "reckless," it was "not enough."[158] Harris called on other states to make the same commitment in order to "establish this as a new international norm for responsible behavior in outer space."[159] Since this announcement, New Zealand, Canada, South Korea, Japan, Germany, the United Kingdom, Switzerland, Australia, and France have also committed to a moratorium on destructive direct-ascent ASAT tests.[160] In December 2022, the UN General Assembly passed a resolution in support of a moratorium.[161] Only nine states, including the People's Republic of China, Russia, and Iran, voted against the resolution;[162] India abstained.[163]

While no states have linked the destructive ASAT test moratorium to obligations under the Outer Space Treaty, it nevertheless clears the way for a stronger understanding of the due regard requirement to take hold. With a growing consensus against debris-generating events like destructive-ASAT tests, there is now less justification for the *opinio juris* aversion on the part of states to link a

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[156] Vice President Kamala Harris, Remarks on the Ongoing Work to Establish Norms in Space (Apr. 18, 2022).
[157] *Id*.
[158] *Id.*
[159] *Id.*
[160] Shannon Bugos, *Seven Countries Join ASAT Test Ban*, ARMS CONTROL ASSOCIATION (Nov. 2022), https://bit.ly/3ROFEe8; Jeff Foust, *France Joins ASAT Testing Moratorium*, SPACENEWS (Nov. 30, 2022), https://bit.ly/3tm47hH; Marcia Smith, *U.S.-Led ASAT Test Moratorium Gains Ground*, SPACEPOLICYONLINE.COM (Nov. 3, 2022), https://bit.ly/3Tx8WPP.
[161] Jeff Foust, *United Nations General Assembly Approves ASAT Test Ban Resolution*, SPACENEWS (Dec. 13, 2022), https://bit.ly/4792gdI.
[162] *Id.*
[163] *Id.*

large-scale debris-generating ASAT test to a violation of the due regard requirement.

B. Lunar Operations

1. Challenges to Operating on the Moon

Lunar operations present a number of unique challenges with implications for the due regard requirement under the Outer Space Treaty. Both the United States and the PRC are particularly interested in landing on the Moon's south pole.[164] This is primarily because the lunar south pole has areas of elevation with extended access to sunlight while still being close enough to PSRs, deep craters believed to contain water ice, a resource critical for sustained operations.[165] Further restricting the already limited space on the lunar south pole is heavily disrupted terrain, characterized by the peaks and valleys of several large craters.[166] Not only does this mean there are a finite number of flat areas favorable to landing and operating, but also that there may be just a few routes conducive for rovers to transit between sites.[167] Because of these unique factors, it is likely that the United States, the PRC, and others planning missions to the lunar surface in the coming decade will be operating in extremely close proximity, especially by space standards.

The issues inherent in operating in close proximity are magnified by lunar regolith, a thick layer of fragmental and unconsolidated rock material caused by "the continuous impact of meteoroids large and small and the steady bombardment of charged particles from the sun and stars" that covers the surface of the Moon.[168] Regolith can range from 4-5 meters thick in some regions to 10-15 meters thick in others.[169] This means that simple activities involving movement, like rover travel, can stir up regolith, posing risk to other objects or operations in the vicinity. Additionally, during lunar landings, the force of the lander's engines create plume-surface interactions (PSIs) that eject regolith from the landing zone.[170] There is limited knowledge about PSIs, making it difficult to predict how far surface material could be projected during a lunar landing.[171] Analysis from previous moon landings suggests that particles ranging from 1 to

[164] Andrew Jones, *NASA and China are Eyeing the Same Landing Sites Near the Lunar South Pole*, SPACENEWS (Aug. 31, 2022), https://bit.ly/3TOQz9p.
[165] Brian Dunbar, *Moon's South Pole in NASA's Landing Sites*, NAT'L AERONAUTICS & SPACE ADMIN.(Apr. 15, 2019), https://bit.ly/4aq1mfU.
[166] *See* LUNAR LANDING AND OPERATIONS POLICY ANALYSIS, *supra* note 15, at 15.
[167] *Id*. at 15–16.
[168] Sara Noble, *The Lunar Regolith*, NASA, https://bit.ly/3GNNkHc (last visited Aug. 23, 2023).
[169] *Id*.
[170] *See* LUNAR LANDING AND OPERATIONS POLICY ANALYSIS, *supra* note 15, at 22.
[171] *Id*.

10 centimeters in diameter could have traveled up to 1.5 kilometers from those landing sites.[172] As payloads to the Moon become larger and heavier, the radius at which a surface landing could affect nearby operations will likely also grow. All of these factors have the potential to bring the due regard requirement to the front and center of state interactions on the Moon.

2. The Artemis Accords

The Artemis Program, led by NASA, comprises a range of space exploration and scientific missions, aiming to "establish a sustainable presence on the Moon to prepare for missions to Mars" and create a broad international coalition in outer space.[173] Artemis is not a NASA "program" in the traditional sense of the word, as it does not have unified leadership and funding, but is rather a "broad articulation of a unified purpose across missions, funding lines, directorates, and partnerships."[174] The Artemis Program was established in response to the December 2017 White House's Space Policy Directive-1, which amended Presidential Policy Directive-4, replacing a section that directed the United States to "set far-reaching exploration milestones" with an emphasis on the return of humans to the Moon:

> Lead an innovative and sustainable program of exploration with commercial and international partners to enable human expansion across the solar system and to bring back to Earth new knowledge and opportunities. Beginning with missions beyond low-Earth orbit, the United States will lead the return of humans to the Moon for long-term exploration and utilization, followed by human missions to Mars and other destinations.[175]

The Artemis Program is one of the most ambitious space exploration efforts in history and has "real momentum and bipartisan political support" in the United States.[176] The campaign will include both crewed and un-crewed robotic operations to the surface of the Moon as well as lunar orbit.[177] NASA programs that fall under the Artemis umbrella include: Gateway, a small, human-tended

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[172] *Id*.
[173] *See* LUNAR LANDING AND OPERATIONS POLICY ANALYSIS, *supra* note 15, at 8; The Artemis Accords: Principles for a Safe, Peaceful, and Prosperous Future, NAT'L AERONAUTICS & SPACE ADMIN., https://bit.ly/4avg6tO.
[174] *See* LUNAR LANDING AND OPERATIONS POLICY ANALYSIS, *supra* note 15, at 8.
[175] President Donald J. Trump, Space Policy Directive 1—Presidential Memorandum on Reinvigorating America's Human Space Exploration Program, WhiteHouse.gov (Dec. 11, 2017), https://bit.ly/480YmVR.
[176] Christian Davenport, *The Moon Beckons Once Again, and This Time NASA Wants to Stay*, WASH. POST (Jan. 9, 2023), https://bit.ly/3RttUfY.
[177] Darcy Elburn, *Artemis III: NASA's First Human Mission to the Lunar South Pole*, NAT'L AERONAUTICS & SPACE ADMIN. (Jan. 13, 2023), https://bit.ly/3RpefhA.

space station in lunar orbit that will provide support for sustained exploration and research in deep space, including docking ports for visiting spacecraft, a place for crew to live and work, and space for on-board science investigations;[178] Orion spacecraft, a human spacecraft for deep-space missions;[179] the Space Launch System (SLS), a super heavy-lift launch rocket that can carry more payload to deep space than any other launch vehicle, designed to "send the Orion spacecraft, four astronauts, and large cargo to the Moon on a single mission";[180] the Human Landing System (HLS), designed to transport astronauts in lunar orbit to the surface of the Moon;[181] and Artemis Base Camp on the Moon's south pole.[182] Each of these programs involves both commercial and international contributions.[183] Other programs under consideration for Artemis would support the sustainability of operations, including in-situ resource utilization (ISRU), a program to utilize local resources on the Moon and other celestial bodies to generate materials needed for operations,[184] as well as power, communications, and landing infrastructure.[185]

The emphasis on international cooperation in the Artemis program serves not only to further space operations by leveraging the expertise and resources of international partners, but serves geopolitical and strategic goals. Practical international cooperation can often be used as a way to push law and policy forward in incremental, digestible ways. This focus on international cooperation gave rise to the Artemis Accords.[186] NASA's Artemis Accords press release states, "[i]nternational cooperation on Artemis is intended not only to bolster space exploration but to enhance peaceful relationships among nations."[187]

With the subtitle "Principles for Cooperation in the Civil Exploration and Use of the Moon, Mars, Comets, and Asteroids for Peaceful Purposes" the Accords are a political agreement initially signed by eight original negotiating

[178] *Gateway: Overview*, NAT'L AERONAUTICS & SPACE ADMIN., https://bit.ly/3todjC6 (last updated May 24, 2023).
[179] *Orion Spacecraft: Orion Overview*, NAT'L AERONAUTICS & SPACE ADMIN., https://bit.ly/3GOBHQn (last updated Nov. 10, 2022).
[180] *Space Launch System*, NAT'L AERONAUTICS & SPACE ADMIN., https://bit.ly/481Q4Nb (last updated Jul. 7, 2023).
[181] *Humans on the Moon: About Human Landing Systems Development*, NAT'L AERONAUTICS & SPACE ADMIN., https://bit.ly/3GRt1sC (last updated May 19, 2023).
[182] *Artemis III Science Definition Team Report*, NAT'L AERONAUTICS & SPACE ADMIN. 26, https://bit.ly/3Rwvi17 (last visited Aug. 23, 2023).
[183] LUNAR LANDING AND OPERATIONS POLICY ANALYSIS, *supra* note 15, at 8.
[184] *Explore Space Tech: In-Situ Resource Utilization (ISRU)*, NAT'L AERONAUTICS & SPACE ADMIN., https://bit.ly/475fEjk (last updated Apr. 6, 2020).
[185] *See* LUNAR LANDING AND OPERATIONS POLICY, *supra* note 15, at 8.
[186] Press Release, Nat'l Aeronautics & Space Admin., International Partners Advance Cooperation with First Signings of Artemis Accords (Oct. 13, 2020), https://go.nasa.gov/3RPs4Y0.
[187] *Id.*

states on October 13, 2020, now with twenty-three signatories.[188] Russia and the PRC have not signed the Accords. While Russia has not made comments directly regarding the Accords, the head of Russia's national space agency is on record describing the Artemis program as "too U.S.-centric,"[189] and a "political project" that resembles NATO.[190] In the PRC, the Accords received "decisively negative" coverage in Chinese news media, characterized as "ill-conceived instruments to further U.S. dominance" and a "disingenuous attempt to stymie Chinese space ambitions."[191] However, analysts have noticed that some Chinese legal experts appear open to the key principles of the Artemis Accords and "appear cognizant of the parallel objectives between the United States and China as they continue to develop outer space."[192] These analysts note that while the U.S. "Wolf Amendment"[193] prevents the United States from cooperating with China in outer space, reactions by Chinese legal experts "should encourage measured optimism about Chinese acceptance of the Accords' underlying principles."[194]

The Accords aim to establish "a practical set of principles, guidelines, and best practices in carrying out activities in outer space . . . intended to increase the safety of operations, reduce uncertainty, and promote the sustainable and beneficial use of space for all humankind."[195] The Preamble explicitly states the desire to "implement the provisions of the Outer Space Treaty and other relevant international instruments and thereby establish a political understanding regarding mutually beneficial practices for the future exploration and use of outer space."[196]

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[188] Artemis Accords: Principles for Cooperation in the Civil Exploration and Use of the Moon, Mars, Comets, and Asteroids for Peaceful Purposes, *opened for signature* Oct. 13, 2020, https://go.nasa.gov/4aGgg1V [hereinafter Artemis Accords]. Artemis Accords signatories are: Argentina, Australia, Bahrain, Brazil, Canada, Colombia, the Czech Republic, Ecuador, France, India, Israel, Italy, Japan, the Republic of Korea, Luxembourg, Mexico, New Zealand, Nigeria, Poland, Romania, Rwanda, Saudi Arabia, Singapore, Spain, Ukraine, the United Arab Emirates, the United Kingdom, and the United States. (Press Release, U.S. Dep't of State, France Becomes Twentieth Nation to Sign the Artemis Accords (Jun. 7, 2022), https://bit.ly/3TsBDxp; Cheryl Warner, *NASA Welcomes Nigeria, Rwanda as Newest Artemis Accords Signatories*, NAT'L AERONAUTICS & SPACE ADMIN. (Dec. 13, 2022); Sean Potter, *Saudi Arabia Signs Artemis Accords*, NAT'L AERONAUTICS & SPACE ADMIN. (Jul. 14, 2022); Jeff Foust, *Argentina Signs Artemis Accords*, SPACENEWS (Jul. 27, 2023), https://bit.ly/3GRnz9i.).

[189] Jeff Foust, *Russia Skeptical About Participating in Lunar Gateway*, SPACENEWS (Oct. 12, 2020), https://bit.ly/3tyMVFD.

[190] Mark R. Whittington, *Russia Rejects Joining NASA's Artemis Moon Program in Favor of China*, HILL (Jul. 19, 2020), https://bit.ly/48pM497.

[191] Elliot Ji, Michael B. Cerny & Raphael J. Piliero, *What Does China Think About NASA's Artemis Accords?*, DIPLOMAT (Sep. 17, 2020), https://bit.ly/48ovAy5.

[192] *Id.*

[193] *Id*. Initially passed in 2011, the "Wolf Amendment" limits U.S. government agencies, like NASA, from working with Chinese commercial or government agencies. *See* Hannah Kohler, *The Eagle and the Hare: U.S.-Chinese Relations, the Wolf Amendment, and the Future of International Cooperation in Space*, 103 GEO. L.J. 1135, 1149 (2015).

[194] Ji, Cerny & Piliero, *supra* note 191.

[195] Artemis Accords, *supra* note 188, at 2.

[196] *Id.* at 1.

The Accords apply to civil space activities conducted by the space agencies of each signatory in outer space, including on the Moon, Mars, comets, and asteroids, as well as in orbit of Earth, Mars, and the Moon.[197] They do not carry commitments for commercial or military activities in outer space, nor do they apply to Earth's orbit.[198]

Although non-binding, the Artemis Accords are an implementation of obligations under the Outer Space Treaty and support a distinction between the due regard and harmful interference provisions of Article IX of the Outer Space Treaty, calling them out as distinct requirements and indicating that duties under Article IX go beyond a duty to consult regarding harmful interference. The Accords suggest there is an element of notification and coordination, or de-confliction, inherent in Article IX of the Outer Space Treaty, likely contained within the requirement to operate with due regard. They also serve as a strong foundation for developing a broader consensus on due regard as operations in space continue.

Section 11 of the Artemis Accords, Deconfliction of Space Activities, is particularly relevant to Article IX and the due regard requirement. It begins with the statement that "[t]he Signatories acknowledge and reaffirm their commitment to the Outer Space Treaty, including those provisions relating to due regard and harmful interference."[199] Paragraph three goes on to reiterate provisions of Article IX of the Outer Space Treaty, stating that "[c]onsistent with Article IX of the Outer Space Treaty, a Signatory authorizing an activity under these Accords commits to respect the principle of due regard. A Signatory to these Accords with reason to believe that it may suffer, or has suffered, harmful interference, may request consultations with a Signatory or any other Party to the Outer Space Treaty authorizing the activity."[200]

Paragraph seven of Section 11 sets forth the means by which the signatories intend to implement their obligations under the Outer Space Treaty: "[i]n order to implement their obligations under the Outer Space Treaty," Artemis Accords signatories "intend to provide notification of their activities and commit to coordinating with any relevant actor to avoid harmful interference."[201] This supports the conclusion that signatories to the Artemis Accords understand there is an obligation in the Outer Space Treaty, likely contained in the due regard requirement, that is satisfied via notification and coordination or de-confliction. The method by which Artemis Accords signatories have agreed to accomplish this

[197] *Id*. at 2.
[198] *Id*.
[199] *Id*. at 5.
[200] *Id.*
[201] *Id.*

notification and coordination as an implementation of their obligations under the Outer Space Treaty is via a concept called safety zones. "Safety Zones" are defined as "the area in which nominal operations of a relevant activity or an anomalous event could reasonably cause harmful interference."[202]

Signatories agree that the size and scope of a safety zone, as well as the notice and coordination, should "reflect the nature of the operations being conducted and the environment that such operations are conducted in" and should be determined in a "reasonable manner" using "commonly accepted scientific and engineering principles."[203] The zone should be constructed in a way that protects personnel, equipment, and operations from harmful interference.[204] Safety zones directly correlate with the relevant operation, and are therefore temporary, ending when the operation ceases.[205] The Accords require signatories notify each other as well as the Secretary General of the United Nations of the "establishment, alteration, or end of any safety zone," and commits signatories to provide the basis for the area to another signatory upon request.[206] Signatories are encouraged to make information regarding the safety zone available to the general public, "including the extent and general nature of operations taking place within them."[207]

Importantly, under paragraph 10, Signatories commit to respecting reasonable safety zones to avoid harmful interference with operations therein, "including by providing prior notification and coordinating with each other before conducting operations in a safety zone established pursuant to [the] Accords."[208] Although this is not part of the section specifically called out as an implementation of obligations under the Outer Space Treaty, it has the potential to develop into a responsible way of implementing the requirement to operate with due regard. Avoiding harmful interference with operations in a reasonably declared safety zone, including by coordination and de-confliction once notified of the bounds of the safety zone and the nature of the relevant operation, would be a reasonable interpretation of the requirement to conduct activities with due regard for others.

Under Article 32, VCLT, agreements between less than all parties to a Treaty regarding the interpretation or application of the Treaty constitute a form of subsequent practice that may be used as a supplementary means of interpretation.[209] Although the Artemis Accords as a whole are a non-binding

[202] *Id.*
[203] *Id.* at 5–6.
[204] *Id*. at 6.
[205] *Id.*
[206] *Id.*
[207] *Id.*
[208] *Id.*
[209] ILC Report, *supra* note 57, at 50.

political commitment, the provisions of Section 11, specifically paragraph seven, which is explicitly set forth "in order to implement [signatories'] obligations under the Outer Space Treaty,"[210] may constitute subsequent state practice by *some* parties in the application of the Outer Space Treaty. Additionally, it may be presumed as parties to the Artemis Accords move forward with providing notification of their activities and coordinating to avoid harmful interference, this can also be considered "conduct by one or more state parties…in the application of the treaty,"[211] and used as a supplementary means of interpretation under Article 32.

This section of the Artemis Accords, couched as an implementation of obligations under the Outer Space Treaty, helps to illuminate and assess state practice moving forward. Additionally, as operations in outer space continue and states begin taking steps to provide notification and coordination regarding their activities, it may be possible to develop a better understanding of how states view the requirement to operate with due regard.

Once states have provided notification regarding space activities to the general public, either via an official safety zone under the Artemis Accords or otherwise, the way in which states engage with that information will help to further develop understanding of the obligation to conduct activities with due regard. When states respect, fail to respect, or respond to the bounds of a safety zone, we will have state practice and the potential for a dialogue about what is permissible under international law.

3. NASA's Lunar Landing and Operations Policy Analysis

Building on the concept of safety zones as a means of implementing obligations under the Outer Space Treaty is the Lunar Landing and Operations Policy Analysis, published by NASA's Office of Technology, Policy, and Strategy (OTPS) in September 2022. This report was created in response to a request from NASA's Deputy Administrator and Associate Administrator of the Science Mission Directorate to answer two questions regarding lunar surface missions: "(1) what technical and policy considerations should NASA take into account in the selection of lunar landing and operations sites, and (2) what technical and policy considerations should NASA take into account when implementing tools such as safety zones in order to protect these operations and U.S. interests?" [212] The goal of the report was to provide options and recommendations to NASA leadership that respond to the challenges inherent in lunar operations, and the expected proliferation of actors and activities on the

[210] Artemis Accords, *supra* note 188, at 5.
[211] ILC Report, *supra* note 57, at 13.
[212] LUNAR LANDING AND OPERATIONS POLICY ANALYSIS, *supra* note 15, at ii.

surface of the Moon in the very near future.[213] In essence, the report poses legal and policy recommendations to address operational challenges with activities on the lunar surface.

The recommendations in the Lunar Landing and Operations Policy Analysis report give some insight into how U.S. government policy analysts view requirements under Article IX of the Outer Space Treaty and the due regard requirement, in particular. The recommendations provide an idea about how those obligations may be applied in practice on the surface of the Moon, a new context in which states are likely to be operating in much closer proximity than in Earth's orbit. The report also confirms that the safety zones in the Artemis Accords serve as a combined implementation of the Article IX obligations to conduct activities with due regard to corresponding interests of other states and to consult prior to any activities that might cause harmful interference with the activities of others. Section 2.2 states: "One of the most useful achievements of the Artemis Accords is to combine these elements—due regard, consultations prior to interference, and the exercise of control over objects [as required by Article VIII of the Outer Space Treaty]—into the tool that we call 'safety zones.'"[214] This statement regarding safety zones as an implementation of the due regard and consultation prior to harmful interference requirements is particularly probative, as one of the report's two authors, Gabriel Swiney, a Department of State attorney assigned as Senior Policy Advisor in NASA's OTPS, was also one of the primary authors and negotiators of the Artemis Accords.[215]

The report provides practical, tactical-level guidelines for implementing the safety zone concept from the Artemis Accords, this may be the beginning of considerations factoring into a calculus of what constitutes due regard. The report emphasizes that there is no one-size-fits-all safety zone, but provides a "minimum set of considerations that should be taken into account when considering dangers posed by surface operations" developed in consultation with technical subject-matter experts.[216] This list would presumably be used to develop the size and scope of the safety zone in accordance with the Artemis Accords. The list would also be a direct implementation of legal obligations under Article IX, to include the due regard requirement. The minimum considerations that are to be taken into consideration for developing the size and scope of safety zones are:

- Regolith ejected from the surface as the result of rover travel or other movement;

[213] *Id.*
[214] *Id.*
[215] *Harvard Law School Faculty, Gabriel Swiney*, HARVARD L. SCHOOL, https://bit.ly/3tt4cQD.
[216] LUNAR LANDING AND OPERATIONS POLICY ANALYSIS, *supra* note 16, at 31–32.

- Pressure vessels during normal operations, at end of life, and in the event of failure;
- Shadowing caused by tall structures;
- Non-ionizing radiation from all sources;
- Ionizing radiation from all sources;
- Any chemicals released during normal operations or in the event of failure;
- Any other hazards unique to specific hardware or operations (e.g., nuclear power systems);
- Special hazards posed by the nature of the location or terrain (e.g., significant slopes, boulders, dust, surface, or regolith characteristics);
- Damage to instrumentation (i.e., sensors, seismometers, or other instruments that may be damaged due to nearby landings and/or operations);
- Waste disposal.

Using the above list of considerations, the report recommends a system for designing and implementing safety zones in which policymakers and mission planners work together to "identify risks that each element of a mission could cause to others," "identify risks that other actors might cause to our own operations," and therefrom "identify a radius or other distance around each activity that can reasonably minimize (but likely not eliminate) those risks."[217] Once the safety zone has been designed, implementation takes place by communicating "the details of the safety zones to the space community so that others can respect the zones."[218] The report notes NASA should be prepared to provide technical justifications for each safety zone to the international community "as promised by the Artemis Accords . . . ."[219]

While this notice is given to the entire international space community, the report highlights that signatories to the Artemis Accords have promised to notify one another "if a later actor wishes to enter an existing safety zone, and then to consult to mitigate any interference that might arise from that entry into the area."[220] Although those who have not joined the Artemis Accords have not explicitly promised to respect safety zones, the report notes all space-faring nations are parties to the Outer Space Treaty and are therefore required "to give 'due regard' to the interests of others, and to notify and consult in advance of any actions that might cause harmful interference."[221] The following sentences give a

[217] *Id*. at 32.
[218] *Id.*
[219] *Id.*
[220] *Id. at 33.*
[221] *Id.*

strong understanding of how the due regard and harmful interference provisions of Article IX carry a requirement to notify, coordinate, and de- conflict:

> By publicly establishing safety zones around own operations [sic], we have put the international community on notice that any entry into these areas could cause harmful interference, thus triggering the notice and consultation requirements of Article IX. The end result is therefore the same for signatories and non-signatories to the Accords: notice and consultation. Any disagreements regarding the application of the Outer Space Treaty should be resolved through diplomatic channels.[222]

This recommendation demonstrates one way to implement the obligation to operate with due regard is by taking detailed, technical information about operations in outer space and considering how the operation could pose risk to the activities of others. Conversely, notifying other actors of the details of an operation allows them to do the same, arming them with more information on which they can make assessments of whether their activities are conducted with due regard to the operation of which they have been put on notice. It is a cooperative, de-confliction-based model grounded in technical information sharing.

The report goes on to recommend that NASA and the U.S. government as a whole "respect safety zones or similar tools established by non-signatories as well, since the concept of safety zones is directly derived from the Outer Space Treaty."[223] It states, "[a]s long as non-signatories' safety zones are reasonable, they should be respected."[224] This means non-signatories to the Artemis Accords have just as much ability to contribute to the development of due regard under the Artemis Accords framework. The dialogue that takes place when states make notifications of safety zones or other similar tools and other states respond to those parameters will be valuable regardless of who is an Artemis Accords signatory.

Additionally, the report acknowledges some actors may establish safety zones that are "unreasonable," which likely means not grounded in technical justifications and designed to minimize the risk based on those considerations. In instances where an actor establishes an "unreasonable" safety zone or "attempts to 'cordon off' large areas around their operations[,]" the report recommends that NASA work with the State Department to respond, keeping in mind that the "safety zones are simply a mechanism for implementing existing obligations set

[222] *Id.*
[223] *Id.*
[224] *Id.*

out in the Outer Space Treaty: the obligations to give due regard and consult before interference."[225]

Respect for the safety zones or other similar tools of others, because the concept is directly derived from the Outer Space Treaty, furthers the argument that inherent in the due regard requirement and prohibition against harmful interference is an element of de-confliction. If a state is put on notice regarding operations, and that notice contains a *reasonable* geographic area justified by technical, mission-specific facts, due regard requires that the states put on notice have respect for operation. This manifests by respecting the geographic area, or safety zone, surrounding the operation. Under the due regard requirement, once a state has received notice of a safety zone or similar area, it should de-conflict its own operations in order to avoid harmful interference, and may coordinate to ensure its own operations can continue.

In instances in which the U.S. government disagrees with an established safety zone via diplomatic channels, the report recommends that the United States use its "own technical knowledge to judge whether other actors' requests are premised on a realistic fear of interference."[226] To the extent they are not, the report proposes the U.S. "communicate that we do not recognize them as legitimate, but also explain what sort of safety zones or other measures we would consider justified."[227] The report emphasizes that "[t]his would be the case whether the Artemis Accords or the concept of safety zones existed; safety zones are simply a mechanism to regularize implementation of the Outer Space Treaty."[228] It notes "respect for safety zones – whether our own or others' – is an exercise in persuasion, applying mission and hardware-specific facts to existing legal obligations."[229]

This section reiterates, again, that the concept of safety zones is directly derived from legal obligations under the Outer Space Treaty and is simply a process by which to routinize the implementation of those obligations. Importantly, it also recommends a dialogue between states regarding what constitutes a reasonable or justified safety zone, based on the mission and hardware-specific facts. If the United States leads the way in the conversation about what it views as a reasonable safety zone based on the technical facts of specific missions, and does this by linking back to the underlying legal obligations, it will assist in the development of an understanding of those legal obligations. Beyond simply knowing that notice and coordination or de-

[225] *Id.* at 33–34.
[226] *Id.* at 34.
[227] *Id.*
[228] *Id.*
[229] *Id.*

confliction are at the root of the Article IX obligations, we will gain an understanding of where different states fall in terms of acceptable levels of risk of interference. This simple recommendation has the potential to carry due regard forward as a useful, legally binding tool to ensure operations on the Moon – and beyond – are predictable and sustainable.

The report acknowledges that respect for safety zones will have downsides, noting, "as lunar operations proliferate, the number of safety zones in place at any one time will increase."[230] Crucially, however, the report emphasizes that while the corresponding "need to provide notice, and then coordinate operations to minimize interference, may add complications to mission planning[,]" "[i]n a rules-based system, this complication is largely unavoidable."[231] This simple section pushes the United States forward into the next step in developing the due regard obligation as an important tool in support of a rules-based order in outer space. While the United States is still the leading space power today, outer space—and the Moon in particular—is not protected from the Great Power Competition. Recognition that the United States should accept the downsides of respecting safety zones as a tradeoff for furthering the rules-based order in outer space is the crux of cementing an understanding of due regard that preserves outer space as a secure and predictable environment.

While the Artemis Accords are a non-binding political commitment, they, combined with the Lunar Landing and Operations Policy Analysis report, provide an understanding of how the United States—and its partners, to some degree—will implement the obligations to conduct activities with due regard on the Moon. This alone could constitute subsequent state practice on the part of the United States under Article 32, VCLT, as sections of the Accords and statements in the Lunar Landing report regarding how the Accords implement the Outer Space Treaty constitute conduct of a party in the application of a treaty. Specifically, the Accords, as illuminated by the statement regarding Article IX in the Lunar Operations report, are an exercise of executive functions and are sufficiently unequivocal, at least with regard to civil space, as required by the ILC conclusions and commentaries.

Additionally, the Lunar Landings Operations and Policy Analysis report provides a glimpse as to how the United States may operate on the Moon as it executes its obligations under the Outer Space Treaty. While the patchwork of statements in this report and the Artemis Accords may help the argument that specific actions on the Moon are undertaken (or not taken) as an implementation of the due regard requirement and prohibition against harmful interference, explicit statements on the part of the United States that specific measures are an

[230] *Id.*
[231] *Id.*

implementation of these obligations will help us understand how the United States views those obligations, and help shift them toward a useful tool for shaping behavior in outer space in a way that benefits all.

Finally, and most importantly, the Artemis Accords are the first steps toward establishing concordant state practice, reflecting an unwritten agreement among all parties as to what constitutes due regard in outer space. As lunar operations increase and there are a variety of states working cooperatively and/or in close proximity on the Moon, so will the state practice that may be linked back to an understanding of the due regard requirement. While just a few states can still provide us with evidence that constitutes a supplementary means of interpretation under Article 32, VCLT, subsequent concordant practice by all parties to the Outer Space Treaty will reflect an unwritten agreement among all parties to be used for interpretation of due regard under Article 31, VCLT, fulfilling the same function as an amendment or supplemental protocol to the Outer Space Treaty. Because both acts and omissions can constitute conduct of a party in the application of a treaty, it will be important to watch what states say—and do not say—as activity on the Moon unfolds.

V. CONCLUSION

Uncertainty creates opportunities for exploitation, and uncertainty about obligations under the due regard requirement of Article IX poses risk to secure, predictable, and sustainable operations in outer space. Although there is a demonstrated reluctance on the part of states to help shape a common understanding of the due regard requirement, lunar surface operations in the very near future demand a clear, common understanding of that requirement. The understanding of due regard that flows from operations on the surface of the Moon has the potential to carry over to other areas of outer space, providing dividends in Earth's orbits, on other celestial bodies, and beyond.

International law provides the tools required to address the uncertainty in this case. States can maximize the protection of their own national interests in outer space and preserve space as a secure, predictable, and sustainable domain under a rules-based international order by explicitly linking their own responsible behaviors in outer space to the obligation to conduct activities with due regard under Article IX of the Outer Space Treaty. The Artemis Accords and Lunar Landing and Operations Policy Analysis recommendations are the first small steps in this direction.

By providing notice to other space actors, and cooperating or de-conflicting operations when they have the potential to impact another State Party's activities in outer space, and by labeling these actions an implementation of the due regard requirement, the United States and its allies and partners can work to

define the parameters of due regard without unduly restricting maneuver space and freedom of action in outer space. A common understanding of due regard based on notification procedures, grounded in technical justifications, and supported by cooperation or de-confliction will only restrict those actors who do not aim to act responsibly in outer space.

At best, lack of a shared understanding of the requirement to operate with due regard leads to a space environment lacking clarity and predictability, stunting investment, and hindering cooperation in outer space. At worst, it increases the risk of a catastrophic misunderstanding or miscalculation in outer space that results in a conflict not necessarily restricted to outer space. States should seize the momentum generated by the Artemis Accords and regularize notification and de-confliction procedures as an implementation of due regard, making explicit to the international community that those actions are taken in accordance with the due regard requirement. Whatever short-term inconveniences or disadvantages this engenders will be eclipsed by the benefits of a secure, predictable, and sustainable rules-based international order on the Moon and in outer space, generally.

NAVAL ENVIRONMENTAL PLANNING FOR AT-SEA SONAR TRAINING UNDER THE NATIONAL ENVIRONMENTAL POLICY ACT AND THE MARINE MAMMAL PROTECTION ACT

Lieutenant Commander Bradley D. Newsad, JAGC, USN*

For the first time since its creation in the National Environmental Policy Act of 1969 (NEPA), the Council on Environmental Quality (CEQ), a division of the Executive Office of the President, promulgated a complete revision to the NEPA-implementing regulations in the summer of 2020. The Biden Administration appointed a new CEQ Chair in 2021 and the CEQ promulgated three initial amendments to its regulations in 2022 before Congress passed the Fiscal Responsibility Act of 2023, making the first significant amendments to NEPA since its passage in 1970. Less than two months later, the CEQ published a proposed comprehensive rulemaking for public comment in July 2023. The impact of CEQ regulations on government-wide environmental planning is significant because NEPA left most of the details to the CEQ and action agencies. This article argues that changes to NEPA and the CEQ regulations have not significantly affected Navy environmental planning under NEPA and the Marine Mammal Protection Act of 1972 (MMPA) for at-sea sound navigation ranging (sonar) training. Additionally, this article will argue that there remains a substantial amount of uncertainty in the field of sonar and its effects on marine life, and that these uncertainties play an important role in setting MMPA standards and policymaking.

I. INTRODUCTION

For the first time since its creation in the National Environmental Policy Act of 1969 ("NEPA"), the Council on Environmental Quality ("CEQ"), a division of the Executive Office of the President,[1] promulgated a complete

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[1] 42 U.S.C. § 4342 (2018) (statutory creation of the CEQ).

revision to the NEPA-implementing regulations in the summer of 2020.[2] The changes were immediately challenged in federal district court, with all but one case stayed pending CEQ rulemaking under the Biden Administration.[3] The lone case not stayed was dismissed for lack of standing and ripeness.[4] The Biden Administration appointed a new CEQ Chair in 2021 and the CEQ promulgated three initial amendments to its regulations in 2022.[5] A comprehensive rulemaking was pending[6] when Congress passed the Fiscal Responsibility Act of 2023, making the first significant amendments to NEPA since its passage in 1970.[7] Less than two months later, the CEQ published a proposed comprehensive rulemaking for public comment in July 2023.[8]

The impact of CEQ regulations on government-wide environmental planning is significant because NEPA left most of the details to be filled in by CEQ and action agencies. The question this article broadly addresses is if and how changes to NEPA and the CEQ regulations affect Navy environmental planning under NEPA and the Marine Mammal Protection Act of 1972 ("MMPA") for at-sea training, particularly sound navigation ranging (sonar) training.

Outside of the statutory and regulatory provisions of NEPA and the MMPA, two major cases have shaped Navy environmental planning under NEPA and the MMPA for sonar training. The Supreme Court of the United States decided the case of *Winter v. Natural Resources Defense Council* ("NRDC") in November 2008.[9] NRDC and several other plaintiffs filed suit seeking injunctive relief contending that the Navy's 293-page Environmental Assessment (EA) of its planned at-sea training exercises involving the use of sonar off the coast of southern California failed to comply with NEPA.[10] NRDC asked the court to stop the Navy from conducting its planned exercises until they complied with NEPA.[11] The district court issued and the Ninth Circuit affirmed a preliminary injunction

[2] 85 Fed. Reg. 43304–76 (proposed Jul. 16, 2020) (to be codified at 40 C.F.R. pt 1500).
[3] 87 Fed. Reg. 23453, 23455 (proposed Apr. 20, 2022) (to be codified at 40 C.F.R. pts. 1502, 1507–08) (CEQ's final rule of three amendments to the 2020 CEQ regulations and noting the five lawsuits from the 2020 amendments and the government's stay requests).
[4] *Wild Va. v. Council on Envtl. Quality*, 544 F. Supp 3d 620 (W.D. Va. 2021), *aff'd*, 56 F. 4th 281 (4th Cir. 2022).
[5] 87 Fed. Reg. 23453 (proposed Apr. 20, 2022) (to be codified at 40 C.F.R. pts. 1502, 1507–08) (CEQ's final rule of three amendments to the 2020 CEQ regulations).
[6] *Id.* (CEQ announced its intention to conduct a second phase of rulemaking to comprehensively revise the 2020 regulations; no timeline was announced).
[7] Fiscal Responsibility Act (FRA) of 2023, Pub. L. 118-5, 137 Stat. 10, Sec. 321 (June 3, 2023).
[8] National Environmental Policy Act Implementing Regulations Revisions Phase 2, 88 Fed. Reg. 49924-49988 (Jul. 31, 2023) (notice of proposed rulemaking to revise the NEPA-implementing regulations, including to implement the Fiscal Responsibility Act's amendments to NEPA; open for public comment until Sep. 29, 2023).
[9] *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7 (2008).
[10] *Id.* at 15–17.
[11] *Id.* at 16–17.

that allowed the exercises to go forward with six additional court-ordered mitigation measures.[12] The Supreme Court ultimately avoided the merits of the NEPA claim by holding that the district court and the Ninth Circuit failed to properly balance the equities involved and properly consider the public interest in issuing the preliminary injunction.[13]

Eight years later, in *Natural Resources Defense Council v. Pritzker* the Ninth Circuit invalidated an incidental taking permit under the MMPA issued by the National Marine Fisheries Service ("NMFS") to the Navy to conduct at-sea sonar training.[14] The court ruled that NMFS had failed to meet the stringent standards under the MMPA in issuing the incidental taking permit.[15] In doing so, the court's opinion highlighted the scientific uncertainties surrounding the effects of sonar and the relatively malleable MMPA standards.

Given the developments since *Winter*, I will argue that the CEQ regulation revisions and the 2023 NEPA amendments have not significantly changed the Navy's NEPA obligation for sonar training. Additionally, I will argue that there remains a substantial amount of uncertainty in the field of sonar and its effects on marine life, and that these uncertainties play an important role in setting MMPA standards and policymaking.

Part II will provide the factual and procedural background from the *Winter* case including the Supreme Court's reasoning, holdings, and the issues avoided. Part III will discuss the 2008 baseline and changes to NEPA, the CEQ and Navy NEPA-implementing regulations, and sonar science. Part IV will argue that the current state of law has not changed the Navy's NEPA obligation for at-sea sonar training. Part V will discuss how law, science, and policy collide in setting MMPA standards and policymaking. Part VI will summarize the paper's conclusions.

II. *WINTER V. NRDC*

A. Case Background and Prior History

The U.S. Navy's use of mid-frequency active ("MFA") sonar dates back as far as World War II.[16] Navy ships emit active sonar pulses into the ocean and

[12] *Id.* at 17–19.
[13] *Id.* at 20–32.
[14] *Nat. Res. Def. Council, Inc. v. Pritzker*, 828 F.3d 1125 (9th Cir. 2016).
[15] *Id.* at 1134.
[16] Joint Appendix at 37, *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7 (2008) (No. 07-1239); Robin K. Craig, *20-Ton Canaries: The Great Whales of the North Atlantic: Symposium Article: Beyond Winter v. NRDC: A Decade of Litigating the Navy's Active Sonar Around the Environmental Exemptions*, 36 B.C. ENVTL. AFF. L. REV. 353, 354 (2009).

these pulses bounce off underwater submarines, allowing the Navy to detect the submarines by listening for the reflected echoes from the sonar pulses.[17] The environmental concern is that these sonar pulses are loud and have the potential to harm marine life.[18] Around the turn of the millennium, various environmental groups began challenging the Navy's use of sonar in the world's oceans.[19] While the *Winter* case focused on alleged violations of NEPA, other cases concerning the Navy's use of sonar involved challenges under the MMPA.[20]

In partial response to the on-going litigation, Congress amended the MMPA in the National Defense Authorization Act ("NDAA") for fiscal year 2004 to allow for the issuance of five-year permits for the incidental "taking" of small numbers of specific marine mammal populations during "military readiness activit[ies]."[21] However, in accordance with statutory requirements, these permits still contain significant marine mammal protections that have been the subject of notable litigation.[22] Additionally, the FY 2004 NDAA amendments also allow the Secretary of Defense, after consulting with the Secretary of Commerce, to issue 2-year exemptions from the MMPA for activities that are necessary for national defense.[23] As will be discussed in this article, the Navy's practice is to pursue and obtain MMPA permits instead of exemptions. However, with the February 2007 start date for the first naval training exercise litigated in the *Winter* case nearing, the Navy had not completed an environmental impact statement ("EIS") for the exercises nor completed the necessary consultation with NMFS to obtain an MMPA incidental taking permit.[24] As such, no permit was obtained and in January 2007, the Secretary of Defense granted the Navy a two-year exemption from the MMPA for the sonar training exercises at issue in *Winter*.[25]

The exemption was not a blanket free-for-all to otherwise violate the MMPA. Instead, the consultation with the Secretary of Commerce, which was done with the National Oceanic and Atmospheric Administration (NOAA) and NMFS, resulted in the exemption being conditioned on 29 marine mammal

[17] Craig, *supra* note 16, at 353–54.
[18] *Id.*
[19] *Id.* at 354–55.
[20] *Id.* at 360–64.
[21] *Id.*; National Defense Authorization Act for Fiscal Year 2004, Pub. L. 108-136, § 319, 117 Stat. 1392, 1433–35 (2003) (the FY 2004 NDAA allowed for 5-year permits; the FY 2019 NDAA amended the MMPA to allow the permits to extend up to 7 years).
[22] *See* 16 U.S.C. § 1371(a)(5) (2018) (issuance of a permit requires a finding that the total taking will have a "negligible impact on such species" and that permits prescribe methods ensuring "the least practicable adverse impact on such species"); *See Nat. Res. Def. Counsel, Inc., v. Pritzker*, 828 F.3d 1125, 1129–30 (9th Cir. 2016) (holding that a finding of "negligible impact" under the MMPA still requires application of the "least practicable adverse impact" measures under 16 U.S.C. 1371(a)(5)).
[23] 16 U.S.C. § 1371(f).
[24] *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 15–16 (2008).
[25] *Id.* at 15.

protective measures.[26] The following month (February 2007), the Navy completed consultation with NMFS under the Endangered Species Act of 1973 ("ESA") and issued a 293-page EA.[27] NMFS issued a biological opinion which concluded that while MFA sonar exposure "would likely harass members of threatened or endangered species by temporarily disrupting their behavioral patterns, such exposure was not likely to harm, injure, or kill any listed marine mammal, and, therefore, would not likely jeopardize the continued existence of any listed marine-mammal species."[28] The EA concluded that the 14 planned at-sea sonar training exercises in southern California would not have a significant impact on the environment (a "finding of no significant impact," also known as a "FONSI" under NEPA).[29]

The Navy's EA provided a detailed analysis of the expected marine mammal harassment in accordance with the definitions in the MMPA, which classify harassment as either Level A or B.[30] Level A harassments are actions that injure or pose a significant threat of injury to marine mammals. Level B harassments are acts that disrupt or are likely to disrupt natural marine mammal behavioral patterns, including breeding, feeding, sheltering, and migrating. Both types of harassment are considered a "take" under the MMPA.[31] Given the threat here—noise from sonar emissions—hearing injuries were of particular concern. In its EA, the Navy classified permanent hearing loss as a Level A harassment and short-term hearing loss, as well as other temporary or short-term effects, as Level B harassments.[32]

While the parties, judges, and justices disagreed over the implications of the Navy's harassment/injury modeling results throughout the litigation, there was little to no debate reflected in the Supreme Court's majority and dissenting opinions about the projected harassments and injuries reflected in the EA. The Navy's EA predicted approximately 170,000 Level B harassments and 564 Level A harassments spread over 32 marine mammals during the two years it would take to complete the 14 training exercises in the southern California range. All but 16 of the Level A harassments were originally modeled as non-injurious Level B harassments to beaked whales. However, these 548 harassments were ultimately considered Level A harassments because MFA sonar was determined to be the "most plausible contributory source" of several stranding events of beaked

[26] Brief for Petitioners at 18, *Winter*, 555 U.S. 7 (2008) (No. 07-1239).
[27] *Id.* at 19–20.
[28] *Id.* at 19; Joint Appendix, *supra* note 16, at 7 (the biological opinion considered the effects on seven (7) endangered or threatened species—blue whales, fin whales, humpback whales, sei whales, sperm whales, and Guadalupe fur seals).
[29] *Winter*, 555 U.S. at 16.
[30] *Id.*; *see also* Brief for Petitioners, *supra* note 26, at 20–24.
[31] 16 U.S.C. §§ 1362(13), (18).
[32] Brief for Petitioners, *supra* note 26, at 20–21.

whales.[33] The Navy's EA predicted that the remaining 16 Level A harassments, all permanent hearing loss to common dolphins, could be prevented by effective use of the Navy's mitigation measures in the MMPA exemption.[34]

In March 2007, NRDC filed suit in the Central District of California, seeking a declaration that the 14 planned at-sea training exercises in the southern California range would violate NEPA, the Coastal Zone Management Act of 1972 ("CZMA"), and the ESA, and to enjoin the Navy's use of MFA sonar in the exercises.[35] In August 2007, the District Court granted a preliminary injunction, preventing the Navy from conducting their remaining at-sea training exercises, finding that NRDC was likely to succeed on its NEPA and CZMA claims and that, in accordance with Ninth Circuit precedent, NRDC had shown a "possibility" of irreparable harm.[36] With respect to the balance of equities, the District Court concluded there was in fact a "near certainty" of irreparable harm that outweighed any Navy interest.[37]

The Navy appealed and the Ninth Circuit issued a stay of the preliminary injunction pending the outcome of the appeal.[38] In November 2007, finding injunctive relief appropriate, the Ninth Circuit remanded the case back to the District Court with an order to narrow the injunction by providing mitigation conditions under which the Navy could conduct its remaining at-sea sonar training exercises.[39] On remand in January 2008, the District Court ordered a new preliminary injunction that allowed the Navy to conduct their remaining at-sea training exercises with MFA sonar as long as they complied with six additional mitigation measures.[40] The uniformed head of the Navy, the Chief of Naval Operations (CNO), determined that two of the court-ordered mitigation measures "unacceptably risk[ed] naval training . . . and national security."[41] The Navy appealed to the Ninth Circuit and sought a stay of the new preliminary injunction, but only challenged the two mitigation measures the CNO found unacceptable.[42]

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[33] Brief for Petitioners, *supra* note 26, at 21–23; Joint Appendix, *supra* note 16, at 114–16.
[34] Brief for Petitioners, *supra* note 26, at 22.
[35] *Winter*, 555 U.S. at 16–17; Brief for Petitioners, *supra* note 26, at 25.
[36] *Winter*, 555 U.S. at 17; Brief for Petitioners, *supra* note 26, at 25.
[37] *Winter*, 555 U.S. at 17.
[38] *Id.*
[39] *Id.*; Brief for Petitioners, *supra* note 26, at 26.
[40] *Winter*, 555 U.S. at 17–18 (the six court-ordered mitigation measures were "additional" to the 29 mitigation measures contained in the MMPA exemption).
[41] Brief for Petitioners, *supra* note 26, at 26–27 (the two measures required the Navy to "(1) cease sonar transmissions whenever a marine mammal is spotted within 2200 yards (1.25 miles) of any sonar source, and (2) reduce sonar power by six decibels (75 [percent]), whether or not a marine mammal is present, whenever the Navy detects 'significant surface ducting,' an environmental condition characterized by a mixed layer of constant water temperature extending at least 100 feet below the surface").
[42] *Winter*, 555 U.S. at 18.

On January 10th, 2008, the same day the District Court issued its new preliminary injunction, the Navy requested "alternative arrangements" to its NEPA obligations for "emergency circumstances" under 40 C.F.R. § 1506.11.[43] Five days later, after consulting with the CEQ, the Navy issued a decision memorandum accepting the CEQ's approved alternative arrangements for its NEPA obligations with respect to the remaining at-sea sonar training exercises in the southern California range planned through January 2009.[44] The CEQ determined that the District Court's injunction established emergency circumstances by creating a significant and unreasonable risk that Navy units would not be fully mission capable.[45] The CEQ-approved alternative arrangements permitted the Navy to conduct its training exercises in accordance with the 29 mitigation measures from its MMPA exemption and imposed additional notice, research, and reporting requirements.[46]

On the same day the Navy accepted the CEQ's alternative arrangements, the President of the United States granted the Navy an exemption from the CZMA pursuant to statutory authority.[47] The President determined that the planned naval exercises, including the use of MFA sonar, were in the "paramount interest of the United States" and "essential to national security."[48]

Given these new developments, the following day the Ninth Circuit remanded the case back to the District Court to consider the executive branch's interventions in the first instance.[49] The Navy then moved the District Court for vacation of its preliminary injunction or a partial stay pending appeal in the Ninth Circuit. After granting a temporary partial stay pending its disposition,[50] the District Court denied the Navy's motion for vacation and a partial stay pending appeal in early February.[51] While the district court questioned the constitutionality of the President's CZMA exemption as an impermissible executive revision of an Article III court judicial decision, the court avoided this issue by ruling that its preliminary injunction was still an appropriate remedy for the alleged NEPA

[43] *Id.*; Brief for Petitioners, *supra* note 26, at 26 (the preliminary injunction was issued on Jan. 3rd, 2008, but was modified by the court on Jan. 10th, 2008); Joint Appendix, *supra* note 16, at 184 (Jan. 15th, 2008, memo accepting the CEQ's alternative arrangements).
[44] *Winter*, 555 U.S. at 18–19; Joint Appendix, *supra* note 16, at 184.
[45] *Winter*, 555 U.S. at 18–19; Joint Appendix, *supra* note 16, at 184–210.
[46] Joint Appendix, *supra* note 16, at 184–210.
[47] *Winter*, 555 U.S. at 18; Brief for Petitioners, *supra* note 26, at 29; 16 U.S.C. § 1456(c)(1)(B).
[48] *Winter*, 555 U.S. at 18.
[49] Brief for Petitioners, *supra* note 26, at 30; Joint Appendix, *supra* note 16, at 10 (remand order entered in Ninth Circuit's docket for case No. 08-55054).
[50] This temporary partial stay allowed a naval exercise to go forward without the two contested mitigation measures while the District Court considered the Navy's motion; *see* Brief for Petitioners, *supra* note 26, at 30.
[51] *Nat. Res. Def. Council, v. Winter*, 527 F. Supp. 2d 1216 (C.D. Cal. 2008).

violation.[52] The court reasoned that the CEQ's approval of alternative NEPA arrangements was invalid under the plain language of 40 C.F.R. § 1506.11 because its injunction was not a "sudden or unanticipated event" giving rise to emergency circumstances.[53]

The Ninth Circuit affirmed the District Court ruling.[54] In reviewing the District Court's preliminary injunction for an abuse of discretion, the Ninth Circuit chose not to "adjudicate the meaning of the word 'emergency,'" but instead held that the court did not abuse its discretion "in determining that CEQ's broad interpretation of 'emergency circumstances' was not authorized by 40 C.F.R. § 1506.11."[55] Falling outside the scope of an emergency, the court concluded that the "preliminary injunction was entirely predictable given the parties' litigation history."[56]

Concerning the required elements of the preliminary injunction, the Ninth Circuit held that NRDC had established a likelihood of success on their NEPA claim that the Navy was required to prepare an EIS for the training exercises and the Navy's EA was "cursory, unsupported by cited evidence, or unconvincing."[57] The court also determined that NRDC had established a "possibility" of irreparable injury, satisfying the Ninth Circuit test.[58] Finally, the court held that the balance of hardships and the public interest weighed in favor of NRDC.[59] In contradiction to the CNO's determination, the court reasoned that the negative impact on the Navy's training exercises was "speculative" because they had yet to attempt to operate under the two contested court-ordered mitigation measures.[60] The Ninth Circuit concluded that the District Court did not abuse its discretion in issuing the preliminary injunction and that the imposed mitigation measures reached an appropriate balance between the competing interests at stake.[61] The Ninth Circuit also *sua sponte* issued a temporary stay of the two contested mitigation measures pending disposition by the Supreme Court.[62] The Navy petitioned the Supreme Court for review, which was granted in in June 2008.[63]

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[52] *Id.* at 1219–20, 1235–38.
[53] *Id.* at 1219–20, 1228, 1235–38.
[54] *Nat. Res. Def. Council, Inc., v. Winter*, 518 F.3d 658 (9th Cir. 2008), *rev'd*, 555 U.S. 7 (2008).
[55] *Id.* at 681 n.41, 686.
[56] *Id.* at 681.
[57] *Id.* at 693.
[58] *Id.* at 696–97.
[59] *Id.* at 697–703.
[60] *Id.* at 698–99.
[61] *Id.* at 702–03.
[62] Brief for Petitioners, *supra* note 26, at 32.
[63] *Winter v. Nat, Res. Def. Council, Inc.*, 554 U.S. 916 (2008) (petition for writ of certiorari granted).

B. The Supreme Court Holdings and Reasoning

The Court's majority opinion was authored by Chief Justice Roberts and joined by the Court's four other Republican-appointed Justices—Justices Alito, Kennedy, Scalia, and Thomas. As discussed below, the Court found that NRDC failed to meet the required showing for a preliminary injunction because the balance of equities and the public interest both favored the Navy.[64] As such, the Court reversed the judgement of the Ninth Circuit and vacated the challenged portions of the District Court's preliminary injunction.[65]

Justice Breyer delivered an opinion concurring in part and dissenting in part, joined by Justice Stevens. Justice Breyer agreed with the majority that NRDC failed to make the required showing for a preliminary injunction, however, instead of vacating the challenged portion of the injunction as the majority did, he would have modified the Ninth Circuit's February 2008 partial stay to keep some aspects of the two contested mitigation measures in effect until the Navy completed its pending EIS.[66] Justice Ginsburg delivered a dissenting opinion joined by Justice Souter. Justice Ginsburg would have affirmed the Ninth Circuit's ruling.[67] The first issues the Court addressed were the required elements for the issuance of a preliminary injunction and the necessary showing of irreparable harm.

1. Preliminary Injunction Requires Showing a Likelihood of Irreparable Harm, Not a Mere Possibility

The Court re-confirmed that a plaintiff seeking the issuance of a preliminary injunction must establish that (1) they are likely to succeed on the merits, (2) they are likely to suffer irreparable harm in the absence of preliminary relief, (3) the balance of equities tips in their favor, and (4) an injunction is in the public interest.[68] Rejecting the Ninth Circuit's "possibility" standard for irreparable harm as "too lenient," the Court "reiterated" that the required showing is that "irreparable injury is *likely* in the absence of an injunction."[69]

Although the Court discussed the "irreparable harm" element and some of the relevant facts, the Court did not issue a holding as to whether the plaintiffs had met the required showing. Instead, the Court reasoned that even if NRDC had

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[64] *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 23–26 (2008).
[65] *Id.* at 33.
[66] *Id.* at 34–36, 42–43 (the Navy had already agreed to produce an EIS for MFA sonar use in Southern California, but it would not be complete until January 2009).
[67] *Id.* at 43–54.
[68] *Id.* at 20.
[69] *Id.* at 22 (emphasis in original).

shown likely irreparable harm, any "such injury is outweighed by the public interest and the Navy's interest in effective, realistic training of its sailors."[70]

2. The Balance of Equities and the Public Interest Favor the Navy

The Court largely mixed its analysis of the two dispositive elements—the balance of the equities and the public interest. While the Court acknowledged that the plaintiff's ecological, scientific, and recreational interests were legitimate and serious, it concluded that the balance of equities tipped "strongly" in favor of the Navy.[71] Stressing that the President, who serves as the Commander-in-Chief of military forces, had determined that training with active sonar was "essential to national security," the Court found that the "overall" public interest lay with national security and the Navy.[72] And while the Court conceded that "military interests do not always trump other considerations," it found that "the proper determination of where the public interest lies does not strike us as a close question."[73]

In holding that the balance of equities and the public interest favored the Navy, the Court emphasized several points. First, the Court stated that the lower courts had "significantly understated" the impact of the preliminary injunction on the Navy's ability to conduct realistic training.[74] The Court spent the bulk of its analysis defeating the lower courts' reasoning for sustaining the two challenged mitigation factors, largely relying on the statements of senior Navy officers.[75]

Second, and related to the first point, the Court declared that they "give great deference to the professional judgement of military authorities concerning the relative importance of a particular military interest."[76] As such, the Court accepted the assertions from senior naval officers that "the use of MFA sonar under realistic conditions during training exercises is of the utmost importance to the Navy and the Nation," and that realistic conditions could not be achieved under the two challenged mitigation measures.[77] The Court's deference directly rejected the Ninth Circuit's reasoning that the negative impact on the Navy was speculative.

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[70] *Id.* at 23.
[71] *Id.* at 26.
[72] *Id.* (" . . . we conclude that the balance of equities and consideration of the overall public interest in this case tip strongly in favor of the Navy.").
[73] *Id.*
[74] *Winter*, 555 U.S. at 24.
[75] *Id.* at 26–31 (Section III of the opinion addresses the lower courts' reasoning).
[76] *Id.* (quoting *Goldman v. Weinberger*, 475 U.S. 503, 507 (1986)).
[77] *Id.* at 25.

Finally, the Court stressed that the Navy's acceptance and use of more than 30 mitigation measures to address marine mammal safety in the exercises does not mean that "other, more intrusive restrictions pose no threat to preparedness for war."[78] This was a direct refutation of the District Court's assertion that the Navy could employ the challenged mitigation measures "without sacrificing training objectives."[79]

C. Issues Avoided by the Court

1. Likelihood of Success on the Merits of NRDC's NEPA Claim

The Court did not address this directly,[80] but in discussing irreparable harm, the Court noted that NEPA does not mandate particular results, only procedural requirements to ensure that an agency has "available, and will carefully consider, detailed information concerning significant environmental impacts" before reaching its decision regarding a federal action.[81] The Court reasoned that part of the harm NEPA seeks to prevent is making ill-informed action decisions for which there may otherwise be little to no information about the environmental consequences and potential mitigating measures.[82] Here, however, the Court noted that the Navy's 293-page EA was evidence that it had taken a "hard look" at the environmental consequences before approving the contested exercises, which it had been conducting in southern California for 40 years.[83]

2. Facial and As-applied Legality of "Emergency Circumstances" Provision

The action taken by the CEQ in granting alternative arrangements for emergency circumstances was completely ignored by the Court outside of its recitation of the procedural history of the case and the plaintiffs' arguments. NRDC argued that "the CEQ's actions violated the separation of powers by readjudicating a factual issue already decided by an Article III court" and that the CEQ's interpretations of NEPA were not entitled to deference because the CEQ lacked the statutory authority to conduct adjudications.[84] NRDC did not make a

[78] *Id.* at 30–31.
[79] *Id.*
[80] *Id.* at 23–24 ("we do not address the lower courts' holding that plaintiffs have also established a likelihood of success on the merits").
[81] *Id.* at 23 (citing and quoting *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349–50 (1989)).
[82] *Id.*
[83] *Id.*
[84] *Id.* at 21.

facial challenge to the legality of the emergency circumstances provision because of previous positions they had taken before Congress.[85] NRDC's separation of powers argument attacked CEQ's actions as applied to the facts of the case because the district court had already issued a preliminary injunction based on NRDC's NEPA claim before CEQ granted alternative arrangements. However, both Justice Ginsburg and Justice Souter thought the CEQ lacked the authority to eliminate an agency's statutory duty to prepare an EIS, an apparent facial challenge to the legality of 40 C.F.R. § 1506.11, the "emergency circumstances" exception.[86]

Regardless, these challenges, which were relevant under the preliminary injunction element concerning the likelihood of success on the merits of NRDC's NEPA claim, were rendered moot when the Court disposed of the case on two other elements—the balance of equities and the public interest.[87]

3. Whether Irreparable Harm was Likely

The Court discussed the harm to the plaintiffs throughout their analysis, both in reference to the irreparable harm element and the balance of equities between the parties.[88] However, just as the Court passed on issuing any conclusions on the likelihood of NRDC's NEPA claim on the merits, the Court did not make any stated conclusions regarding whether the documented evidence amounted to irreparable harm. The dispositive nature of the Court's equity balancing and public interest determination made the plaintiffs' harm moot.[89]

Nonetheless, the Court's opinion generally cast doubt on whether the evidence from the Navy's EA demonstrated irreparable harm. The Court stated that "the most serious possible injury would be harm to an unknown number of the marine mammals that [the plaintiffs] study and observe," but that the Navy's interest in realistic training and the public's interest in national security "plainly"

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[85] Kate R. Bowers, *Saying What the Law Isn't: Legislative Delegations of Waiver Authority in Environmental Laws*, 34 HARV. ENVT'L. L. REV. 257, 276 n.132 (2010) (citing the petition for writ of certiorari in *Winter* in noting that "NRDC had argued to Congress that NEPA permitted emergency action in consultation with CEQ prior to completing environmental documentation").
[86] *Winter*, 555 U.S. at 50–51 (Ginsburg, J., dissenting); *see also* William S. Eubanks II, *Damage Done? The Status of NEPA After* Winter v. NRDC *and Answers to Lingering Questions Left Open by the Court*, 33 VT. L. REV. 649, 669 n.89 (2009) (stating that the CEQ "arguably" has the authority it asserts under 40 C.F.R. § 1506.11, but noting that Justice Souter repeatedly challenged that U.S. government at the *Winter* oral argument regarding the existence of statutory authority for 40 C.F.R. § 1506.11).
[87] *Winter*, 555 U.S. at 31 n.5.
[88] *Id.* at 20–33.
[89] *Id.* at 23 (" . . . even if plaintiffs have shown irreparable injury from the Navy's training exercises, any such injury is outweighed by the public interest and the Navy's interest in effective, realistic training of its sailors.").

outweighed this concern.[90] Additionally, the Court buttressed its final arguments by citing as fact that the Navy had conducted sonar training in the southern California range "for 40 years with no documented episode of harm to a marine mammal."[91]

In discussing the irreparable harm evidence in broad terms, the Court positively noted that the District Court concluded that the plaintiffs had established a "near certainty" of irreparable harm.[92] However, the Court also noted that the "nature" of this conclusion was left unclear because the District Court did not "reconsider the likelihood of irreparable harm in light of the four [District Court-imposed] restrictions not challenged by the Navy."[93]

III. THE BASELINE AND CHANGES IN LAW AND SCIENCE FROM *WINTER*—NEPA, CEQ & NAVY REGULATIONS, AND SONAR SCIENCE

A. NEPA—the Basic Framework

NEPA, passed by Congress in 1970, requires all federal government agencies to include a "detailed statement . . . on the environmental impact" in the proposal for major federal actions "significantly affecting the quality of the human environment."[94] This requirement—which is the heart and soul of NEPA and the statutory basis for EISs—ensures that agencies, in making their decisions, "will have available, and will carefully consider, detailed information concerning significant environmental impacts."[95] It also ensures that the public will have the same information and be able to play a role in the agency decision-making process.[96] NEPA also requires agencies to provide and consider alternatives to their proposed actions.[97] However, "NEPA itself does not mandate particular results, but simply prescribes the necessary process."[98] As long as the "adverse environmental impacts of a proposed action are adequately identified and evaluated," agencies have no obligation to choose the most environmentally-friendly option.[99]

NEPA also created the CEQ, and while not clear from the statutory language, the Supreme Court confirmed that NEPA provides the CEQ with

[90] *Id.* at 26.
[91] *Id.* at 32–33.
[92] *Id.* at 22.
[93] *Id.* at 22–23.
[94] 42 U.S.C. § 4332(2)(C)(i).
[95] *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989).
[96] *Id.*
[97] 42 U.S.C. § 4332(2)(C)(iii).
[98] *Robertson*, 490 U.S. at 350.
[99] *Id.*

authority to promulgate regulations implementing NEPA.[100] NEPA had not been amended since 1982[101] before Congress made the first significant amendments to NEPA in the Fiscal Responsibility Act (FRA) of 2023 in June 2023 as part of a bipartisan deal to extend the public debt limit until January 2025.[102] Structurally, the FRA amended NEPA by making changes to the key operative section—Section 102—and adding seven new sections to Title I of NEPA.[103] Many of the amendments codified either (1) long-standing CEQ regulations or federal court interpretations of NEPA or (2) portions of the 2020 revision to the CEQ regulations. While some of the amendments may impact NEPA practice more generally, this article will focus on those that have the potential to affect Navy at-sea sonar training. Those amendments include (1) a 2-year time limit for EIS, with the ability to file a judicial suit when time limits are not met; (2) limiting the review of alternatives to a "reasonable range"; (3) specifically not requiring "new scientific or technical research unless the new scientific or technical research is essential to a reasoned choice among alternatives, and the overall costs and time frame of obtaining it are not unreasonable"; (4) implementing a 5-year reliance limit for programmatic EIS, but allowing further reliance if the agency reevaluates the analysis and any assumptions to ensure they remain valid; and (5) providing an additional public comment period when the agency publishes its intent to prepare an EIS.[104]

B. CEQ Regulations

1. Basic CEQ Regulatory Framework—1978 to 2020

The CEQ regulations provide significant structure to the relatively bare NEPA legislation. For instance, NEPA does not provide any definition of what constitutes a "significant" environmental effect, or the full breadth of information and analysis required in an EIS. The CEQ issued its initial regulations in 1978, providing federal agencies mandatory guidance on how to properly conduct the NEPA process and the implementing standards.[105] The regulations provided a lengthy section on the production of EISs that included 25 separate provisions and

[100] *See Andrus v. Sierra Club*, 442 U.S. 347, 356-358 (1979) (noting that President Cater issued an executive order requiring (1) the CEQ to promulgate NEPA-implementing regulations, and (2) the heads of federal agencies to follow the CEQ regulations; the Court cites 42 U.S.C. § 4344(3) for congressional authority for CEQ to issue NEPA-implementing regulations).
[101] Pub. L. No. 97-258, § 4(b) (1982).
[102] FRA of 2023, *supra* note 7.
[103] *Id.*
[104] *Id.*
[105] National Environmental Policy Act—Regulations 43 Fed. Reg. §55978-56007 (Nov. 29, 1978); 40 C.F.R. § 1508.27 (1978) (defining "significantly").

a section defining 28 terms, including "significantly."[106] The CEQ regulations also required federal agencies to adopt and publish via regulatory notice and comment procedure their own NEPA-implementing procedures within eight months.[107]

Two very minor amendments—one in 1986 and one in 2005—were the only changes to the CEQ regulations before the Trump Administration made significant revisions in 2020.[108]

2. 2020 CEQ Regulation Revision

In June 2018, the CEQ published notice in the Federal Register that it was considering "updating" its NEPA-implementing regulations and seeking public comment on potential revisions to make the NEPA process "more efficient, timely, and effective."[109] The CEQ's action was in response to President Trump's order to "ensure that agencies apply NEPA in a manner that reduces unnecessary burdens and delays as much as possible, including by using CEQ's authority to interpret NEPA to simplify and accelerate the NEPA review process."[110] President Trump's order was spurred in part by government findings that the average time from the issuance of the notice of intent (NOI) to complete an EIS to the issuance of the record of decision (ROD) was 4.5 years, with a median time of 3.5 years.[111] Further, it was found that only 25% of EISs took less than 2.2 years, while the longest 25 percent took more than 6 years.[112] These realities were far from the CEQ's 1981 prediction that most EISs, including complex matters, would require only 12 months.[113]

Two years later, and after receiving more than 12,500 public comments and hosting two public hearings, the CEQ published a comprehensive revision to

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[106] 40 C.F.R. §§ 1502.1-25 (1978) (Part 1502 – Environmental Impact Statement); 40 C.F.R. §§ 1508.1-28 (1978) (Part 1508 – Terminology and Index); 40 C.F.R. § 1508.27 (1978) (defining "significantly").
[107] 40 C.F.R. § 1507.3 (1978).
[108] Council on Environmental Quality 51 Fed. Reg. 15618-15626 (Apr. 25, 1986) (amending 40 C.F.R. § 1502.22 to require federal agencies to disclose the fact of incomplete or unavailable information when evaluating significant adverse environmental impacts in an EIS and requiring agencies to obtain the information if possible and the costs are not "exorbitant"); Other Requirements of NEPA 70 Fed. Reg. 41148 (Jul. 18, 2005) (amending 40 C.F.R. § 1506.9 by adding a second mailing address for the CEQ).
[109] Update to the Regulations for Implementing the Procedural Provisions of the National Environmental Policy Act 83 Fed. Reg. 28591-92 (Jun. 20, 2018)
[110] Exec. Order No. 13,807, 82 Fed. Reg. 40463-49469, 40468 (2017).
[111] Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act, 85 Fed. Reg. 43305 (promulgation of final CEQ regulations).
[112] *Id.*
[113] *Id.*

the NEPA-implementing regulations.[114] Five lawsuits were quickly filed in federal district court challenging various aspects of the 2020 revision.[115] Only one case proceeded forward with a court decision, which dismissed the plaintiff's claims for a lack of ripeness and constitutional standing.[116] At the request of the government, all other cases were stayed while the Biden Administration reviewed the regulations and determined the way forward.[117]

3. Emergency Circumstances Exception

Where emergency circumstances made it necessary in proposed federal actions with significant environmental impacts, the 1978 CEQ regulations provided for alternative arrangements to meet the statutory requirements of NEPA after consultation with the CEQ.[118] The emergency circumstances provision is largely unchanged today.[119] The supporting discussion to the 2020 CEQ regulation revision make it clear that the CEQ's position is that it "has no authority to exempt Federal agencies from compliance with NEPA, but that CEQ can appropriately provide for exceptions to specific requirements of CEQ's regulations . . . ."[120]

The CEQ has implemented alternative arrangements on 47 occasions, with the last instance coming in 2018.[121] The alternative arrangements used by the Navy in the *Winter* case in January 2008 marked the 41st time the CEQ had approved such arrangements under purported emergency circumstances.[122] Of the 47 instances of emergency circumstances, only three times have plaintiffs challenged the government's action in federal court.[123] While the two more recent cases were largely as-applied challenges to the emergency circumstances

[114] Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act, 85 Fed. Reg. at 43304-43376.
[115] National Environmental Policy Act Implementing Regulations Revisions 87 Fed. Reg. at 23455 (publication of CEQ's final rule making three revisions to the 2020 CEQ regulations).
[116] *Id.*; *Wild Va. v. Council on Envtl. Quality*, 544 F.Supp 3d 620 (W.D. Va. 2021), *aff'd*, 56 F.4th 281 (4th Cir., 2022).
[117] National Environmental Policy Act Implementing Regulations Revisions 87 Fed. Reg. at 23455.
[118] 40 C.F.R. § 1506.11 (1978).
[119] 40 C.F.R. § 1506.12 (2020) (the amendment added "for compliance with section 102(2)(C) of NEPA" to the first sentence of the 1978 regulation); Implementing the Procedural Provisions of the National Environmental Policy Act, 85 Fed. Reg. at 43339 (this change was made "to clarify that alternative arrangements are still meant to comply with section 102(2)(C)'s requirement for a 'detailed statement'").
[120] Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act, 85 Fed. Reg. at 43339.
[121] *See* Alternative Arrangements Pursuant to 40 CFR Section 1506.11 – Emergencies, Council on Environmental Quality [hereinafter "Alternative Arrangements Chart"], https://bit.ly/3Rrpfek (last visited on May 5, 2023).
[122] *Id.*
[123] *See Id.* (the table provides details on the "resolution" of each occurrence, including any court cases).

exception, arguing that the facts of the case did not constitute an emergency,[124] the first case raised a facial challenge to the legality of the CEQ emergency circumstances exception.[125] In upholding the legality of the exception, the federal district court cited Supreme Court precedent approving the CEQ's power to promulgate NEPA regulations and simply argued that the "CEQ not only had the authority to waive its own regulations . . . but also to interpret the provisions of NEPA to accommodate emergency circumstances."[126] The court cited no specific authority in NEPA allowing the CEQ to promulgate the emergency exception.[127] However, one of the later cases justified the emergency circumstances exception by arguing that the initial qualifying language, "to the fullest extent possible," in NEPA's key section containing the requirement for an EIS,[128] provides for exceptions to the requirement to complete an EIS in some circumstances.[129] It has also been argued that the emergency circumstances exception is supported by 42 U.S.C. § 4331(b), which states that it is the government's responsibility to "use all practicable means, consistent with other essential considerations of national policy" in carrying out the policies set forth in NEPA.[130]

4. Biden Administration CEQ Rulemaking Actions

In June 2021, the CEQ published an interim final rule extending the deadline by two additional years for federal agencies to update their NEPA-implementing procedures.[131] The rule also announced that the CEQ was reviewing the 2020 revision, citing general concerns regarding their legality, and stated the CEQ's intention to address issues through future rulemaking.[132] In April 2022, the CEQ published a final rule that amended three provisions of the CEQ regulations

[124] *See Nat'l Audubon Soc'y v. Hester*, 627 F.Supp 1419 (D.D.C.), *rev'd*, 801 F.2d 405 (D.C. Cir. 1986) (the district court granted plaintiff's preliminary injunction request reasoning in part that the government's emergency basis under C.F.R. § 1506.11 was questionable; the appellate court reversed without discussing C.F.R. § 1506.11); *Valley Citizens for a Safe Env't v. West*, No. 91-30077-F, 1991 U.S. Dist. LEXIS 21863 (D. Mass. 1991) (against the plaintiff's arguments that the circumstances did not constitute an emergency, the court ruled that the government's use of alternate arrangements under C.F.R. § 1506.11 for the purported emergency was not arbitrary and capricious).
[125] *Crosby v. Young*, 512 F. Supp. 1363 (E.D. Mich. 1981).
[126] *Id.* at 1385–86 (citing *Andrus v. Sierra Club*, *supra* note 100, 442 U.S. at 358).
[127] *Id.*
[128] 42 U.S.C. § 4332.
[129] *Valley Citizens for a Safe Env't*, 1991 U.S. Dist. LEXIS 21863 at *15–16; *See also Forest Serv. Emples. for Envtl. Ethics v. U.S. Forest Serv.*, 2017 U.S. Dist. LEXIS 107061, *8–9 (E.D. Wash. 2017).
[130] Margaret Ann Larrea, *The Emergency Alternative Arrangement Exception to the National Environmental Policy Act: What Constitutes an Emergency? Should the Navy Pin its Hopes on Noah Webster?*, 61 NAVAL L. REV. 36, 49 (2012).
[131] Deadline for Agencies To Propose Updates to National Environmental Policy Act Procedures 86 Fed. Reg. 34154 (Jun. 29, 2021) (the 2020 CEQ rule set a deadline of Sep. 14, 2021; the new deadline is Sep. 14, 2023).
[132] *Id.* (the rule cited E.O. 13990 and 14008 for Presidential direction to review the 2020 regulations).

to "generally restore" those that were in effect for decades before being revised in 2020.[133] The CEQ also announced its intention to conduct a second phase of rulemaking to comprehensively revise the 2020 regulations.[134] While the second phase of rulemaking was pending, Congress codified several provisions of the 2020 CEQ regulation revision in the FRA of 2023. Nearly two months later in July 2023, the CEQ published its proposed second phase of CEQ regulation rulemaking for public comment.[135]

The proposed revisions in the CEQ rulemaking fall into five general categories: (1) revisions to implement NEPA amendments made by the FRA of 2023; (2) "where it made sense to do so," reverting certain provisions "to the language from the 1978 regulations"; (3) removing "certain provisions added by the 2020 rule that CEQ considers imprudent or legally unsettled"; (4) amending certain provisions to enhance consistency and clarity; and, (5) amendments that implement "decades of CEQ and agency experience," foster science-based decision-making, including accounting for climate change and environmental justice, improve efficiency and effectiveness, and better effectuate NEPA's statutory process.[136]

C. Navy NEPA Regulations and the 2019 Amendments

The Navy published its NEPA-implementing regulations in August 1990, and made amendments in 1990, 2004, and 2019.[137] The regulations implement NEPA, the CEQ regulations, relevant Department of Defense regulations, and "assign responsibilities within the Department of the Navy (DON) for preparation, review, and approval of environmental documents prepared under NEPA."[138] The most significant portion of the regulations include those in 32 C.F.R. § 775.4 (responsibilities) and § 775.6 (planning

[133] National Environmental Policy Act Implementing Regulations Revisions 87 Fed. Reg. at 23453 (the CEQ revised (1) 40 C.F.R. §§ 1502.13 & 1508.1(z) to clarify "that agencies have discretion to consider a variety of factors when assessing an application for an authorization, removing the requirement that an agency base the purpose and need on the goals of an applicant and the agency's statutory authority," (2) 40 C.F.R. § 1507.3 "to remove language that could be construed to limit agencies' flexibility to develop or revise procedures to implement NEPA specific to their programs and functions that may go beyond the CEQ regulatory requirements", and (3) the definition of "effects" in 40 C.F.R. § 1508.1(g) to now "include direct, indirect, and cumulative effects.").
[134] *Id.*
[135] National Environmental Policy Act Implementing Regulations Revisions Phase 2, 88 Fed. Reg. 49924-49988 (Jul. 31, 2023) (notice of proposed rulemaking to revise the NEPA-implementing regulations, including to implement the Fiscal Responsibility Act's amendments to NEPA; open for public comment until Sep. 29, 2023).
[136] *Id.* at 49929.
[137] Procedures for Implementing the National Environmental Policy Act 55 Fed. Reg. 33898-33903 (August 20, 1990); 32 C.F.R. Part 775 (noting the following amendments: 55 Fed. Reg. 39960 (Oct. 1, 1990), 69 Fed. Reg. 8110 (Feb. 23, 2004), and 84 Fed. Reg. 66589 (Dec. 5, 2019)).
[138] 32 C.F.R. § 775.1(a).

considerations), but the regulations also include rules on scoping, documentation and analysis, and public participation.

The 2019 amendment revised the Navy's categorical exclusions (CATEX) from the NEPA process in 32 C.F.R. § 775.6(e) & (g).[139] The Navy started the revision process in 2015 when the Office of the Deputy Assistant Secretary of the Navy for Environment directed a review of the Navy's categorical exclusion regulations.[140] A panel of experts from within the DON was formed to "review[ ] and analyze[ ] the supporting rationale, scope, applicability, and wording of each existing CATEX."[141] The CEQ was an "integral" part of the process and ultimately concurred in the proposed rulemaking in 2017.[142] The Navy received five comments on its proposed rule, including comments from NRDC, and based on those comments made a notable modification to better align their CATEX policy with CEQ regulations.[143]

Within 12 months of the effective date of the final rule from the second phase of the Biden Administration's CEQ regulation rulemaking, the Navy, like every other federal agency, will need to revise, as necessary, their NEPA-implementing regulations through the rulemaking process.[144]

D. The Science of Sonar Effects on Marine Life

Many scientific papers and studies have been dedicated to the effects of ocean noise pollution, sonar in particular, on marine life and the causes of otherwise unexplained marine mammal beachings.[145] As the *Winter* case

[139] Policies and Responsibilities for Implementation of the National Environmental Policy Act Within the Department of the Navy 84 Fed. Reg. 66586 (Dec. 5, 2019) (categorical exclusions, which are determined and published by an agency, are classes of actions that "normally do not individually or cumulatively have significant environmental impacts and therefore do not require further review under NEPA").
[140] *Id.*
[141] *Id.*
[142] *Id.* at 66587.
[143] *Id.* at 66587–88 (to address a comment made about the modification to 32 C.F.R. § 775.6(e), the Navy added language to "clarify its position that application of a CATEX is inappropriate unless the action is determined not to have a significant impact on the human environment either individually or cumulatively," in accordance with 40 C.F.R. § 1508.4).
[144] National Environmental Policy Act Implementing Regulations Revisions Phase 2, 88 Fed. Reg. 49924, 49985 (proposed rule at 40 C.F.R. § 1507.3)
[145] *See*, e.g., Lindy Weilgart, *The impact of ocean noise pollution on fish and invertebrates* (2018) (a review of 115 studies on the effects of anthropogenic noise pollution, including naval sonar, on fish and invertebrates) https://bit.ly/3GOlgni (last visited May 5, 2023); Y. Bernaldo de Quirós, et al., *Advance in Research on the Impacts of Anti-submarine Sonar on Beaked Whales*, 286 PROC. ROYAL SOC'Y B (Issue 1895, 2019) (concluding effects of MFA sonar on beaked whales "varied among individuals or populations, and predisposing factors may contribute to individual outcomes" and spatial management, such as sonar bans, are effective mitigation measures) https://bit.ly/3v53jOE (last visited May 5, 2023).

demonstrated in 2008, ocean noise pollution and its effects on marine life is a complex and debated issue. As such, anything more than a relatively brief review of this issue is well beyond the scope of this article.

1. At the Time of *Winter*

At the time of the *Winter* litigation the Navy had already acknowledged in its own scientific study that MFA sonar was a contributing factor in a marine mammal beaching near the Bahamas in March of 2000, resulting in the death of six beaked whales and one dolphin.[146] Another scientific paper published in 2003 studied beaked whale beachings linked to military sonar use, finding decompression sickness from surfacing to be implicated as a possible mechanism of harm.[147] However, by *Winter* the exact mechanisms and conditions leading to marine mammal harm and beachings from military sonar were unclear.[148]

Based on a review of the science by NMFS, the Navy argued in *Winter* that the science indicated that "at most, MFA sonar may cause temporary hearing loss or brief disruptions of marine mammals' behavioral patterns," but that the Navy's exercises, using mitigation measures, would not result in adverse population effects for any marine mammals.[149] The Navy acknowledged that NMFS found MFA sonar to be "implicated" as a contributing factor in a number of mass marine mammal stranding events outside of the southern California range, but argued that there were several competing hypotheses regarding a possible connection and little definitive information.[150] The Navy summarized their argument by stating that the science indicated that sonar may injure or kill marine mammals under certain conditions, but because the Navy would avoid these conditions in part through mitigation measures, the science indicated that it was not likely that the Navy's use of sonar during its exercises in southern California would injure or kill marine mammals.[151]

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[146] NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION & DEPARTMENT OF THE NAVY, JOINT INTERIM REPORT BAHAMAS MARINE MAMMAL STRANDING EVENT OF 15-16 MARCH 2000 47 (2001), https://bit.ly/3vbzls9 (last visited on July 8, 2023).
[147] P. D. Jepson et al., *Gas Bubble Lesions in Stranded Cetaceans*, 425 Nature 575 (2003) https://go.nature.com/3RO3Mhh (last visited on May 5, 2023)
[148] *See* Claire Thomas, *Sonar Doesn't Appear to Deafen Dolphins*, Science, Arp. 8, 2009 (reporting on a recently completed study funded by the U.S. Navy on the hearing effects of sonar on a single dolphin; the study's author stated that more research was needed to examine specific conditions and mammals in the wild) https://bit.ly/3tf8v23 (last visited on May 5, 2023); Daniel Cressey, *Sonar Does Affect Whales, Military Report Confirms*, Nature, Aug. 1, 2008 (reporting two recent U.K. military studies and a civilian scientific study regarding the effect of sonar on marine mammals; one of the civilian researchers reported that it was possible to mitigate the effects of sonar but that more research was needed to determine the effects of sonar on marine mammals under specific conditions) https://doi.org/10.1038/news.2008.997 (last visited on May 5, 2023).
[149] *Winter*, 555 U.S. at 14; Brief for the Petitioners, *supra* note 26, at 71–73.
[150] Brief for the Petitioners, *supra* note 26, at 71–72.
[151] *Id.* at 72–73.

The plaintiffs understood the science differently. They argued that sonar generates "piercing underwater sound at extreme pressure levels," causing physical trauma to marine mammals including "hemorrhaging around the brain, ears, kidneys, and acoustic fats; acute spongiotic changes in the central nervous system; and gas/fat emboli in the lungs, liver, and other vital organs," which in turn lead to "nervous and cardiovascular system dysfunction, respiratory distress, disorientation, and death."[152] They also argued that the NMFS review of the science indicated that sonar caused "mass habitat displacement and hearing loss, as well as adverse behavioral alterations--including changes in feeding, diving, and social behavior."[153]

2. Advancements Since *Winter*

Two U.S. Navy-funded studies in 2013 used simulated military sonar on tagged and monitored blue whales and Cuvier's beaked whales.[154] The studies found that when subjected to the simulated sonar, the whales ceased foraging and/or eating, altered their swim speed and diving patterns, and attempted to flee the noise by swimming away from the source of the simulated sonar.[155] An article published in 2017 reviewed more than 90 scientific studies and reports related to sonar's effects on marine mammals to provide an update on the state of the scientific community's knowledge on the subject.[156] The author concluded that "the impacts of military sonar on a variety of cetacean species are now more than a smoking gun" and that governments need to implement best practices, including effective baseline monitoring and mitigation measures.[157] The author also discussed the absence of evidence in some cases and the uncertainties in marine science, urging the application of the precautionary principle.[158]

A 2017 workshop of experts in the field reviewed the current knowledge regarding atypical beaked whale mass stranding events associated with MFA

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[152] Brief for the Respondents at 14–15, *Winter v. NRDC*, 555 U.S. 7 (2008) (No. 07-1239), 2008 U.S. S. Ct. Briefs LEXIS 770.
[153] *Id.* at 15.
[154] Jeremy A. Goldberg et al., *Blue Whales Respond to Simulated Mid-Frequency Sonar*, PROC. ROYAL SOC'Y B 280 (Issue 1765, 2013) (U.S. Navy funded study of the effect of MFA military sonar on tagged blue whales) https://bit.ly/3Tyo3IL (last visited on May 5, 2023); Stacy L. DeRuiter et al., *First Direct Measurements of Behavioural Responses by Cuvier's Beaked Whales to Mid-Frequency Active Sonar*, Biology Letters 9 (Issue 4, 2013) (U.S. Navy funded study of the effects on MFA sonar on two tagged Cuvier's beaked whales) https://bit.ly/48oWOVs (last visited on May 5, 2023).
[155] *Id.*
[156] E. Christien M. Parsons, *Impacts of Navy Sonar on Whales and Dolphins: Now beyond a Smoking Gun?*, FRONT. MAR. SCI. 4 (2017) https://bit.ly/4anrS9M (last visited on May 5, 2023).
[157] *Id.*
[158] *Id.*

sonar.[159] In their 2019 report, the authors' concluded that the evidence suggests that the effects of MFA sonar on Cuvier's beaked whales appear to be the strongest, but that effects "vary among individuals or populations, and predisposing factors may contribute to individual outcomes."[160] The authors recommended additional research regarding the effect of MFA sonar on beaked whales in six different areas.[161] A 2019 study funded by the Navy and NMFS concluded that there is increasing scientific support for the "risk-disturbance hypothesis," which posits that marine mammals behavioral changes in response to sonar is based on predator fear.[162] The scientists noted that while the corresponding behavioral responses are energetically costly, how "these responses may lead to long-term individual and population-level impacts is poorly understood."[163]

Thus, without a further exhaustive listing of the recent research, it appears that the evidence of direct and indirect effects of MFA sonar on marine mammals, especially Cuvier's beaked whales, continues to get stronger, but much research is still to be done to determine the exact mechanisms of the effects and the best mitigation measures. A notable pattern in the scientific research is the focus on marine mammal behavioral responses to sonar and the potential indirect impact of these behavioral responses. This is in contrast to the focus of Level A and B harm, as defined by the MMPA, caused by sonar in the *Winter* case, which largely focused on temporary and permanent hearing loss.

IV. THE CURRENT STATE OF LAW HAS NOT SIGNIFICANTLY CHANGED THE NAVY'S SONAR TRAINING NEPA OBLIGATIONS SINCE *WINTER*

A. The Most Significant 2020 CEQ Regulation Revisions were Reversed

The most significant changes made in the 2020 CEQ regulation revision were reversed by the April 2022 amendments. One of the significant changes arguably never went into effect. The 2020 revision to 40 C.F.R. § 1507.3 added a "ceiling" provision—prohibiting agencies from imposing additional procedures or requirements beyond those in the CEQ regulations.[164] The agencies had one year to propose new agency regulations to make any necessary changes to

[159] Quirós et al., *supra* note 145.
[160] *Id.*
[161] *Id.* (the authors' recommended additional research in the areas of anatomy, physiology, pathology, ecology, behavior, and technology development).
[162] Catriona M. Harris et al., *Marine Mammals and Sonar: Dose–Response Studies, the Risk-Disturbance Hypothesis and The Role of Exposure Context*, 55 J. APPLIED ECOLOGY 396, 396 (2018) https://bit.ly/3Tvbrlz (last visited on May 5, 2023).
[163] *Id.*
[164] 40 C.F.R. § 1507.3(b) (2020) (". . . Except for agency efficiency . . . or as otherwise required by law, agency NEPA procedures shall not impose additional procedures or requirements beyond those set forth in the regulations in this subchapter").

conform to this and other new CEQ provisions.[165] But the Biden Administration extended that period by two additional years and amended 40 C.F.R. § 1507.3 by removing the ceiling provision well before the new deadline.[166] As such, agencies were never required to remove any additional procedures or requirements that may have been in place at the time of the 2020 revision. Importantly, the FRA of 2023 did not codify the ceiling provision.

Another significant 2020 revision arguably created ambiguity regarding an agency's discretion in determining the purpose and need of a particular EIS.[167] This is important because the purpose and need of an EIS will directly impact the agency's determination of a proposed project's goals, which in turn is the most relevant consideration in developing reasonable alternatives.[168] The Biden Administration amended this change as well, ensuring that it is clear that agencies have the discretion to consider a variety of factors when determining the purpose and need of a particular EIS, including the public interest and an agency's policies and programs.[169] The FRA of 2023 did not codify this portion of the 2020 revision. However, while this change is significant for the reasons stated above, it would have little effect on proposed projects originating from the government, such as at-sea Naval sonar training exercises, because it is the government's own goals that control the NEPA analysis. This change affects private organizations seeking government approval (often through the attainment of a permit) for their projects, especially where there is disagreement between the agency and a private organization about the scope of a project's goals or purpose.[170]

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[165] *Id.*

[166] National Environmental Policy Act Implementing Regulations Revisions 87 Fed. Reg. at 23453 (the CEQ revised 40 C.F.R. § 1507.3 "to remove language that could be construed to limit agencies' flexibility to develop or revise procedures to implement NEPA specific to their programs and functions that may go beyond the CEQ regulatory requirements").

[167] National Environmental Policy Act Implementing Regulations Revisions 87 Fed. Reg at 23458, 23458 (". . . ambiguity created by the 2020 rule language and ensure agencies have the flexibility to consider a variety of factors in developing the purpose and need statement and are not unnecessarily restricted by misconstruing this language to require agencies to prioritize an applicant's goals over other potentially relevant factors, including effectively carrying out the agency's policies and programs or the public interest.").

[168] *See Id. See also* 40 C.F.R. § 1508.1(z) ("Reasonable alternatives means a reasonable range of alternatives that are technically and economically feasible, and meet the purpose and need for the proposed action.").

[169] National Environmental Policy Act Implementing Regulations Revisions 87 Fed. Reg. at 23453 (the CEQ revised 40 C.F.R. §§ 1502.13 & 1508.1(z) to clarify "that agencies have discretion to consider a variety of factors when assessing an application for an authorization, removing the requirement that an agency base the purpose and need on the goals of an applicant and the agency's statutory authority").

[170] *Union Neighbors United, Inc. v. Jewell*, 831 F.3d 564, 575 (D.C. Cir., 2016) (where a private company seeking an incidental take permit under the ESA in order to build a wind energy farm, the reasonable alternatives are evaluated with a project's "stated goals in mind," which are determined by the federal agency).

Most importantly, the CEQ revised the definition of "effects" in 40 C.F.R. § 1508.1(g) to "include direct, indirect, and cumulative effects," a return to the pre-2020 revision definition.[171] The 2020 revision specifically repealed "cumulative impacts" and removed "indirect effects" from the regulations.[172] The FRA of 2023 did not codify the 2020 revision. However, while the 2022 policy decision to re-add indirect and cumulative effects is significant because it re-broadened the effects that must be considered when determining whether there are "significant" environmental effects under NEPA, it arguably would have had little effect on the Navy's NEPA analysis of MFA sonar's effect on marine mammals. This is because the Level A and B harassments caused by naval sonar, the basis for the Navy's incidental take permit under the MMPA from NMFS,[173] are typically considered direct effects.[174] But, as noted earlier, many of the scientific studies since *Winter* have focused on the indirect effects of naval sonar on marine mammal behavior.

Either way, the 2022 policy decision to return to the former, broader standard is significant. The lower 2020 standard for "effects" would have been a significant change in the law. For instance, in *Grand Canyon Trust v. Federal Aviation Administration*, the Court of Appeals for the District of Columbia Circuit held that the FAA's EA and FONSI were inadequate because the agency failed to consider the cumulative impacts related to the proposal to build a new airport near Zion National Park.[175] Under the 2020 revision, that case would likely have been decided differently, in favor of the federal agency who failed to consider cumulative effects. For many environmentalists and potential litigants, the return to the broader standard will ensure federal agencies, in making their decisions, continue to consider a broad range of effects. For the Navy, it requires the continued consideration of indirect effects of naval sonar on marine mammals.

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[171] National Environmental Policy Act Implementing Regulations Revisions 87 Fed. Reg. at 23453.
[172] *Compare* 40 C.F.R. §§ 1508.7 & 1508.8 (1978) *with* 40 C.F.R. § 1508.1(g) (2020).
[173] *See, e.g.*, Taking and Importing Marine Mammals; Taking Marine Mammals Incidental to the U.S. Navy Training Activities in the Gulf of Alaska Study Area, 88 Fed. Reg. 604, 605 (Jan. 4, 2023) [hereinafter "NMFS GOA Incidental Take Permit"] (publication of final rule from NMFS issuing the Navy a permit "for take of marine mammals, by Level A harassment and Level B harassment, incidental to training from the use of active sonar").
[174] *See, e.g.*, U.S. DEP'T OF THE NAVY, GULF OF ALASKA NAVY TRAINING ACTIVITIES FINAL SUPPLEMENTAL ENVIRONMENTAL IMPACT STATEMENT/ OVERSEAS ENVIRONMENTAL IMPACT STATEMENT 3.8-202 (Jan. 4, 2023) [hereinafter "GOA EIS"] ("Pursuant to the MMPA, indirect effects (secondary stressors) are not expected to result in mortality, Level A harassment, or Level B harassment of any marine mammal. Pursuant to the ESA, indirect effects may affect but are not likely to adversely affect certain ESA-listed marine mammals and would have no effect on marine mammal critical habitats.").
[175] *Grand Canyon Trust v. Fed. Aviation Admin.*, 290 F.3d 339, 343–347 (D.C. Cir., 2009).

B. Other 2020 CEQ Regulation Revisions are Unlikely to Change the NEPA Obligation for Sonar Exercises

Other 2020 CEQ regulation revisions are in effect, but subject to change during phase two of the Biden Administration's review of the 2020 CEQ regulations.[176] The 2020 revision of the definition of "major federal action" in 40 C.F.R. § 1508.1(q)(1)(i), which excludes "activities or decisions with effects located entirely outside of the jurisdiction of the United States," appears to allow the Navy to conduct some at-sea sonar training exercises outside the NEPA process. Specifically, sonar training exercises occurring entirely outside U.S. jurisdiction, which would require an exercise area entirely outside U.S. territorial seas and exclusive economic zones (i.e., on the high seas), could be conducted without NEPA compliance. However, the Navy's obligations under the MMPA and the ESA remain. The MMPA's prohibition of marine mammal takings extends to "the high seas" for persons and vessels subject to the jurisdiction of the U.S.[177] And among other jurisdictional areas, the ESA prohibits the "take" of listed endangered or threatened species on the high seas.[178] Thus, even if 40 C.F.R. § 1508.1(q)(1)(i) was left unchanged, the Navy would be required to seek MMPA and/or ESA incidental take permits from NMFS for sonar training activities on the high seas where listed marine mammals and endangered or threatened species are likely to be adversely affected.

There is a counter argument to the assertion that the exclusion of "activities . . . with effects located entirely outside of the jurisdiction of the United States" allows the Navy to conduct sonar training exercises on the high seas outside the NEPA process.[179] First, while Navy warships are considered sovereign and generally immune from foreign state laws and regulations throughout the world, they are subject to U.S. Congressional jurisdiction, on the high seas or otherwise.[180] For example, the ESA as a whole makes it fairly clear that it

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[176] Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act, 85 Fed. Reg. 43305 (2020 CEQ regulations effective on Sep. 14, 2020); See also Montana v. Haaland, 50 F.4th 1254, 1284 n.4 (9th Cir., 2022) (Nelson, J., dissenting) (stating that the 2020 regulations "remain in force and control future NEPA analyses" unless and until the they are amended again).

[177] 16 U.S.C. § 1372(a)(1).

[178] 16 U.S.C. § 1538(a)(1)(C).

[179] 40 C.F.R. § 1508.1(q)(1)(i).

[180] *See* U.S. CONST. art. 1, § 8, cl. 14 (Congress shall have the power to "make Rules for the Government and Regulation of the land and naval Forces."). *See generally*, U.N. Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 397, arts. 29–32, 94, 95, 236 (recognizing sovereign immunity of warships and the duty of flag states to "exercise jurisdiction and control" over its ships); NAVADMIN 165/21, 2021 (U.S. Navy policy on sovereign immunity) https://bit.ly/483zNaw (last visited May 5, 2023).

generally applies to U.S. Navy warships on the high seas.[181] Similarly, there has never been any question as to whether NEPA applies to U.S. Navy warships conducting at-sea sonar training—a major federal action that significantly affects the human environment—the sole question being the limit of jurisdiction, for which NEPA is silent. Second, the President of the United States is vested with the executive power to faithfully enforce the laws and to act as the Commander in Chief of the Navy.[182] Said powers are sufficient to allow the President to order the Navy to comply with NEPA for sonar training on the high seas. In a yet-to-be revoked Executive Order, President Jimmy Carter essentially did just that in 1979. The publication of the 2020 final rule revising the definition of "major federal action" made no reference to Executive Order 12114, which requires federal agencies to comply with NEPA-like procedures when they propose major federal actions "affecting the environment of the global commons outside the jurisdiction of any nation," including the oceans.[183] While the revision to the definition of "major federal action" arguably supersedes E.O. 12114, the CEQ still includes it as "active CEQ Guidance" on its website.[184] Moreover, in June 2021 the U.S. Navy revised and re-published its "Environmental Readiness Program Manual," which makes it extensively clear that the Navy considers E.O. 12114 good law and requires the Navy to conduct EIS for significant actions in the global commons (the high seas) that may significantly harm the environment.[185] Thus, subsequent policy promulgated by the Navy and publication in 2023 of an "overseas" EIS for sonar training in the Gulf of Alaska "pursuant to" E.O. 12114 appears to demonstrate that the Navy disagrees that the recent revision to the definition of "major federal action" supersedes E.O. 12114.[186] This is significant because the FRA of 2023 codified the portion of the 2020 revision of the CEQ regulations that excludes extraterritorial activities or decisions from the definition of "a major federal action."[187]

Another notable 2020 revision was the requirement that agencies use "reliable existing data and resources" while specifically exempting agencies from

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[181] 16 U.S.C. §§ 1533(a)(3)(B), 1538(a)(1)C) (ESA § 4 critical habitat designation exception where the DoD has an "integrated natural resources management plan" and § 9 take prohibitions apply to any "officer" or "instrumentality of the Federal Government" on the high seas).
[182] U.S. CONST. art. 2, §§ 1, cl. 1, 2, cl. 1, 3.
[183] Executive Order 12114, 44 Fed. Reg. 1957 (1979) (Section 1-1 states that "[w]hile based on independent authority, this order furthers the purpose of the [NEPA]"; Section 2-4(b)(i) requires an EIS for significant harm in the global commons).
[184] U.S. Department of Energy, Office of NEPA Policy and Compliance, CEQ Guidance Documents (this webpage is directly linked from the CEQ website under hotlink for "Active CEQ Guidance") https://bit.ly/3tpN12w (last visited May 5, 2023).
[185] OPNAVINST M-5090.1, ENVIRONMENTAL READINESS PROGRAM MANUAL, Chapter 10 (2021) https://bit.ly/48n3Tpf (last visited June 24, 2023).
[186] *See, e.g.*, GOA EIS, *supra* note 174 (final "overseas" EIS published in January 2023 citing that the EIS was produced pursuant to E.O. 12114).
[187] FRA of 2023, *supra* note 7.

any requirement "to undertake new scientific and technical research to inform their analyses."[188] Moreover, this revision was codified in the FRA of 2023.[189] Federal courts had interpreted the CEQ's pre-2020 regulation requirement for an "[a]ccurate scientific analysis" to mean that the establishment of "baseline" conditions was required as a practical matter.[190] In some cases, that is likely impossible without undertaking new scientific research. However, the new regulation, and the FRA of 2023, do not bar new scientific research and they specifically acknowledge (1) the possibility that other statutory requirements may require new scientific research[191] and (2) new research may be essential to a reasoned choice among alternatives.[192] It is difficult to know how this change will affect agency practice government-wide, but it seems unlikely that federal courts will obviate the practical requirement to assess baseline conditions. In the case of at-sea Navy sonar training, this amendment appears unlikely to change Navy practice because MMPA regulations require a significant amount of baseline information to be provided to NMFS in order to evaluate applications for incidental take permits.[193]

C. Navy Regulation Changes Do Not Change the NEPA Obligation for Sonar Training

While the 2019 amendments to the Navy's NEPA-implementing regulations elicited at least one comment expressing concern that the CATEX amendments would allow the Navy to "circumvent certain procedures, approvals, or authorizations required under the MMPA or other environmental statutes," that appears unlikely, both in theory and practice.[194] The Navy responded to the comment by noting that the amendment was in part an effort to replicate the specific regulatory language from the MMPA and would have no effect on NMFS's external obligations or the Navy's obligations under the MMPA.[195] In practice, there appears to be no effect on the Navy's NEPA analysis and practice for at-sea training involving the use of sonar. The Navy most recently issued its

[188] 40 C.F.R. § 1502.23 (2020) (the provision also stated that "[n]othing in this section is intended to prohibit agencies from compliance with the requirements of other statutes pertaining to scientific and technical research").
[189] FRA of 2023, *supra* note 7.
[190] *See, e.g., Or. Natural Desert Ass'n et al. v. Jewell*, 840 F.3d 562, 568 (9th Cir., 2016).
[191] 40 C.F.R. § 1502.23 (2020).
[192] FRA of 2023, *supra* note 7.
[193] *See, e.g.*, 50 C.F.R. § 216.104 (2023) (incidental take permit application to NMFS requires the applicant to provide "species and numbers of marine mammals likely to be found within the activity area" and a "description of the status, distribution, and seasonal distribution (when applicable) of the affected species or stocks of marine mammals likely to be affected by such activities").
[194] Policies and Responsibilities for Implementation of the National Environmental Policy Act Within the Department of the Navy, 84 Fed. Reg. 66586, 66588 (Dec. 5, 2019) (addressing a comment on the interaction of the MMPA with the amendment to 32 C.F.R. § 775.6(e)).
[195] *Id.*

ROD, and NMFS issued an incidental take permit under the MMPA, in January 2023 for an EIS the Navy began in January 2020 for its planned at-sea training exercises in the Gulf of Alaska, which will include sonar training.[196] This is the process that the Navy has had in place since *Winter*.[197]

D. The Potential Impact of NEPA Amendments from the FRA of 2023 and the Pending CEQ Regulation Revisions

The NEPA amendments from the FRA of 2023 most likely to affect Navy at-sea sonar training include (1) the 2-year time limit for EIS, with the availability of judicial suit when time limits are not met; (2) limiting the review of alternatives to a "reasonable range"; (3) not requiring "new scientific or technical research unless the new scientific or technical research is essential to a reasoned choice among alternatives, and the overall costs and time frame of obtaining it are not unreasonable"; (4) implementing a 5-year reliance limit for programmatic EIS, but allowing further reliance if the agency reevaluates the analysis and any assumptions to ensure they remain valid; and, (5) providing an additional public comment period when the agency publishes its intent to prepare an EIS.[198]

The 2-year time limit is significant because Navy EIS involving sonar training often take longer than 2 years. For instance, the EIS completed for Atlantic Fleet Training and Testing (AFTT) in October 2018, which includes sonar training, took more than 35 months after the Navy published its notice of intent to prepare the EIS, the new statutory start date for the 2-year time limit.[199] While it is unclear how the Navy will adapt to this new time constraint, it is

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[196] *See* GOA EIS, *supra* note 174; NMFS GOA Incidental Take Permit, *supra* note 173; Notice of Availability of Record of Decision for the Gulf of Alaska Navy Training Activities Supplemental Environmental Impact Statement/Overseas Environmental Impact Statement, 50 Fed. Reg. 218 (Jan. 4, 2023) [hereinafter "GOA ROD"] (publication of the Navy's ROD from its September 2022 GOA EIS).

[197] *See, e.g.*, Taking of Marine Mammals Incidental to Specified Activities; Taking Marine Mammals Incidental to Training Operations Conducted Within the Gulf of Mexico Range Complex 76 Fed. Reg. 9250 (Feb. 17, 2011) (incidental take permit from NMFS for Navy training, including sonar, in the Gulf of Mexico); 77 Fed. Reg. 50289 (2012) (incidental take permit from NMFS for Navy SURTASS LFA sonar training in the Atlantic, Indian, and Pacific Oceans and the Mediterranean Sea; this was the NMFS permit litigated in Natural Res. Def. Council, Inc. v. Pritzker, 828 F.3d 1125, 1134 (9th Cir., 2016)); Record of Decision for Surveillance Towed Array Sensor System Low Frequency Active Sonar 77 Fed. Reg. 52317 (Aug. 29, 2012) (Navy ROD for final EIS for Navy SURTASS LFA sonar training in the Atlantic, Indian, and Pacific Oceans and the Mediterranean Sea).

[198] FRA of 2023, *supra* note 7.

[199] Notice of Intent To Prepare an Environmental Impact Statement/Overseas Environmental Impact Statement for Navy Atlantic Fleet Training and Testing, 80 Fed. Reg. 69951 (Nov. 12, 2015); Notice of Availability of Record of Decision for the Atlantic Fleet Training and Testing Final Environmental Impact Statement/Overseas Environmental Impact Statement, 83 Fed. Reg. 54097 (Oct. 26, 2018).

possible that the Navy may delay publication of its notice of intent until all preparation activity is complete. Additionally, many Navy at-sea sonar training EIS are either partially completed in accordance with E.O. 12114 (like the 2018 AFTT EIS), or completed entirely under E.O. 12114. This is important to note because EIS completed under E.O. 12114 are not subject to the authority of NEPA.[200]

The limitation of the review of alternatives to a "reasonable range" has the potential to impact Navy at-sea sonar training EIS by limiting the alternatives the Navy may need to consider. This will largely depend upon Navy interpretation and potential litigation. However, the previous standard was very similar – the analysis of alternatives required an objective evaluation of "all reasonable alternatives."[201] Most courts still considered this to be limited to a reasonable number of alternatives and not necessarily *all* reasonable alternatives.[202] As such, while this amendment has the potential to alter Navy practice, it is unlikely to do so.

As discussed earlier in regard to the 2020 CEQ regulation revision, the codification of the limitation on new scientific research will most likely not obviate the practical requirement to assess baseline conditions set by most federal courts. In the case of at-sea Navy sonar training, this amendment appears unlikely to change Navy practice because MMPA regulations require a significant amount of baseline information to be provided to NMFS in order to evaluate applications for incidental take permits.[203]

The implementation of a 5-year reliance limit for programmatic EIS, while allowing further reliance if the agency reevaluates the analysis and any assumptions to ensure they remain valid, is important for Navy at-sea sonar training EIS if for no other reason than the fact that MMPA incidental taking permits are granted for up to 7 years.[204] Where this disconnect exists, the Navy will likely need to prepare a supplemental EIS at the 5-year point or conduct an EIS reevaluation to meet the statutory requirement.

The additional public comment period following the publication of the Navy's notice of intent to prepare an EIS may not have a significant impact on the

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[200] Executive Order 12114, *supra* note 183.
[201] *See Union Neighbors United v. Jewell*, 831 F.3d 564, 568-69 (D.C. Cir., 2016) (citing the prior CEQ regulation 40 C.F.R. § 1502.14).
[202] *See, e.g., California v. Block*, 690 F.2d 753, 767 (9th Cir., 1982) (stating that "[j]udicial review of the range of alternatives considered by an agency is governed by a 'rule of reason' that requires an agency to set forth only those alternatives necessary to permit a 'reasoned choice.'").
[203] *See* 50 C.F.R. § 216.104 (2023), *supra* note 193.
[204] National Defense Authorization Act for Fiscal Year 2019, Pub. L. 115-232, 132 Stat. 1636, *supra* note 21.

EIS process, but it will provide interested parties with an additional opportunity to include adverse impact concerns and potential mitigation measures and alternatives into the administrative record. This will require the Navy to consider any additional comments and ultimately address them in the final EIS.

Finally, it is worth noting that several of the amendments from the FRA of 2023 impose NEPA limitations that may look significant, but in fact only codify long-standing CEQ regulations or federal court interpretations of NEPA. For instance, the new codification that EIS need only consider "reasonably foreseeable" effects dates back to the original 1978 CEQ regulations, which limited the consideration of (1) cumulative impacts to "the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions" and (2) indirect impacts to those "caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable."[205] This amendment and others like it will have very little if any effect on NEPA practice generally and NEPA practice for Navy at-sea sonar training in particular.

While the Biden Administration published its proposed second phase of CEQ regulation rulemaking in 2023, in most cases the proposed revisions result in one of three changes: (1) regulations implementing the NEPA amendments from the FRA of 2023; (2) a return to the pre-2020 status quo; or, (3) the requirement to consider climate change and environmental justice.[206] None of these categories implicate significant changes to the Navy's environmental planning for at-sea sonar training. Of note from *Winter*, the CEQ emergency circumstances provision has undergone no meaningful change since its initial promulgation in 1978.[207]

V. LAW, SCIENCE, AND POLICY – SCIENTIFIC UNCERTAINTY, SETTING STANDARDS, AND POLICY DECISIONS

A. Scientific Uncertainty and Setting Standards

Although the Supreme Court did not rule on the irreparable harm element in *Winter*, harm to marine mammals from sonar was the underlying basis for the plaintiffs' injury and the *sine qua non* of the plaintiffs' argument in the balance of equities and the public's interest. More broadly, non-negligible harm or impact to marine mammals at the species population level is what the Navy and NMFS seek to avoid through the NEPA and MMPA incidental take permit processes. As such,

[205] 43 Fed. Reg. 55978-56007 (1978); 40 C.F.R. §§ 1508.7 & 1508.8 (1978) (defining "Cumulative impact" and "Effects").
[206] National Environmental Policy Act Implementing Regulations Revisions Phase 2, 88 Fed. Reg. at 49929 (summarizing the proposed revisions and their rationale).
[207] *See* 40 C.F.R. § 1506.12 (2020); Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act, 85 Fed. Reg. at 43339.

it is difficult to downplay the significance to the Navy, NMFS or a court during litigation of the quantitative and qualitative valuation of harm to marine mammals in NEPA documents and MMPA take permits for Navy at-sea sonar training. These valuations are complicated by scientific uncertainties and standard setting under the MMPA.

1. Uncertainty of Sonar's Effects on Marine Mammals

NMFS's 2007 ESA biological opinion, prepared for the Navy's sonar training exercises litigated in *Winter*, cited research from 1995 concluding that "little is known about the effect of short-term disruptions of a marine mammal's normal behavior," but that most of the available evidence suggests behavioral disturbances caused by MFA sonar "do not *directly* kill or injure marine mammals" (emphasis added).[208] The biological opinion also discussed the death of a melon-headed whale calf that was temporally (2 days after) and spatially correlated with Navy sonar training near Hawaii in 2004.[209] The death followed unusual behavior by between 150 and 200 melon-headed whales immediately after the training exercise.[210] The whales, which normally live in open sea, were observed in a shallow confined bay and ultimately needed human intervention to be returned to the open sea.[211] Although a cause of death could not be definitively determined for the whale calf, "maternal separation, poor nutritional condition, and dehydration" were considered likely to have contributed to the whales' death.[212] NMFS concluded that the sonar training was a "plausible contributing causal factor" in these events.[213] If so, this would be an example of an indirect take caused by military at-sea sonar training, but these events highlight some of the uncertainties involved—if the sonar caused the unusual whale behavior, by what mechanism did it do so and how can these effects be mitigated or avoided.

As recently as 2017, a scientific researcher reviewing the state of knowledge regarding the effects of ocean noise pollution, military sonar in particular, hypothesized that "[i]t may be a long time before technology and methods are easily available to answer the many still unanswered questions about the exact nature and degree of the impacts of sound on cetaceans."[214] One of the problems is the lack of long-term or baseline data and studies on marine life before the onset of sound-producing events.[215] This is due in part to the fact that collecting data and conducting research in the marine environment "is logistically

[208] Joint Appendix, *supra* note 16, at 38.
[209] *Id.* at 31–34.
[210] *Id.* at 31.
[211] *Id.* at 31–32.
[212] *Id.* at 33.
[213] *Id.*
[214] Parsons, *supra* note 156.
[215] *Id.*

much more difficult, and more expensive, than in the terrestrial environment."[216] The lack of baseline data in turn significantly limits the ability for researchers to detect species and population trends.[217]

The current scientific uncertainties place an even greater importance on effective mitigation efforts, which are also subject to scientific research and uncertainty.[218] A 2019 study funded by the U.S. Navy and NMFS recommended that new mitigation measures be developed that use the most recent research and are capable of being validated through monitoring and experimental methods.[219] Unsurprisingly, one of the mitigation measures found to be very effective is spatial management, that is, not conducting sonar training exercises in areas of known populations particularly susceptible to harmful responses to sonar use.[220]

2. Setting Standards – Who does it and How?

The lawsuit brought by the plaintiffs in *Winter* argued that the Navy's sonar training exercises were going to have a significant effect on the environment, and thus, the Navy was required to produce an EIS.[221] The Navy's current regular practice is to produce EISs for sonar training exercises.[222] But even if the Navy has conceded that its sonar training activities significantly affect the human environment, and even if NEPA "does not mandate particular results," or require agencies to choose the most environmentally friendly option,[223] the incidental take permit requirements of the MMPA remain. A 2016 case from the United States Court of Appeals for the Ninth Circuit, *NRDC v. Pritzker*, made it clear that before the issuance of an incidental take permit under the MMPA, the Navy and NMFS must show that any incidental take of small numbers of marine mammals covered under the MMPA and/or the ESA, (1) will have a negligible impact on a species stock, *and* (2) that mitigation measures will ensure the least practicable adverse impact on a species stock.[224] That raises two standard setting

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[216] *Id.*
[217] *Id.*
[218] *See cf. id.* (asserting that the answers to current uncertainties related to the MFA sonar effects on beaked whales could render current U.S. Navy mitigation measures ineffective and that many of the mitigation measures are untested best guesses).
[219] Harris et al., *supra* note 162, at 402.
[220] Quirós et al., *supra* note 145.
[221] *Winter*, 555 U.S. at 16–17; Brief for the Petitioners, *supra* note 26, at 25.
[222] *See, e.g.*, U.S. Fleet Forces Command, Environmental Planning, https://bit.ly/3TxoBP4 ("The U.S. Navy conducts military readiness . . . activities in many areas around the world. [The Navy] prepares environmental studies for the military readiness activities it conducts. For example, an [EIS] of military readiness activities conducted in the Atlantic Ocean and the Gulf of Mexico . . . was completed in 2018. . . . The [EIS] . . . analyzed the Navy's use of sonar and explosives.") (last visited on May 5, 2023).
[223] *Robertson*, 490 U.S. at 350.
[224] *Nat. Res. Def. Council, Inc. v. Pritzker*, 828 F.3d 1125, 1134 (9th Cir. 2016); 16 U.S.C. § 1371(a)(5)(A)(i).

questions—what constitutes a "negligible impact" and how to determine the "least practicable adverse impact?"

The regulations provide some additional interpretation. Negligible impact is defined as "an impact resulting from the specified activity that *cannot be reasonably expected* to, and is *not reasonably likely* to, adversely affect the species or stock through effects on annual rates of recruitment or survival."[225] More than anything else, this definition appears to provide a standard of review to the decision—reasonableness. MMPA incidental take permits are required to include "availability and feasibility (economic and technological) of equipment, methods, and manner of conducting such activity or other means of effecting the least practicable adverse impact upon the affected species or stocks, their habitat, . . . paying particular attention to rookeries, mating grounds, and areas of similar significance."[226] While helpful, these standards are not definitive and require further decision-making.

In *Pritzker*, the Ninth Circuit disagreed with the District Court that the Navy's sonar mitigation methods met the "stringent standard" of ensuring the least practicable adverse impact.[227] The Ninth Circuit held that NMFS failed to analyze whether the proposed mitigation measures reduced the effects of sonar to the least practicable adverse impact.[228] More specifically, the court reasoned that NMFS failed to consider if *additional* mitigation measures were necessary to achieve the least practicable impact and whether these hypothetical measures were practicable in light of the Navy's need for effective training.[229]

The dispute about mitigation measures in *Pritzker* centered on the designation of off-limits areas protected from sonar training use, labeled offshore biologically important areas (OBIAs).[230] NMFS had convened a panel of experts to consider the designation of OBIAs.[231] The NMFS experts considered 73 areas for protection and encouraged the use of the precautionary principle[232] in many instances where data was minimal or non-existent, arguing that the lack of data did not equate to no or minimal cetacean presence in the area.[233] The court in *Pritzker* held that NMFS failed to meet the "stringent standard" of ensuring the least practicable adverse impact of sonar on marine mammals because NMFS

[225] 50 C.F.R. § 216.103 (2023) (emphasis added).
[226] 50 C.F.R. § 216.104(a)(11) (2023).
[227] *Pritzker*, 828 F.3d at 1128–29.
[228] *Id.* at 1135.
[229] *Id.*
[230] *Id.* at 1136.
[231] *Id.*
[232] *See* DAVID HUNTER ET AL., INTERNATIONAL ENVIRONMENTAL LAW AND POLICY 478 (5th ed., West Academic 2015) (the precautionary principle is "concerned with taking anticipatory actions to avoid environmental harm *before* it occurs.") (emphasis in original).
[233] *Pritzker*, 828 F.3d at 1136.

failed to give adequate protection to OBIAs flagged by its own experts.[234] The court found NMFS failed to include 70 percent of the OBIAs considered by its experts in part because of "the present lack of data sufficient to meet NMFS's designation criteria, even though NMFS's own experts acknowledged that '[f]or much of the world's oceans, data on cetacean distribution or density do not exist.'"[235]

Pritzker provides an example of the complexities of standard setting. Ordinarily, environmental laws are passed by the legislature and those laws provide the standards by which people must abide. Legislatures regularly delegate to agencies the task of filling in the specific details of those standards. However, this process becomes complicated where science, policy, and the law collide.[236] Often, environmental laws can be ambiguous, allowing the agencies and the judiciary significant discretion in interpreting the law.[237] This in turn results in agencies and judges turning to science to help set standards, sometimes masking what is in actuality a policy decision.[238] In *Pritzker*, NMFS elicited input from expert scientists in helping them set a standard. However, according to the Ninth Circuit, NMFS failed to properly consider the science and the advice of their scientists when making the ultimate policy decision. In doing so, the court pointed to the science and the scientists' advice for the basis of the Court's reasoning. All this begs the question: who is setting the standard here? Congress, NMFS, the Ninth Circuit, or NMFS's panel of expert scientists? Furthermore, is the standard a policy-based decision, science-based decision, or both?

While the answer to these questions is open to interpretation, there is clearly an important role for both science and policy. Generally, the effectiveness of mitigation methods can often be scientifically tested either through experimentation or implementation and monitoring.[239] The facts of *Pritzker* demonstrate the role of policymaking. In OBIAs with a lack of data, should NMFS spend the time and resources to obtain reliable data (a policy decision to collect more data for scientific analysis), or should they decide how to allocate risk (effective sonar training versus marine mammal harm) without collecting additional data (a pure policy decision)? Even if NMFS decides to collect more

[234] *Id.* at 1142.
[235] *Id.*
[236] *See cf.* James Huffman, *Roundtable Discussion: Science, the Environment, and the Law*, 21 ECOLOGY L.Q. 351, 354 (1994) ("We have permitted science, whether junk or high quality, to become a trump in the policymaking and law-interpreting processes.").
[237] *See id.* at 351 ("Many environmental laws have complicated the maintenance of this traditional distinction through vague prescriptions and proscriptions that leave courts with considerable discretion.").
[238] *See id. cf.* ("The judge becomes the policymaker, while looking to science to avoid being, or appearing to be, the policymaker. The policy choice is thus obscured, not discussed, and effectively delegated to the scientist.").
[239] *See* Harris et al., *supra* note 162, at 402.

data or to determine the effectiveness of a mitigation method through experimentation or monitoring, a policy decision still lies ahead—how much harm is too much? More specifically here, what is the threshold for when an impact exceeds the least practicable adverse impact? This dilemma demonstrates that science influences policy, but usually, science cannot be the sole basis for setting standards.[240]

The statutory and regulatory definitions of "negligible impact" and "least practicable adverse impact" do not provide a standard without further policy decisions, which may be influenced by science. Although MMPA standards were never relevant in *Winter* because a two-year MMPA exemption was granted, since *Winter* Navy environmental planning has sought and received MMPA incidental taking permits for its sonar training, receiving only one other two-year MMPA exemption in 2017 for surveillance towed array sensor system low frequency active (SURTASS LFA) sonar following the Ninth Circuit's ruling in *Pritzker* which invalidated the incidental taking permit issued to the Navy by NMFS.[241]

B. Policy Decisions

Setting standards is a complex process, as demonstrated above. While science often plays a part in the process, policy decisions made by scientists, legislators, executive branch officials, and judges often set environmental standards.[242] Policy decisions are not inherently problematic, but they may differ between scientists, meetings of Congress, presidential administrations, and judges, and may be based on improper considerations or "considerations undisclosed and unknown to the public."[243] As an example of how values can differ significantly even when it might appear that general environmentalist interests would align, consider the two most common bases for environmental laws—preservationism and conservationism. Preservationism seeks to protect the environment in its natural state, while conservationism seeks sustainable development by limiting the use and development of natural resources to prevent

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[240] *See cf.* Daniel Rohlf, *Section 4 of the Endangered Species Act: Top Ten Issues for the Next Thirty Years*, 34 ENV'T. L. 483, 503 (2004) (asserting that the selection under the ESA of a "threshold that marks whether a given species is secure or in peril of extinction requires a choice that is fundamentally one of policy, not science").

[241] Deputy Secretary of Defense, Memorandum for the Secretary of the Navy, National Defense Exemption from the Requirements of the Marine Mammal Protection Act for the Department of Defense Surveillance Towed Array Sensor System Low Frequency Active Sonar Military Readiness Activities (2017) https://bit.ly/4au5Cev (last visited May 5, 2023).

[242] *See* CRAIG N. JOHNSTON ET AL., LEGAL PROTECTION OF THE ENVIRONMENT 763 (4th ed., West Academic 2018) (arguing that determinations of endangered and threatened species under the ESA are "value-laden" determinations made by scientists or policymakers that reflect the degree of desired protectiveness).

[243] *Id.* (citing Daniel J. Rohlf, *Section 4 of the Endangered Species Act: Top Ten Issues for the* Next *Thirty Years*, 34 ENV'T. L. 483, 501–07 (2004)).

ecosystem destruction.[244] These two fields conflict because "one stresses non-use values and the other embraces use values."[245] The MMPA's original broad moratorium on the taking of marine mammals is an example of preservation, but the subsequent exclusion of commercial fishing from the moratorium and the allowance for incidental taking permits shifts the MMPA squarely into conservation.[246] NEPA's lack of substantive requirements does not meet either goal.

Environmental planning for Navy at-sea sonar training exercises involves several policy decisions, most importantly the selection of mitigation measures and the identification of the threshold for when an impact exceeds the least practicable adverse impact.

1. Sonar Mitigation Measures and the Least Practicable Impact

While much of the lower court battle over sonar mitigation measures in *Winter* was based on measures used by the Navy in past exercises and the Navy's sonar litigation history,[247] scientists have since recommended the development of new mitigation measures.[248] Whether developing new or using established mitigation measures, the ultimate selection of sufficient mitigation measures is a policy decision—either by the Navy, NMFS, or the courts. Any time harm is regulated above a zero-level, a standard for "how much [harm] is too much" must be set.[249] For Navy sonar training, harm to marine mammals is limited by the MMPA's requirements for a "negligible impact" and the "least practicable adverse impact."[250] But as discussed earlier, although these intelligible principles

[244] *Id.* at 2.
[245] *Id.*
[246] *See* 16 U.S.C. § 1371(a) (moratorium on the taking marine mammals excludes those incidentally taken during commercial fishing).
[247] *See Nat. Res. Def. Council, Inc. v. Winter*, 508 F.3d 885, 887 (9th Cir. 2007) (finding a preliminary injunction appropriate but overbroad as ordered by the district court, the Ninth Circuit remanded for the district court to consider mitigation measures that would allow Navy sonar training to proceed; the Ninth Circuit reasoned that "the Navy's past use of additional mitigation measures . . . during its 2006 exercises in the Pacific Rim, and . . . the district court's longstanding involvement with this matter and its familiarity with the effectiveness and practicability of available mitigation measures" provided the district court with a sufficient basis to select appropriate mitigation measures recommended by either party or on the court's own recommendation).
[248] Harris et al., *supra* note 154, at 402.
[249] *See Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 474–75 (2001) (in a nondelegation challenge to the air quality standards provision of the Clean Air Act, the Court found the requisite "intelligible principle" for the above zero-level harm standard set by Congress; the Court stated that Congress is not required to provide determinative criteria for saying how much harm is too much; it was sufficient to require EPA to make judgments of degree).
[250] 16 U.S.C. § 1371(a)(5)(A)(i) (2023).

and the regulations are helpful, the standards are not clear or definitive and require further policymaking.

In *Pritzker*, the panel of scientific experts employed by NMFS recommended adherence to the precautionary principle where the data was uncertain or insufficient for potential OBIAs.[251] This was a value-based policy recommendation where the precautionary principle places the burden of uncertainty on the activity (sonar training), not the environment (marine mammals).[252] However, NMFS chose an OBIA selection criteria that required known data for an area to be selected for mitigating protection.[253] This decision contradicted the advice of the expert panel and placed the burden of data uncertainty on the environment. NMFS called this a "policy choice" and argued it was entitled to deference.[254] The Ninth Circuit concluded the NMFS policy decision failed to adhere to the stringent standard of ensuring the least practicable adverse impact.[255] The Court reasoned that NMFS chose the competing option of risking under-protection (versus the precautionary principle's over-protection policy) without evaluating whether its choice satisfied the standard.[256] In doing so, NMFS failed to provide scientific support for its conclusion that failing to protect data-poor areas would not result in a greater adverse impact on marine mammals in those areas; and NMFS failed to consider whether protecting the data-poor areas was practicable.[257]

These facts highlight the possibility that NMFS might have made the "risk of under-protection" policy decision, and survived a judicial challenge, had they properly considered additional mitigation measures and been able to justify their decision under the statutory standard. Thus, despite the statutory standard, NMFS likely still has the flexibility to choose among diametrically opposed, value-based, policy decisions. Had the Navy sought and received an incidental take permit in *Winter*, a similar dispute and analysis would likely have been part of the litigation over mitigation measures.

2. Use of the Emergency Circumstances Exception by CEQ

The inclusion of an emergency circumstances exception in the CEQ regulations is by itself a policy decision because while NEPA can be construed to

[251] *Nat. Res. Def. Council, Inc. v. Pritzker*, 828 F.3d 1125, 1136–37 (9th Cir. 2016).
[252] *See* CHRIS WOLD, INTERNATIONAL ENVIRONMENTAL LAW 167 (2022) (self-published) ("The precautionary principle shifts the burden from the environment and environmental proponents to proponents of a proposed activity."); *Pritzker*, 828 F.3d at 1136–37.
[253] *Pritzker*, 828 F.3d at 1136–37.
[254] *Id.* at 1137.
[255] *Id.* at 1138.
[256] *Id.*
[257] *Id.* at 1138–39.

allow such a provision, NEPA does not dictate or require it. No such argument was made during the notice and comment period before the issuance of the original 1978 CEQ regulations.[258] In fact, the only comments made, expressed concern that the regulation as proposed required consultation *before* taking action, which in some urgent emergencies may be impractical. As such, the language was altered in the final rule to ensure that emergency actions could be taken without first consulting with the CEQ.[259] The exception allows the action agency and the CEQ to make policy decisions that other emergent factors outweigh strict compliance with CEQ regulations in a particular case.

The lack of a statutory or regulatory definition of "emergency circumstances," and a lack of significant case law, allows agencies and the CEQ a fair amount of discretion in making these decisions. A review of the CEQ's historical usage of alternative arrangements demonstrates that that there is less cause for cynicism of these policy decisions. Of the 47 instances, 15 were for emergent actions following severe weather events,[260] 13 were to alleviate sudden risks to human, animal, or environmental health,[261] and two were due to immediate and temporary changes in military operations triggered by the Gulf War.[262] Many of the values triggering these policy decisions are environmental and humanitarian. Other decisions are more ambiguous, such as the four alternative arrangements for immediate dam repairs, which can be controversial because they might extend the life of a dam that is not wholly supported by the public (although there was no litigation or evidence of dissent in these cases).[263]

The facts in *Winter* do stand out from many of the other instances, in that the emergency circumstances were arguably due to the Navy's failure to plan and/or complete an EIS on time. But that failure does not change the policies involved—marine mammal protection versus timely military training deemed essential to national security. The approval of alternative arrangements in *Winter* was undoubtedly a policy decision in keeping with the President's determination to issue a CZMA exemption (sonar training was in the "paramount interest of the United States" and "essential to national security"). Notably, the Navy has not sought CEQ alternative arrangements before or since *Winter*.[264]

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[258] 43 Fed. Reg. 55988 (1978) (comments on § 1506.11).
[259] *Id.*
[260] *See* Alternative Arrangements Chart, *supra* note 121 (includes fires, extreme rain/flooding, hurricanes, windstorms, tornados, and lava movement).
[261] *Id.* (examples include an oil spill and actions to protect endangered or threatened species).
[262] *Id.*
[263] *See id.* (Milner Dam in Idaho in 1988, Clear Creek Dam in Washington in 1990, dam connected to Par Pond, Savannah River Site in South Carolina in 1991, and Wolf Creek Dam in Kentucky in 2007).
[264] *Id.*

VI. CONCLUSION

The CEQ regulation revisions and the FRA of 2023 have not yet and are unlikely to significantly change the Navy's NEPA obligations for sonar training exercises. The most impactful of the 2020 revisions were already reversed by the Biden Administration, and other 2020 changes to the CEQ regulations, while some of them potentially significant outside Navy sonar training, are not likely to affect the Navy's at-sea sonar training NEPA obligations. The NEPA amendments from the FRA of 2023 will have some impact, but those impacts are unlikely to be significant. Pending amendments to the CEQ regulations from the Biden Administration will reverse and eliminate many of the 2020 revisions, implement and soften the impact of the 2023 NEPA amendments, and add important climate change and environmental justice considerations. The Navy's 2019 amendments to its NEPA-implementing regulations, focused almost exclusively on the CATEX rules, are also unlikely to affect the Navy's sonar training NEPA obligations.

Despite the passage of 15 years and a fair amount of new research in the field of sonar and its effects on marine life since *Winter*, there remains a substantial amount of uncertainty. This uncertainty includes (1) sonar's full effects on marine life, (2) the mechanisms of those effects, (3) geographic-specific data on marine mammal distribution and density, and (4) the most effective mitigation measures. Nevertheless, standards have been set in the MMPA and the implementing regulations. But those standards lack sufficient specificity; they are malleable and are subject to case-by-case decision-making, and potentially, judicial rulings. The lack of clear and definitive standards allows policymakers significant discretion in making decisions. As such, in any individual case it is often arguable who is setting the standard—Congress, NMFS, or the courts.

Pritzker demonstrates that at least some courts are strictly enforcing the MMPA standards, but it is equally clear, given scientific uncertainties and the relatively flexible standards, that MMPA disputes will often be very fact dependent. And while the Supreme Court in *Winter* found the national security interest in timely Navy at-sea sonar training outweighed harm to an unknown number of marine mammals, it emphasized that military interests do not always trump environmental interests.

The regulatory emergency circumstances exception provides a significant amount of discretion but allows the CEQ to tailor alternative arrangements to satisfy NEPA. The CEQ's sparing historical use of alternative arrangements demonstrates that generally, the environment has not been relegated to a lower priority.

The lasting legacy of the *Winter* case is injunction law; not NEPA. In the 15 years since the Supreme Court decided *Winter*, the case has been cited in 18 subsequent Supreme Court cases.[265] All but three of those exclusively cite *Winter* for injunction law. The other three cases cited *Winter* for (1) the proposition that deference is given to Executive Branch personnel in the determination of whether something is essential to national security;[266] (2) the use of affidavits to support claims of national security importance;[267] and, (3) the law surrounding stays of court orders.[268] The lone reference to the EIS requirements of NEPA is in a dissenting opinion.[269] The other lasting importance of *Winter* is how the national security evidence was presented and considered. The Court relied and deferred heavily on the affidavits of military officers in balancing the equities and determining the public's interest.

[265] *Ramirez v. Collier*, 142 S. Ct. 1264 (2022); *Whole Woman's Health v. Jackson*, 141 S. Ct. 2494 (2021); *Roman Catholic Diocese v. Cuomo*, 141 S. Ct. 63 (2020); *Democratic Nat'l Comm. V. Wis. State Legis.*, 141 S. Ct. 28 (2020) (cited only in dissenting opinion); *Little v. Reclaim Idaho*, 140 S. Ct. 2616 (2020) (cited only in concurring opinion); *June Med. Sers. L.L.C. v. Russo*, 140 S. Ct. 2103 (2020) (cited only in dissenting opinion); *North Carolina v. Covington*, 138 S. Ct. 2548 (2018); *Trump v. Hawaii*, 138 S. Ct. 2392 (2018); *Benisek v. Lamone*, 138 S. Ct. 1942 (2018); *Trump v. Int'l Refugee Assistance Project*, 137 S. Ct. 2080 (2017); *Ziglar v. Abbasi*, 137 S. Ct. 1843 (2017); *Sandoz Inc. v. Amgen Inc.*, 137 S. Ct. 1664 (2017); North Carolina v. Covington, 137 S. Ct. 1624 (2017); *Glossip v. Gross*, 576 U.S. 863 (2015) (cited only in dissenting opinion); *Perry v. Perez*, 565 U.S. 388 (2012); *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139 (2010); *Holder v. Humanitarian Law Project*, 561 U.S. 1 (2010); *Nken v. Holder*, 556 U.S. 418 (2009).

[266] *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1861 (2017) (citing *Winter* for the proposition that "courts have shown deference to what the Executive Branch has determined . . . is essential to national security") (internal quotation marks omitted).

[267] *Holder v. Humanitarian Law Project*, 561 U.S. 1, 33 (2010) (citing *Winter* for the proposition that it is appropriate for courts to rely on "affidavits to support according weight to national security claims").

[268] *Nken v. Holder*, 556 U.S. 418, 437 (2009) (Kennedy, J., concurring) (citing *Winter* in asserting that "[a] stay of removal is an extraordinary remedy that should not be granted in the ordinary case, much less awarded as of right").

[269] *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139 (2010) (Stevens, J., dissenting) (citing *Winter* for the assertion that an "EIS is more important when party is conducting a new type of activity with completely unknown effects on the environment") (internal quotation marks omitted).

THE EFFECT OF U.S. MILITARY PRESENCE ABROAD ON THE CONCEPTS OF NEUTRALITY AND CO-BELLIGERENCY: A CASE STUDY OF U.S.-PHILIPPINES RELATIONS AND THE POTENTIAL FOR FUTURE CONFLICT IN THE PACIFIC

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Amid growing tensions in the Western Pacific, the United States and the Philippines have recently concluded an agreement to open new military facilities in the Philippines for use by United States armed forces. However, this expanded U.S. presence in the Philippines will likely complicate Philippine efforts to maintain neutrality in the event of an armed conflict between the U.S. and China. Ideal compliance with international law regarding the rights and duties of neutral States conflicts with Philippine obligations under its mutual defense agreements with the U.S., creating a situation where the Philippines will have a narrow tightrope to walk if it wishes to remain neutral. Its best course for doing so may be to go beyond the bare requirements under the international law of neutrality by publicly and officially declaring its neutral status to the international community, including China. However, its proximity to the likely theatre of such a conflict may make it impossible for the Philippines to retain its neutral status without violating its treaty obligations to the United States, thereby creating a substantial risk that the Philippines will be inevitably drawn into the conflict against its will.

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I. INTRODUCTION

With the threat of the People's Republic of China (PRC) looming in the Pacific, both the Philippines and the United States have recently sought to strengthen their relationship with each other. Since 1946 when the Philippines gained independence, the United States and the Philippines have maintained a long-standing alliance.[1] In February 2023, the United States and the Philippines jointly announced that the United States was establishing four new facilities in the Philippines for use by the U.S. armed forces. In accordance with the terms of bilateral agreements between the United States and the Philippines, in the event of a conflict between the Philippines and the PRC, the United States may use these locations within the Philippines in order to aid in the defense of the Philippines. However, after a joint meeting between President Biden and President Marcos in early May 2023, President Marcos publicly stated that these facilities cannot be used as outposts for a U.S. offensive action against the PRC.[2] Even though President Marcos stated he was in "lockstep" with the United States, President Marcos did admit that he did not discuss the possibility with President Biden that the United States may want to use the facilities as a staging area for an offensive attack against the PRC.[3]

If the United States and the PRC entered into an armed conflict, there may be circumstances where the Philippines may seek to remain out of the conflict. However, if the United States were to use those newly established sites with the express consent of the Philippines to take offensive action against the PRC, then the Philippines would be unable to maintain its neutrality in the conflict. If the United States were to use those sites without the express consent of the Philippines in an offensive attack against the PRC, the Philippines would not automatically lose its neutrality status[4] or become a co-belligerent,[5] but it could if the Philippines took other actions. The Philippines and the United States have several mutual defense treaties, and while regional and collective self-defense agreements *may* affect a State's right to maintain a neutral status,[6] a neutral State, in this case the Philippines, potentially loses its neutrality status only if it takes action that violates its duties as a neutral, including being called upon

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[1] *FACT SHEET: Investing in the Special Friendship and Alliance Between the United States and the Philippines*, THE WHITE HOUSE (May 1, 2023), https://bit.ly/3t391je.
[2] *A Conversation with President Ferdinand Marcos, Jr. of the Philippines*, *CSIS* (May 4, 2023), https://bit.ly/3LqkUWs.
[3] *Id*.
[4] Neutral State is defined in the DoD Law of War Manual as a "State that is not taking part in the armed conflict." U.S. DEP'T OF DEF., DEPARTMENT OF DEFENSE LAW OF WAR MANUAL ¶ 15.1.2.2 (Dec. 2016) [hereinafter, DOD LAW OF WAR MANUAL].
[5] Belligerent State is defined in the DoD Law of War Manual as a "State that is engaged in an international armed conflict, whether or not a formal declaration of war has been made." *Id*. ¶ 15.1.2.1.
[6] *Id*. ¶ 15.2.3.2.

by a belligerent with whom they are in a collective security agreement (here, the United States) to permit use of its sovereign territory to allow the United States to take offensive action or to allow the United States to move forces, munitions, and other supplies through its territory.

The Philippines could not only lose its neutral status, but also become a co-belligerent by either engaging in the use of armed force against the PRC or through *systematic or significant violations* of its duties under the law of neutrality, thus making the Philippines itself, not just the United States forces within the Philippines, a lawful target of the PRC. These types of acts range from Philippine armed forces joining the United States in armed conflict with the PRC, to *continuously* permitting United States warships to remain in port more than 24 hours, or failing to stop the United States if the United States makes *repeated* attacks against the PRC from neutral Philippines territory.

This article discusses the rights and duties of neutral states, analyzes when a state may lose its neutrality and/or become a co-belligerent, and provides an overview of the agreements between the United States and the Philippines that set forth their respective obligations. If the Philippines desires to remain neutral and not be declared a co-belligerent in a future United States-PRC conflict while maintaining its alliance with the United States, the Philippines has a very narrow line within which to operate. If a conflict were to break out, the Philippines would most likely be unable to maintain its neutrality for long without being drawn into the conflict. With the establishment of the new sites in the Philippines, even though such sites are not considered permanent, the Philippines would need to signify to the international community, specifically to the PRC that it desired to remain neutral in the conflict and ensure that its obligations of neutrality are met. However, the United States could call upon the Philippines to act in accordance with the bilateral agreements if there was an armed attack in the Pacific. Regardless of whether the Philippines sought to remain neutral, because of its proximity to the PRC, its strategic importance in the Pacific, it will most likely have no choice but to become involved in the conflict.

II. RIGHTS AND DUTIES OF NEUTRAL STATES

During an armed conflict, a State may either be a belligerent or a neutral.[7] The law of neutrality arose from belligerent State acts of interference with non-participants' maritime trade in attempts to curtail the war-sustaining commerce of opposing belligerents with third States.[8] Toward that end, the concept of neutrality

[7] YORAM DINSTEIN, WAR, AGGRESSION AND SELF-DEFENCE 25 (2011).
[8] CONSTANTINE ANTONOPOULOS, NON-PARTICIPATION IN ARMED CONFLICT: CONTINUITY AND MODERN CHALLENGES TO THE LAW OF NEUTRALITY 1 (Cambridge Univ. Press 2022).

has resulted from the evolution of three areas: (1) customary international law, (2) treaties, and (3) other non-treaty texts.[9]

In the early 1900s, there was a major push to codify the law of neutrality.[10] During the Second Hague Peace Conference, two conventions concerned neutrality: the Convention of Neutrality in Land Warfare and the Convention on Neutrality in Naval Warfare, also known as Hague Conventions V and XIII of 1907.[11] Later, non-treaty texts such as the London Declaration of 1909, the Hague Rules of Air Warfare of 1923, the San Remo Manual of Maritime Warfare of 1994, and the Humanitarian Policy and Conflict Research Manual on International Law Applicable to Air and Missile Warfare also outlined international understanding and prevailing scholars' views regarding neutrality.[12]

The general principle of neutrality applicable in international armed conflicts is that a State that is neutral or has declared its neutrality in an armed conflict must abstain from taking part in the armed conflict to maintain its neutrality.[13] The neutral State must also act impartially toward all belligerent States and not favor one over the other.[14] A State that is neutral has the right to the inviolability of its territory, where its sovereign territory is not attacked or destroyed, as well as the freedom of continued peaceful relations with all other States, including the belligerents.[15] These rights and duties of a neutral State are the basis for which neutrality is analyzed in international law.

Some States have sought to maintain a permanent neutrality status. Such status signifies to the international community that the State intends to maintain neutrality in all current and future conflicts. For example, between 1830 and 1914 Belgium, by virtue of a treaty, established itself a permanently neutral State.[16] In 1815, Switzerland established its permanent neutrality status as part of a general peace settlement of the Congress of Vienna.[17] During the Cold War, Sweden sought to establish itself as a neutral and sought recognition by other States by voluntary proclamation.[18]

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[9] *Id.* at 75.
[10] STEPHEN C. NEFF, THE RIGHTS AND DUTIES OF NEUTRALS: A GENERAL HISTORY 129 (2000).
[11] *Id*. *See also* Convention on Maritime Neutrality, Feb. 20, 1928, 135 L.N.T.S. 187 [hereinafter Havana Convention].
[12] ANTONOPOULOS, *supra* note 8, at 75.
[13] *Id.*
[14] Convention (V) Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land art. 9, Oct. 18, 1907, 36 Stat. 2310 [hereinafter Hague Convention (V)].
[15] *See id.* at art. 1.
[16] ANTONOPOULOS, *supra* note 8, at 12.
[17] *Id.*
[18] *Id.*

If two States have entered into a collective security agreement and one State becomes a belligerent against a third party, the neutral State does not automatically lose its neutral status solely by virtue of being in a collective security agreement or a basing agreement with a belligerent.[19] However, there are certain requirements that both the belligerent State and the neutral State must abide by in order for the neutral State to maintain its neutral status.

A. Inviolability of Neutral Territory – Sea and Air

A State's sovereign territory includes the State's land mass, internal waters, territorial sea, archipelagic waters, and the subsoil and airspace above such areas.[20] Under international law, belligerents are expressly forbidden to use neutral ports and waters as a base of naval operations against their opponents.[21] Within the territorial sea or internal waters of a neutral State, any act of hostility including visit, search, and capture by a belligerent warship is a violation of neutrality by the belligerent, and therefore a neutral may not expressly permit these acts of hostilities in its territorial sea or internal waters.[22] However, neutrality is not affected by the mere passage of belligerent warships through the territorial sea.[23] Neutrality of a coastal State is also not affected by the presence of up to three belligerent warships in one of its ports at the same time for replenishment of food, water, and fuel with quantities sufficient to reach a port in the belligerent's own territory and for repairs necessary to make the vessels seaworthy but not restore or increase their fighting capacity.[24]

Additionally, the neutral State has certain rights within its own airspace. Article 40 of the Hague Rules of Air Warfare provides for a prohibition of entry

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[19] A basing agreement is an agreement whereby the host State agrees to cede some of its sovereignty to a second State wherein the second State may, for example, house their military forces permanently or temporarily or conduct aspects military operations within that host State. ALEXANDER A. COOLEY, BASE POLITICS: DEMOCRATIC CHANGE AND THE U.S. MILITARY OVERSEAS 10 (2008).

[20] The sovereign territory does not extend to the exclusive economic zone (EEZ) and the continental shelf. Within the EEZ and the continental shelf, belligerents have the right to conduct military operations, lay mines, and exercise belligerent rights with respect to neutral vessels, but have the requirement of due regard concerning the neutral coastal State's sovereign rights of exploration and exploitation of the resources of the EEZ and the continental shelf as well as the coastal State's duty to protect the marine environment. *See* ANTONOPOULOS, *supra* note 8, at 75; *San Remo Manual on International Law Applicable to Armed Conflicts at Sea*, Int'l Inst. Humanitarian L. (Dec. 31, 1995), https://bit.ly/3rjqzqE [hereinafter *San Remo Manual*].

[21] Convention (XIII) Concerning the Rights and Duties of Neutral Powers in Naval War, art. 5, October 18, 1907, [hereinafter Hague Convention (XIII)]; Convention on Maritime Neutrality, Feb. 20, 1928, 135 L.N.T.S. 187 [hereinafter Havana Convention]; *San Remo Manual*, *supra* note 20.

[22] Hague Convention (XIII), supra note 21, at art. 2; *see also San Remo Manual*, supra note 20 ("Within and over neutral waters . . . hostile actions by belligerent forces are forbidden.").

[23] Hague Convention (XIII), supra note 21, at art. 10.

[24] *Id.* at art. 12–15.

of belligerent aircraft into the jurisdiction of a neutral State, and the San Remo Manual provides that belligerent military and auxiliary aircraft may not enter neutral airspace.[25] There are some exceptions: the neutral State may allow belligerent military aircraft in distress to enter its airspace and land but must intern both the aircraft and crew for the duration of the armed conflict; the neutral State must at all times keep open to belligerents its airspace above international straits and archipelagic sea lanes; and neutral States may allow belligerent military aircraft to enter its airspace for the purpose of capitulation.[26]

Article I of Hague Convention V outlines a fundamental right of a neutral State to prohibit a belligerent from conducting military operations on neutral territory;[27] this certainly includes the land territory, but presumably extends to internal waters, the territorial sea, and the air space above these areas.[28] The U.S. position mirrors the international position and requires belligerents to refrain from unauthorized entry into the territory of a neutral State and refrain from hostile actions or other violations of neutrality.[29]

B. Inviolability of Neutral Territory – Land

Until the beginning of 19th century, belligerents could transport troops and supplies across neutral territory.[30] A prohibition against such action was codified in Hague Convention V.[31] Belligerents, therefore, are forbidden from moving troops or convoys of either munitions of war or supplies across the territory of a neutral power, and a neutral State is generally under an obligation to prohibit the belligerent from doing so.[32] For example, on March 1, 2003 the United States requested that Turkey permit 62,000 troops to travel through Turkey to invade northern Iraq as part of Operation Iraqi Freedom.[33] In order to maintain its neutrality, Turkey rejected the U.S. request.[34] Additionally, if a belligerent's troops enter the territory of a neutral State without permission, the neutral State is under an obligation to disarm and intern the troops for the duration of the armed

[25] *San Remo Manual*, *supra* note 20.
[26] PROGRAM ON HUMANITARIAN POL'Y & CONFLICT RSCH. AT HARV. UNIV., HPCR MANUAL ON INTERNATIONAL LAW APPLICABLE TO AIR AND MISSILE WARFARE 172 (2013).
[27] Art. 1 states that "the territory of neutral Powers is inviolable" leading to the conclusion that there is a fundamental right to prohibit a belligerent from conducting hostilities in neutral territory.
[28] ANTONOPOULOS, *supra* note 8, at 76.
[29] DOD LAW OF WAR MANUAL, supra note 4, ¶¶ 15.3.1.1.–2.
[30] ANTONOPOULOS, *supra* note 8, at 82.
[31] Hague Convention (V), *supra* note 14, at art. 7.
[32] *Id.* at art. 2, 11.
[33] ANTONOPOULOS, *supra* note 8, at 76.
[34] While some members of the Turkish parliament rejected the proposal because they did not want Turkey to enter the war, some rejected because they wanted more concessions from the United States before making such a commitment. Philip P. Pan, *Turkey Rejects U.S. Use of Bases*, WASH. POST (Mar. 2, 2003), https://wapo.st/3PJuiHx.

conflict.[35] In January 1991, when Iraqi Air Force jets flew to Iran during Operation Desert Storm, the Iranian authorities interned the planes and their crews for the duration of the conflict.[36]

However, the prohibition against a neutral State permitting belligerent troops in its territory is not absolute and can be affected by the purpose of the belligerent troops' presence. During World War II, Sweden made concessions to Nazi Germany by allowing the transit of German troops and munitions supplies across its territory.[37] Sweden was a neutral State and, as a result, it was under an obligation not to allow its territory to be used in such a manner per the Hague Conventions. Britain protested, but Sweden argued that the troops were either sick or personnel on leave,[38] relying on the rules that troops who are wounded or sick may pass through neutral territory without violating the neutrality of the neutral State, so long as the only personnel transported are actually wounded or sick or accompanying medical personnel and no materiel of war is transported.[39]

As with the territorial sea, neutral land territory also may not be used as a base of operations for any party to the conflict.[40] While the Hague Convention V does not include an express provision prohibiting belligerents from using the land territory of a neutral State as a base of operations, such a prohibition may be inferred from Articles 2 and 3, which prohibit the "mov[ing of] troops or convoys of either munitions of war or supplies across the territory of a neutral Power," as well as erecting new or using existing communications facilities in neutral territory for military purposes and the concomitant duty of the neutral State not to allow these acts."[41]

The DoD Law of War Manual also prohibits using neutral territory as a base of operations, but it broadens the prohibition to include not just utilization of the physical territory but also "(1) outfitting hostile expeditions with supplies and services; (2) recruiting forces in neutral territory; (3) establishing military communications facilities in neutral territory; and (4) moving belligerent forces and convoys of military supplies on land."[42] While the DoD Law of War Manual prohibits the use of neutral territory as a base of operations, that does not necessarily mean that the base or installation that is located in a neutral country must be shuttered in order for the neutral country to remain neutral; it merely

[35] Hague Convention (V), supra note 14, at art. 2, 11.
[36] ANTONOPOULOS, *supra* note 8, at 76.
[37] *Id.* at 79.
[38] *Id.*
[39] Hague Convention (V), *supra* note 14, at art. 14; DOD LAW OF WAR MANUAL, *supra* note 4, ¶ 15.18.
[40] Hague Convention (V), *supra* note 14, at art. 2; Hague Convention (XIII), *supra* note 21, at art. 5.
[41] Hague Convention (V), *supra* note 14, at art. 2, 3.
[42] DOD LAW OF WAR MANUAL, *supra* note 4, ¶ 15.5.

means that the base of operations cannot be used in a conflict if it is located in the neutral territory.

C. Loss of Neutral Status and Transition to Co-Belligerency – The Support Test

A State may lose its status as a neutral by taking action that is in contravention of its rights and duties as a neutral State under international law. There is a duty on the part of the neutral power to use force to prevent belligerent powers from using the neutral State's territory during an armed conflict.[43] If a neutral State fails to take action to stop the belligerent from using the neutral's territory, then the neutral State is no longer neutral.[44] If a neutral fails to safeguard its territorial integrity because either it is unwilling or unable to act, the other belligerent is entitled to take action against enemy forces in the neutral territory in self-defense.[45]

For example, in 1954 the Final Declaration of the Geneva Accords outlined that Cambodia was to remain neutral in the conflict in Vietnam.[46] While the United States did not sign the Final Declaration, the Final Declaration signaled to the international community an intention of Cambodia to maintain neutrality. In November 1957, Cambodia's National Assembly enacted its neutrality into domestic law.[47] Despite Cambodia's declared neutrality, Norodom Sihanouk, the King, Prince, and Chief of State of Cambodia sought to assist both sides of the

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[43] *See, e.g.*, Hague Convention (XIII), *supra* note 21, at art. 8 ("A neutral Government is bound to employ the means at its disposal to prevent the fitting out or arming of any vessel within its jurisdiction which it has reason to believe is intended to cruise, or engage in hostile operations, against a Power with which that Government is at peace. It is also bound to display the same vigilance to prevent the departure from its jurisdiction of any vessel intended to cruise, or engage in hostile operations, which had been adapted entirely or partly within the said jurisdiction for use in war.") ("A neutral Power is bound to exercise such surveillance as the means at its disposal allow to prevent any violation of the provisions of the above Articles occurring in its ports or roadsteads or in its waters.").

[44] DOD LAW OF WAR MANUAL, *supra* note 4, ¶ 15.3.2.2.

[45] The U.N. Charter provides that nothing "shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security." U.N. Charter Art. 51. *See also* DOD LAW OF WAR MANUAL, *supra* note 4, ¶ 15.4.2.; Timothy Guideu, *Defending America's Cambodian Incursion*, 11 ARIZ. J. INT'L & COMPAR. L. 215, 223 (1994).

[46] "The Royal Government of Cambodia is resolved never to take part in an aggressive policy and never to permit the territory of Cambodia to be utilized in the service of such a policy. The Royal Government of Cambodia will not join in any . . . military alliance not in conformity with the principles of the Charter of the United Nations, or as long as it is not threated, the obligation to establish bases on Cambodian territory for the military forces of foreign powers." OFF. OF THE HISTORIAN, FOREIGN SERV. INST., DOC. 75, FOREIGN RELATIONS OF THE UNITED STATES, 1952–1954, THE GENEVA CONFERENCE, VOL. XVI (Allen H. Kitchens & Neal H. Petersen eds., Gov't Printing Off. 1981).

[47] Guideu, *supra* note 45, at 225.

conflict.[48] Cambodia also failed to stop North Vietnam from using the Ho Chi Minh Trail and the Sihanoukville Port Route to move supplies and troops, and North Vietnam also established sanctuary bases within Cambodian territory.[49] In addition, Cambodia took captured North Vietnamese soldiers and released them back to the National Liberation Front's representative in Phnom Penh, which was contrary to its requirement as a neutral State to intern the belligerent forces until the end of the conflict.[50] The North Vietnamese use of the territory of Cambodia to move supplies and troops and to establish military outposts violated Cambodia's neutrality obligations. Further, Cambodia's acquiescence to the North Vietnamese also violated Cambodia's neutrality obligations. This series of events ultimately led to the loss of Cambodia's neutral status under international law.[51]

In addition to losing its status as a neutral State, a State's actions may transform it into a co-belligerent in the conflict.[52] If a State loses its neutrality, it does not automatically become a co-belligerent. However, a once-neutral State may become a co-belligerent through the systematic or significant breaches of the State's duties under the law of neutrality; this is also known as the "Support Test."[53] Not all support to a neutral crosses the line to make the party a co-belligerent. For example, the U.S.'s recent provision of military aid to Ukraine does not on its own make the U.S. a co-belligerent, or a party to that conflict.[54] On the other hand, if the neutral State were to continuously permit a belligerent State to maintain its vessels in a port for extended periods of time or to continuously permit a belligerent army to travel across neutral territory to engage in combat, then there is a strong argument that the neutral is now a co-belligerent. In this situation the neutral State is providing continuous, ongoing support to the

[48] *Id.*
[49] *Id.*
[50] *Id.*
[51] *Id.*
[52] On one end of the spectrum is a clear violation of neutrality–where a once-neutral State becomes a co-belligerent through an act of aggression. An act of aggression in defined as "the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations." G.A. Res. 3314 (XXIX), art. 1 (Dec. 14, 1974). This includes the action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State. *See* G.A. Res. 3314 (XXIX), art. 3(g) (Dec. 14, 1974).
[53] Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 HARV. L. REV. 2047 (2005). While Bradley and Goldsmith's article has been challenged (*see*, Michael N. Schmitt, *Providing Arms and Materiel to Ukraine: Neutrality, Co-Belligerency, and the use of Force Articles of War*, LIEBER INSTITUTE WEST POINT (Mar. 7, 2022), https://bit.ly/3Rrn7on (quoting Rebecca Ingber, *Co-Belligerency*, 42 YALE J. INT'L. L. 67, 72–73 (2017)), the legal challenges to the article can be distinguished here. Both Prof. Schmitt and Prof. Ingber argue that non-State actors who provide assistance to a terrorist group whom the U.S. Congress has issued an Authorization for the Use of Military Force and engage in systematic and significant breaches of neutrality
[54] Schmitt, *supra* note 53.

belligerent, in violation of its duties as a neutral State. The neutral State is taking actions that amount to systematic or significant breaches of the State's duties of as a neutral and has crossed the line into supporting the belligerent State. However, there is no clear answer as to when that line is crossed.

In 1969, Cambodia negotiated an agreement with the North Vietnamese, permitting their use of the Sihanoukville Port Route, cementing Cambodia's status as no longer neutral in the Vietnam War.[55] The United States used the Cambodian actions as justification for its incursion into Cambodia during the Vietnam War, arguing that both Cambodia and North Vietnam violated their duties under the law of neutrality despite the Final Declaration of the Geneva Accords.[56] The United States, a belligerent, therefore had the right of recourse to take action in self-defense because Cambodia allowed another belligerent to establish bases in, and conduct hostilities from, Cambodian territory.[57]

D. The Interplay between Neutrality and Bi-Lateral or Multi-Lateral Agreements

Absent a previously established agreement that expressly permits such action, the United States must obtain the consent of the host nation prior to engaging in offensive military action against a belligerent State from a United States military installation or site abroad.[58] Thus, the presence of a previously established agreement, such as a mutual defense treaty, does not automatically override a host nation's neutrality in an armed conflict between the other State party to such agreement, also known as the sending State, and a third State. It merely signifies the *intention* of the host nation to provide military aid to the other party in an armed conflict with another State that threatens the security of either the host nation or the other State party.[59]

Even when a mutual defense agreement is in existence, there may be a situation where one or both State parties of the agreement may desire for one of the parties to remain neutral in an armed conflict between the sending State and a third State. If one of the parties to a mutual defense agreement wishes to remain neutral, they would need to adhere to the requirements of neutrality under international law. However, those requirements could conflict with that party's

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[55] *Id.*
[56] *Id.*
[57] *Id.*
[58] *See* Hague Convention (V), *supra* note 14, at art. 2.
[59] For example, Art. IV of the 1951 Mutual Defense Treaty between the United States and the Republic of the Philippines provides that "Each Party recognizes that an armed attack in the Pacific Area on either of the Parties would be dangerous to its own peace and safety and declares that it would act to meet the common dangers in accordance with its constitutional processes." Mutual Defense Treaty, Phil.-U.S., Aug. 30, 1951, 3 UST 3947-52.

obligations under the mutual defense treaty, causing the neutral party to be in breach of one or the other of its obligations.

There is some debate as to whether a State may retain its permanent neutrality status even after joining a collective security agreement, such as the United Nations or the North Atlantic Treaty Organization. There is an argument that in order for these States to maintain their neutral status, they must remain neutral under all circumstances, including not taking part of any military alliance or military collective security action authorized by an international body.[60] However, that argument fails, as joining a collective security agreement merely indicates a desire to be bound to the agreement, and historical examples show that joining the agreement does not automatically mean that the State is no longer a neutral. During the negotiation of the UN Charter, France proposed inclusion of a provision that membership in the United Nations was incompatible with neutrality.[61] France's concern was that a State would seek to be included as a member of the United Nations, obtaining all of the benefits of membership, but then claim neutrality as the basis for electing not to comply with an obligation under the Charter, such as a provision requiring collective military action.[62] However, this provision was not included in the Charter, and Austria became a member of the United Nations in 1955, along with Switzerland in 2002, despite both having permanent neutrality status at the time that they joined.[63]

However, a State party to the UN Charter that wishes to remain a neutral party cannot officially take a completely neutral stance if the UN Security Council has taken action. A collective security agreement, like the UN Charter, does not prevent a State from being a neutral but may modify a State's ability to comply with the duties of a neutral in cases where obligations under the collective security agreement conflict. For example, a State may elect not to take part in a collective security action authorized under Article 48 of the UN Charter, but that State does not have the right to adopt a stance of complete impartiality and continue, for example, maintaining commercial relations with a State that is a target of measures under Article 41, even if the neutral State has some pre-existing obligation with the target State.[64]

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[60] ANTONOPOULOS, *supra* note 8, at 12.
[61] *Id.* at 59.
[62] *Id.*
[63] *Id.*
[64] *See San Remo Manual*, *supra* note 20. ("Where, in the course of an international armed conflict, the Security Council has taken preventive or enforcement action involving the application of economic measures under Chapter VII of the Charter, Member States of the United Nations may not rely upon the law of neutrality to justify conduct which would be incompatible with their obligations under the Charter or under decisions of the Security Council.").

III. APPLICATION TO U.S.-PHILIPPINE RELATIONS

A. U.S. Military Presence Abroad

After World War II, the United States sought to expand its presence abroad by establishing military operating bases overseas, mainly in Europe and in Asia. Although the number of military bases abroad has gradually decreased since the end of the Cold War, as of 2021, U.S. military facilities outside of U.S. territory numbered around 750 sites, which includes 59 installations in 19 countries.[65] The recent conflict in Ukraine and the potential of a conflict with the PRC has caused the United States to seek to increase its presence abroad, both through an increase in military facilities and an increase in troops stationed abroad.

The host nations that provide the territory and the resources for such installations and facilities enter into some mutually beneficial agreement with the United States. The installations are established according to the terms of those agreements, and, similarly to U.S. diplomatic and consular offices in foreign countries.[66] These agreements are generally categorized into three types: agreements that govern the forces in the region (status of forces agreements), agreements that govern the physical sites (basing agreements), and collective security or mutual defense agreements.[67] The United States may have a mutual defense agreement without having a basing agreement with a certain State, but in most cases where the United States has a basing agreement there also is a mutual defense agreement.[68] In many cases, such as with the Philippines, the terms of both are outlined in the same document.

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[65] In the case of an activity in a foreign country, an installation is any property under the operational control of the Secretary of a Military Department or the Secretary of Defense, without regard to the duration of operational control. U.S. DEP'T OF DEF. INSTRUCTION 4165.14, REAL PROPERTY INVENTORY (RPI) AND FORECASTING (Jan. 17, 2014). In contrast, a site or a facility may include an installation, but also includes any property located in a foreign country that is not under the operational control of the Secretary of a Military Department or the Secretary of Defense. *Id.*

[66] *See* Friedrich v. Friedrich, 983 F.2d 1396, 1401 (6th Cir. 1993); U.S. DEP'T OF STATE, 7 FAM 013, DIPLOMATIC AND CONSULAR PREMISES (Nov. 16, 2022) ("The status of diplomatic and consular premises arises from the rules of law relating to the inviolability and immunity from jurisdiction of the receiving State; the premises are not part of the territory of the sending State (the United States of America). Therefore, contrary to popular belief, a U.S. embassy or consulate is not U.S. soil.").

[67] Basing agreements are agreements that govern the territory which the United States is utilizing. A status of forces agreement governs the military personnel stationed on these installations. In some cases, such as the Philippines, the mutual defense and the basing agreements are included in the same documents. *See* Treaty of Mutual Cooperation and Security, Japan-U.S., Jun. 23, 1960, 11 U.S.T. 1632.

[68] *Id.*

Host countries often view basing and mutual defense agreements with the United States as a symbol of the broader United States-host country relations– indicating that these host nations have a more favored status with the United States because the United States chose to locate a military operating base within the host nation's territory. The United States usually seeks to establish mutual defense agreements, and in some cases, basing agreements because the United States views the security of the host country as so paramount to the United States' own security that it will assist in defense.[69]

While these agreements are also beneficial to the United States, the United States faces some challenges with respect to basing agreements. After World War II, the United States enjoyed "near exclusive use rights over military [installations.]"[70] However, over the years, and during subsequent renegotiations, host nations were seen to "criticize[] the terms of the agreement[s] as 'unequal' or 'colonial.'"[71] The agreements may also unintentionally signal tacit support for the host nations' governments and regimes. For example, the U.S.'s western European allies strongly opposed the U.S.-Spain 1953 Madrid Pact with the government run by General Francisco Franco who, at the time, was completely ostracized from the international community due to his autocratic policies.[72] In addition, in the 1990s, other Central Asian countries viewed the U.S agreement with Uzbekistan as an endorsement of the Uzbek regime's policies and undemocratic tendencies.[73]

B. Present-day Developments

In 1898, as a result of the Spanish-American War, the Philippine Islands, a former Spanish colony, became a U.S. territory.[74] The Philippines gained independence in 1946 and, soon thereafter, the United States and the Philippines signed the United States-Republic of Philippines Military Bases Agreement (MBA).[75] The terms of the agreement granted to the United States "certain lands of the public domain" rent-free for a period of 99 years.[76] The United States retained "exclusive sovereignty rights over its bases," which included 23 military installations covering approximately 250,000 hectares.[77] Under the MBA, the United States had the ability to move weapons and equipment amongst the

[69] COOLEY, *supra* note 19 at 7.
[70] Andrew I. Yeo, *Security Sovereignty, and Justice in U.S. Overseas Military Presence*, 19 INT'L J. PEACE STUD. 43, 48 (2014).
[71] *Id.*
[72] COOLEY, *supra* note 19 at 7.
[73] *Id.* at 7–8.
[74] Eleanor Albert, *The U.S.-Philippines Defense Alliance*, COUNCIL ON FOREIGN RELATIONS (Oct. 21, 2016), https://on.cfr.org/3PI51x7.
[75] *Id.*
[76] Agreement Concerning Military Bases, Phil.-U.S., Mar. 14, 1947, 61 Stat. 4019.
[77] Yeo, s*upra* note 70, at 49.

facilities and had the exclusive authority to govern, maintain, and construct on the installations without consulting the Philippines.[78]

In 1951, the United States and the Philippines signed a Mutual Defense Treaty (MDT), which supplemented the MBA.[79] Unlike the MBA, which was a basing agreement, the MDT was a collective security agreement.[80] The MDT provided for a "mutual commitment to peacefully resolve international disputes, separately or jointly developing capacity to resist attack, and the need for consultation when the territorial integrity, political independence, or security of the United States or the Philippines is under threat of attack in the Pacific."[81]

One matter of controversy regarding the MDT is the potential for differing interpretations between the United States and the Philippines regarding disputed territory, which may be of concern if a conflict broke out in, for example, islands whose territory is in dispute.[82] The MDT provides that an armed attack that would activate the treaty, requiring mutual defense, would include an attack on a "metropolitan territory" or "island territory" under the control and jurisdiction of either party in the Pacific.[83] There is much disputed territory within the South China Sea. The Philippines has made some territorial claims after the enactment of the MDT to islands which other States, specifically the PRC, claim as their own sovereign territory.[84] The United States interprets the treaty so as not to apply to those islands.[85] If the PRC, therefore, were to engage in an act of aggression in such disputed territory, the United States has interpreted the triggering provision of the MDT as not requiring the United States to act in this case.[86]

Between 1947 and 1991, the MBA "underwent at least forty amendments which returned based land to the Philippines and provided the Philippine government greater control over the U.S. [installations]."[87] The first of these agreements was the Bohlen-Serrano Memorandum of Agreement, which returned seventeen installations totaling 117 hectares to the Philippines.[88] In a later addendum to the Bohlen-Serrano Agreement, the Philippines negotiated a clause

[78] Albert, *supra* note 74.
[79] Mutual Defense Treaty, Phil.-U.S., Aug. 30, 1951, *supra* note 59.
[80] *See id.* at art. IV.
[81] KENTARO WANI, NEUTRALITY IN INTERNATIONAL LAW: FROM THE SIXTEENTH CENTURY TO 1945 (2017).
[82] *Id.*
[83] *Id.*
[84] South China Sea Arbitration (Phil. v. China), Case No. 2013-19 (Perm. Ct. Arb. 2016).
[85] WANI, *supra* note 81.
[86] *Id.*
[87] COOLEY, s*upra* note 19, at 49.
[88] *Id.*

that required "prior consultation" for use of any of the remaining installations outside of the scope of the MDT and the Southeast Asia Treaty Organization.[89]

In 1966, implementation of the Ramos-Rusk Agreement shortened the term limit of the MBA from 99 years to 25 years from its signing, which moved the expiration date to 16 September 1991.[90] In 1979, the United States agreed to review the MBA every five years until the expiration and, in addition, transferred control of the remaining installations to the Philippine government whereby a Philippine commander would be appointed to head each installation.[91] With the expiration date looming, the Philippines needed to determine the options available. In February 1987, the Philippine government revised its Constitution, giving the Philippine Senate the authority to determine what was to occur after the expiration date of the MBA.[92] In a vote of 12 to 11, the Philippine Senators voted against base renewal.[93] On November 24, 1992, U.S. military forces completed their withdrawal from the Philippines.[94]

However, with the looming Chinese regional threat in the late 1990s as well as concerns about domestic Islamic terrorism, the Philippines became more amenable to U.S. presence in the country.[95] In 1998, six years after the withdrawal of all U.S. troops in the region, the United States and the Philippines entered into a Visiting Forces Agreement (VFA), which allowed for U.S. and Philippine military forces to conduct joint exercises which focused on training and capability enhancement for addressing crises or natural disasters.[96] The VFA also outlined procedures for U.S. Service Members to enter on official business as well as procedures for how to resolve issues that may arise as a result of U.S. forces being present in the Philippines.[97] However, no troops were permanently assigned to the Philippines. As part of the VFA, U.S. military personnel were deployed to the Philippines to assist and advise as part of Operation Enduring Freedom due to the presence of terrorist groups within the Philippines.[98] The program was widely considered a success.[99]

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[89] *Id.*
[90] *Id.*
[91] *Id.*
[92] *Id.* "After the expiration in 1991 of the [MDA], foreign military bases, troops, or facilities shall not be allowed in the Philippines except under a treaty duly concurred in by the Senate and, when the Congress so requires, ratification by a majority of the votes cast by the people in a national referendum." *Id.*
[93] *Id.*
[94] *Id.* at 82.
[95] *Id.* at 86.
[96] WANI, s*upra* note 81.
[97] John Schaus, *What is the Philippines-United States Visiting Forces Agreement, and Why Does it Matter?*, CENTER FOR STRATEGIC AND INTERNATIONAL STUDIES (Feb. 12, 2020), https://bit.ly/3Zo8KDt.
[98] *Id.*
[99] *Id.*

In 2014, the United States and the Philippines signed the Enhanced Defense Cooperation Agreement (EDCA), which permitted U.S. military presence in the Philippines but did not permit permanent military presence or a permanent base in the Philippines.[100] The support that the United States would provide under the EDCA included humanitarian assistance and maritime operations support.[101] U.S. troops were also granted broad access to the Philippine military bases at the invitation of the Philippine government.[102] In November 2013, the United States provided more than $87 million in humanitarian assistance after Typhoon Haiyan, delivering essential relief supplies and equipment.[103]

In April 2016, then-U.S. Secretary of the Defense, Ashton Carter, said "our long-running defense alliance has been a cornerstone of peace and stability in the region."[104] Obama administration officials coined the U.S. commitment to the Philippines as "ironclad."[105] However, in June 2016, Rodrigo Duterte was elected President of the Philippines.[106] President Duterte did not have a robust relationship with the United States. In February 2020, the Philippines gave notice to the United States that it intended to withdraw from the VFA after the United States revoked the visa of one of President Duterte's allies, Senator Ronald "Bato" dela Rosa, who, as the Chief of the Philippine National Police, led anti-drug efforts that resulted in the deaths of thousands of Filipinos suspected of involvement in the illegal drug market.[107] Around the same time, President Duterte announced his "independent foreign policy" that sought to keep greater distance from the United States.[108] Later in the summer of 2020, President Duterte reversed course regarding the VFA.[109]

C. Can the Philippines Remain Neutral?

The 2022 National Defense Strategy states that "the most comprehensive and serious challenge to U.S. national security is the PRC's coercive and increasingly aggressive endeavor to refashion the Indo-Pacific region and the

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[100] Enhanced Defense Cooperation Agreement, Phil.-U.S., Apr. 28, 2014, T.I.A.S. 14-625. *See also* WANI, *supra* note 81.
[101] WANI, *supra* note 81.
[102] *Id.*
[103] *Id.*
[104] *Id.*
[105] *Id.*
[106] *Id.*
[107] *Id.*
[108] *Id.*
[109] John Grady, *Philippine SECDEF: Mutual Defense Treaty Review Must Assess U.S. Commitment to Philippines*, USNI NEWS (Sep. 8, 2021), https://bit.ly/3PoA5Rj.

international system to suit its interests and authoritarian preferences."[110] One aspect of the PRC's foreign policy objectives is to "undermine U.S. alliances and security partnerships in the Indo-Pacific region . . . to coerce its neighbors and threaten their interests."[111]

As a result of the looming PRC threat, in February 2023, the United States and the Philippines announced the expansion of U.S. military presence in the Philippines.[112] Although Secretary of Defense Lloyd Austin stated that the United States did not intend to re-establish permanent bases in the Philippines, the presence of U.S. troops in the country could be viewed as both an attempt to deter any potential Chinese aggression and an attempt to prepare for a military response should the United States desire to take any offensive or defensive action against China.[113] After the agreement, Secretary Austin spoke with Philippine Officer-in-Charge of the Department of National Defense, Carlito Galvez, who reiterated that the MDT between the Philippines and the United States extends to Philippine armed forces, aircraft, and public vessels, including those of its Coast Guard, anywhere in the South China Sea.[114]

Recently, the PRC has been taking action in and around the Philippines, massing more than 40 vessels including a PLA Navy ship around Thitu Island within its 12-nautical mile territorial sea and using a military-grade laser against a Philippine vessel operating lawfully around the Second Thomas Shoal, temporarily blinding some of the crew.[115] After the laser-pointing incident, President Marcos Jr. stated that the Philippines would not invoke the MDT with the United States as such invocation would intensify the tensions in the area and such actions by the PRC were not sufficient to trigger the MDT.[116]

If the Philippines desires to remain neutral in any United States-PRC conflict, even if U.S. forces were in Philippine sovereign territory, the Philippines could, and has, publicly stated that these sites cannot be used by the United States

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[110] *National Defense Strategy of The United States of America Including the 2022 Nuclear Posture Review and the 2022 Missile Defense Review*, U.S. DEP'T OF DEF. (Oct. 27, 2022), https://bit.ly/46gkolX.
[111] *Id.*
[112] *Philippines, U.S. Announce Four New EDCA Sites*, U.S. DEP'T OF DEF. (Feb. 1, 2023), https://bit.ly/3sYDTkG.
[113] *Secretary of Defense Lloyd J. Austin III Joint Press Briefing with Philippine Secretary of National Defense Carlito Galvez in Manila, Philippines*, U.S. DEP'T OF DEF. (Feb 2, 2023), https://bit.ly/44XbOaH.
[114] *Readout of Secretary of Defense Lloyd J. Austin III's Call with Philippine Senior Undersecretary and Officer in Charge of the Department of National Defense Carlito Galvez*, U.S. DEP'T OF DEF. (Mar. 20, 2023), https://bit.ly/3EPBFXn.
[115] *Id.*
[116] *PBBM Says Invoking MDT with US after China's Laser-Pointing Incident Will Only Escalate Tension in WPS*, OFF. OF THE PRESIDENT OF THE PHIL., PRESIDENTIAL COMMC'NS OFF. (Mar. 20, 2023), https://bit.ly/3PJ5Be8.

in any offensive operations and can even request the United States vacate those sites.[117] Such an action is not without precedent. In 2005, Uzbekistan formally notified the United States that it was terminating U.S. access to the Karshi-Khanabad (K2) base in the south of the country.[118] The United States used that base as a major staging facility to support reconnaissance, combat, and humanitarian missions in neighboring Afghanistan. The United States was critical of the Uzbek government's crackdown on antigovernment demonstrators in May 2005, and this was seen as a retaliation for such criticism.[119] The United States voluntarily vacated K2 in late 2005. If the Philippines took similar action in the future, the United States may choose to remove its troops from the country and stop using the facilities.

However, that is not the only option If the United States and the PRC were to enter into a conflict, the United States may seek to use the current and recently established facilities within the Philippines as bases from which to operate despite President Marcos's statement that the United States may not launch offensive attacks against the PRC from the Philippines. Previously established EDCA sites include Fort Magsaysay, which improvements include command and control infrastructure and urban combat training facilities; Base Air Base, improvements upon which include command and control infrastructure, fuel storage, and aircraft parking; Antonio Bautista Air Base, improvements upon which include an ammunition warehouse, fuel storage, and command and control infrastructure; Mactan-Benito Abuen Air Base, improvements upon which include fuel storage facility; and the Lumbia Air Base.[120] All of these locations have the infrastructure to provide support to the U.S. armed forces in the event of a conflict. In addition, the expanded sites include Naval Base Camilo Osias in Santa Ana, Cagayan; Camp Melchor Dela Cruz in Gamu, Isabela; Balabac Island in Palawan; and Lal-lo Airport in Cagayan.[121]

The United States previously continued to use military bases established in a host country when the host country attempted to remove itself from a conflict. In 1986, Spanish President Felipe Gonzalez aggressively denounced U.S. air strikes against Libya and prohibited the use of Spanish bases for the campaign even though the United States maintained military bases in Spain.[122] Then, in March 2004, Spain's President-elect Jose Luis Rodriguez Zapatero ordered the withdrawal of Spanish troops from Iraq, and U.S. defense and policy planners

[117] *A Conversation with President Ferdinand Marcos, Jr. of the Philippines, CSIS*, *supra* note 2.
[118] COOLEY, *supra* note 19, at 2.
[119] *Id.*
[120] U.S. Embassy Manila, *Enhanced Defense Cooperation (EDCA) Fact Sheet*, U.S. EMBASSY IN THE PHIL. (Mar. 20, 2023), https://bit.ly/3EJSHX5.
[121] *Philippines, U.S. Announce Locations of Four New EDCA Sites*, U.S. DEP'T OF DEF. (Apr. 3, 2023), https://bit.ly/3sYOUCA.
[122] COOLEY, *supra* note 19, at 2.

expected the new administration to withdraw its blanket authorization for the use of the bases in Spain to support the war and were surprised when no such request materialized.[123] Instead, during Spain's withdrawal the United States continued to fly daily sorties and logistical missions in support of Operation Iraqi Freedom from the Moron airbase and Rota naval station on Spanish territory.[124] Spain was not concerned about whether or not a belligerent would consider it a neutral territory—its geographic location was far enough removed from the conflict that there was no possibility that it would be physically attacked.[125] In a United States-PRC conflict, the Philippines would not have the same luxury.

There is no express provision in either the EDCA or the MDT that permits the United States to take unilateral offensive measures in an armed conflict from the agreed upon sites. However, if the United States did take unilateral measures against the PRC, and the Philippines were to violate its neutrality by either failing to stop or expressly permitting the United States to move forces, munitions, and other supplies through their territory, or permit the U.S to attack the PRC from Philippine territory, the PRC could take action against the Philippines and attack the United States at any of the facilities from which they were operating.

On the other hand, if the United States did not use these sites as a base of operations, the United States could continue to use these sites without violating Philippine neutrality as long as the United States did not use the Philippines' ports and waters as base of naval operations, use the sites to outfit hostile expeditions with supplies and services, recruit forces in the Philippines, establish military communications facilities in the Philippines, or move belligerent forces and convoys of military supplies through the Philippines.[126] If the Philippines does not prevent the United States from utilizing the territory, it would lose its neutrality.

In addition to violating its neutrality, the Philippines could become a co-belligerent through *systematic or significant violations* of its duties under the law of neutrality, thus making the Philippines itself, not just the U.S. forces within the Philippines, a lawful target of the PRC.[127] These acts include the Philippine armed forces expressly joining the United States in armed conflict with the PRC, the Philippines *continuously* permitting U.S. warship(s) to remain in port more than 24 hours, or failing to stop the United States if the United States made *repeated* attacks against the PRC from neutral Philippines territory.[128]

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[123] *Id.*
[124] *Id.* at 1.
[125] *Id.*
[126] DOD LAW OF WAR MANUAL, *supra* note 4, ¶ 15.5.
[127] *See* Schmitt, s*upra* note 54.
[128] *Id.*

IV. HOW TO WALK THE TIGHTROPE AND, WHEN ALL ELSE FAILS, NAVIGATE THE LOSS OF NEUTRALITY

If a conflict were to break out, and the Philippines desired to remain neutral, the Philippines would most likely be unable to maintain its neutrality for long without being drawn into the conflict due to not only its proximity to the PRC and Taiwan but also due to the current relationship with the United States, including its bilateral agreements in effect. If the Philippines were to force the United States out of the facilities, the United States would likely allege that the Philippines was in violation of the MDT and the EDCA. But, if the Philippines were to seek to remain neutral in a future U.S.-PRC conflict, yet maintain a good relationship with the United States, the Philippines has a very narrow tightrope to walk, especially with the recent addition of the four new military facilities.

President Marcos has made it clear that the United States may not take any offensive action against the PRC from the territory of the Philippines; however, the Philippines has reversed course previously on publicly statements. As recently as 2020, President Duterte reversed course his position to limit the Philippines relations with the United States. Even though there is a new President who is serving a six-year term until 2028, it is possible that there may be a reversal of position either in the near term or in after the next election. However, in the meantime the Philippines' public position is that there will be no offensive action taken from inside of the Philippine territory.

There is nothing in any of the currently standing agreements that are publicly available that expressly permit the United States to utilize military facilities in the Philippines in a conflict with a third State. If a conflict were to break out, the Philippines may expressly prohibit the United States from operating out of the military bases in the Philippines. While the current administration and the general population are favorable to the United States, there could be another administration, similar to President Duterte's, that is not as favorable to the United States; or sentiment may change when conflict is brought to the "backyard" in the Philippines.

V. CONCLUSION

Ultimately, if an armed conflict were to break out between the United States and the PRC and the Philippines wanted to remain neutral, it would be in the Philippines' best interest to expressly state to the international community its intention to remain neutral, to signal to the PRC that it is neither a co-belligerent nor has acquiesced to the United States' belligerent acts. While it is not a requirement to publicly state one's intention to remain neutral, such action is in conformity with how other States have acted in situations where they have sought their neutrality status to be recognized.

However, the strategic location of the Philippines due to its proximity to the PRC would not afford the Philippines the ability to allow the United States to take offensive action from its territory and still remain neutral, as Spain was able to do so during Operation Iraqi Freedom. The Philippines would be stuck between a rock and a hard place, and it may just not be feasible for the Philippines to remain neutral in a conflict on its doorstep.

QUESTIONS OF NEUTRALITY AS APPLIED TO A POTENTIAL CONFLICT IN TAIWAN

Lieutenant Commander Daniel R. McGinley, JAGC, USN*

The law of neutrality in international law has survived the prohibitions on the use of force found in the U.N. Charter and other treaties of the twentieth century. Further, the concept of qualified neutrality, applied in World War II by the United States prior to its entry as a belligerent in the conflict, and apparently (though not explicitly) again by the United States and other European states with respect to Ukraine, appears to have a growing foothold in international law. With regular warnings of a potential conflict between the Peoples Republic of China (hereinafter "China") and the Republic of China (hereinafter "Taiwan"), the question is how the law of neutrality, including qualified neutrality (i.e., where a third-party state maintains neutrality while providing war materiel to a victim of aggression), would apply to such a conflict.

This article analyzes a potential armed conflict between China and Taiwan accepting that Taiwan is not widely recognized as a state, and thus a conflict would initially be treated under a non-international armed conflict paradigm. Next, this article applies the standard for recognizing belligerency to Taiwan in a potential armed conflict with China, and what that would mean for applying the doctrine of neutrality and treating the conflict as an international armed conflict. Arguing that the doctrine of neutrality may be applied to such an armed conflict, the article then turns to whether the doctrine of qualified neutrality could and should extend to a situation where China appears to be the aggressor against Taiwan. The article then argues that although the concept of aggression applies to unlawful behavior against states, not against non-state actors, there is a logic to extending the doctrine of qualified neutrality to states engaged in some acts of aggression against a non-state belligerent. This extension of the doctrine is in line with the historical development of neutrality traced from Saints Augustine and Thomas Aquinas, through Hugo Grotius, and eventually to

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the justifications provided by then-Attorney General Robert Jackson on behalf of U.S. qualified neutrality in World War II.

Finally, as discussed throughout, questions of belligerency, neutrality, and qualified neutrality turn more on political and practical considerations than legal doctrine. This article probes the practical considerations for the application of each from the perspectives of the interested parties and argues that recognition of belligerency, application of neutrality, and the extension of qualified neutrality, all provide legal guidance and political maneuver space that may justify their application to an armed conflict between Taiwan and China. Thus, extending qualified neutrality to a conflict between China and Taiwan would provide a legal framework to potentially fit the reality of the situation.

I. INTRODUCTION

Russia's war of aggression in Ukraine has reignited debates over concepts such as aggression, neutrality, and qualified neutrality. The conflict has also served as a case study for those preparing for a potential conflict between the Peoples Republic of China (hereinafter "China") and the Republic of China (hereinafter "Taiwan"). Although there are analogs between the ongoing conflict in Ukraine and a potential conflict in Taiwan, the corresponding legal frameworks will be challenged by a situation that will stand in a gray area between international armed conflict (IAC) and non-international armed conflict (NIAC).

This paper analyzes the law of neutrality as applied to a conflict between a state and non-state actor. The development of neutrality and qualified neutrality will be discussed, as well as how that IAC doctrine has been applied to non-state belligerents. Then, the concepts of recognition of belligerency, neutrality, and qualified neutrality will be applied to a potential conflict between China and Taiwan. Next, an argument will be presented that treating Taiwan as a belligerent and applying the law of neutrality is legally justifiable, but ultimately will turn on political calculations. Finally, an argument will be made for a novel application of the doctrine of qualified neutrality to such a conflict, recognizing the benefits of such an application may be limited.

II. HISTORICAL DEVELOPMENT OF THE PRINCIPLE OF NEUTRALITY

A. Development of Neutrality

The concept of neutrality in armed conflict begins with the writings of Saint Augustine and Saint Thomas Aquinas and the development of just war

theory.[1] Saint Thomas Aquinas argued that there was a moral imperative in armed conflict to assist the side acting justly and not to do anything to support the wrongdoer.[2] Such a moral imperative could hardly justify neutrality, as it assumes a wrongdoer and proscribes action (or inaction) as a result of that determination. Though qualified neutrality would eventually be couched in similar terms, over the next several centuries the idea that neither side in a conflict may be acting unjustly (or justly) gained traction, providing a moral space for states to remain neutral. By the seventeenth century, as states in Europe began to take precedence over the Church in international relations and the moral middle ground continued to grow, Hugo Grotius argued that states who were not party to a conflict may remain impartial as non-participants.[3] In that sense, neutrality was a repudiation of just war theory.

The law of neutrality eventually reached a degree of formalization in the nineteenth and twentieth centuries, but it was largely developed through state practice during the eighteenth and nineteenth century.[4] The formal development of neutrality began with "the two Armed Neutralities of 1780 and 1800, the attitude of the United States towards neutrality, the permanent neutrality of Switzerland and Belgium[,] and the Declaration of Paris of 1856[,]"[5] with the United States attitude contributing significantly to the development of neutrality in the nineteenth century.

The United States sought to be treated as a neutral from its earliest days. During the late eighteenth century, as the United States was establishing itself as a maritime commercial power, it sought to be treated as a neutral for trade purposes. However, U.K. interference with U.S. rights as a neutral to engage in ocean trade with the U.K.'s enemy, France, became a major issue leading to the War of 1812.[6]

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[1] Michael N. Schmitt, *"Strict" Versus "Qualified" Neutrality*, LIEBER INST. WEST POINT: ART. OF WAR, (Mar. 22, 2023), https://bit.ly/3rTRkBL.
[2] *Id*.
[3] *Id*.
[4] Convention (XIII) concerning the Rights and Duties of Neutral Powers in Naval War. The Hague, 18 October 1907, ICRC INTERNATIONAL HUMANITARIAN LAW DATABASES, https://bit.ly/3Rk8qlr (last visited Sep. 9, 2023).
[5] *Id*. The Armed Neutralities were European efforts to protect neutrals from belligerent interference. S*ee* JAMES BROWN SCOTT, THE ARMED NEUTRALITIES OF 1780 AND 1800, at iii (1918). The Declaration of Paris of 1856 (or Treaty of Paris) ended the Crimean War and recognized the rights of neutral vessels. *See* Declaration Respecting Maritime Law Signed by the Plenipotentiaries of Great Britain, Austria, France, Prussia, Russia, Sardinia, and Turkey, assembled in Congress at Paris, Apr. 16, 1856, https://bit.ly/3qKVk7G.
[6] Detlev F. Vagts, *The Traditional Legal Concept of Neutrality in A Changing Environment*, 14 AM. U. INT'L L. REV. 83, 87 (1998), https://bit.ly/45rgUgw.

Moving forward to the Civil War, the United States found itself seeking not to be treated as a neutral, but for other states to remain neutral as it fought the Confederacy.[7] Notably, during the Civil War the United States forced the issue when it blockaded southern states, effectively treating the conflict with the Confederacy as a belligerency.[8] As a result, the United Kingdom recognized the Confederacy as a belligerent and claimed neutrality in the conflict.[9]

However, the United Kingdom violated its obligations regarding due diligence and the law of neutrality when it permitted the Confederacy to purchase ships which could be used by the Confederacy for its war efforts, including the *C.S.A. Alabama*, from shipyards within the United Kingdom.[10] At the conclusion of the war, the United States and the United Kingdom negotiated the Treaty of Washington, which provided an arbitral process to resolve the *Alabama Claims* cases and the alleged violations of the law of neutrality.[11] The tribunal provided for in the treaty would later find that the United Kingdom "failed to use due diligence to fulfil the duties of neutrality."[12] The United States was also found to have violated its obligations to neutrals, as "General Sherman, in chopping a swath of destruction across the lower Confederacy did not always pay heed to the distinctiveness of British-owned plantations and destroyed them too."[13]

B. The Hague Conventions

The next and most significant developments in the law of neutrality were the Hague Conventions of 1907, specifically Hague Convention V, *Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land*, and Hague Convention XIII, concerning the *Rights and Duties of Neutral Powers in Naval War*.[14] These two conventions codified much of the law of neutrality and

[7] *Id*.
[8] U.S. DEP'T DEF., DEPARTMENT OF DEFENSE LAW OF WAR MANUAL ¶ 3.3.3.2 (Jul. 2023), https://bit.ly/3srkdFS [hereinafter LAW OF WAR MANUAL].
[9] *The Neutrality Proclamation*, SPECTATOR, May 18, 1861 at 9 (reprinting the declaration originally issued May 14, 1861 by Queen Victoria).
[10] Alabama Claims of the United States of America Against Great Britain (Gr. Brit. v. U.S.), 29 R.I.A.A. 125, 130–31 (Treaty of Wash. Arb. Trib. 1872), https://bit.ly/45I0Y9l [hereinafter Alabama Claims].
[11] *See* Treaty of Washington, Gr. Brit.-U.S., May 8, 1871, 17 Stat. 863, https://bit.ly/3KXB8X4.
[12] Alabama Claims, *supra* note 10, at 131.
[13] Vagts, *supra* note 6, at 87–88.
[14] *See* Convention (V) Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land, Oct. 18, 1907, 36 STAT. 2310, https://bit.ly/3PbKnFD [hereinafter Hague V]; Convention (XIII) Concerning the Rights and Duties of Neutral Powers in Naval War, 18 October 1907, 36 STAT. 2415, bit.ly/3P93PTg [hereinafter Hague XIII].

today serve as the last major codification of that law, though other treaties relating to international humanitarian law address the rights and duties of neutral states.[15]

Some of the rights and duties provided for in Hague Conventions V and XIII include: "the territory of neutral [p]owers is inviolable,"[16] "[b]elligerents are forbidden to move troops or convoys of either munitions of war or supplies across the territory of a neutral [p]ower,"[17] "[b]elligerents are bound to respect the sovereign rights of neutral [p]owers and to abstain, in neutral territory or neutral waters, from any act which would, if knowingly permitted by any [p]ower, constitute a violation of neutrality,"[18] and "[t]he supply, in any manner, directly or indirectly, by a neutral [p]ower to a belligerent [p]ower, of war-ships, ammunition, or war material of any kind whatever, is forbidden."[19] Acts of war are prohibited in neutral waters, to include "stop, visit, and search, orders to follow a specific course, the exercise of the law of prize, and capture of merchant ships."[20] This prohibition applies to the territorial seas and internal waters of the neutral state.[21]

C. Neutrality After the U.N. Charter

The next major development for the doctrine of neutrality was the prohibition on the use of force found in twentieth century treaties. The latest such treaty, the U.N. Charter, fundamentally altered the law of neutrality, though it did not extinguish it.[22] To demonstrate, consider the position of a neutral state providing material support to a belligerent. Prior to the U.N. Charter, "a belligerent was entitled to use force against a neutral state that either engaged in hostilities alongside its opposing belligerent or provided that belligerent with material support."[23] However, providing material support would not necessarily qualify as an "armed attack" under the U.N. Charter, and thus the offended belligerent would not be justified in responding with force.[24] Instead, that neutral state providing material support to a belligerent at most would be committing an internationally wrongful act, "subject to the remedies available in the law of State

[15] Michael Bothe, *The Law of Neutrality*, *in* THE HANDBOOK OF INTERNATIONAL HUMANITARIAN LAW 605–06 (Dieter Fleck ed., 2021).
[16] Hague V, *supra* note 14, art. 1.
[17] *Id*.at art. 2.
[18] Hague XIII, *supra* note 14, art. 1.
[19] *Id*. at art. 6.
[20] Bothe, *supra* note 15, at 619.
[21] *Id*.
[22] Kevin Jon Heller, *The Law of Neutrality Does Not Apply to the Conflict with al-Qaeda, and It's a Good Thing, Too: A Response to Chang*, 47 TEX. INT'L L.J. 115, 139 (2011), https://bit.ly/3QTUQa0.
[23] *Id*.
[24] *Id*.

responsibility, like countermeasures and reparations."[25] Further, if that neutral state stopped providing material support, it would retain its status of neutrality in the conflict.

In one sense, the U.N. Charter's prohibition on the use of force and recognition of a state's right to self-defense in response to an armed attack, as well as the Charter's collective self-defense by other states of a state which is the victim of an armed attack, helped to further develop the concept of qualified neutrality. Historically, the law of neutrality "required neutral States to observe a strict impartiality between parties to a conflict, regardless of which State was viewed as the aggressor in the armed conflict."[26] Yet, in the twentieth century the concept of qualified neutrality, in which neutral states could provide some level of support to a belligerent state that was the victim of aggression, developed in response to the prohibition on the use of force.[27]

D. Qualified Neutrality

Qualified neutrality predates the U.N. Charter, but grew out of a similar renunciation of war in the Kellogg-Briand Pact of 1928.[28] In the early years of World War II, the United States desired to remain neutral, however, it provided support and materiel to the United Kingdom to aid its war efforts against Germany.[29] In arguing for qualified neutrality, then-Attorney General Robert Jackson drew a thread from just war theorists to Hugo Grotius and found further support from Hersch Lauterpacht (a leading legal scholar of the 20th century), arguing that Germany had violated international law through its acts of aggression.[30] Jackson argued that the prohibition on war "destroyed the historical and juridical foundations of the doctrine of neutrality conceived as an attitude of absolute impartiality in relation to aggressive wars."[31] Thus, in response to

[25] Michael N. Schmitt, *Providing Arms and Materiel to Ukraine: Neutrality, Co belligerency and the Use of Force*, LIEBER INST. WEST POINT: ART. OF WAR (Mar. 7, 2022), https://bit.ly/3DzL9FD; *see also* Int'l Law Comm'n, Rep. on the Work of Its Fifty-Third Session, U.N. Doc. A/56/10, at arts. 22, 31 (2001), https://bit.ly/3KeHjW7 (reciting the Draft Articles on Responsibility of States for Internationally Wrongful Acts).
[26] LAW OF WAR MANUAL, *supra* note 8, ¶ 15.2.2.
[27] *Id*.
[28] Yoram Dinstein, *The Laws of Neutrality*, 14 ISR. Y.B. HUM. RTS. 80, 82 (1984).
[29] *See* Yoram Dinstein, *War, in* AGGRESSION AND SELF-DEFENCE 189 (6th ed. 2017), https://bit.ly/47N8iCj; Bothe, *supra* note 15, at 603.
[30] *See* Address of Robert H. Jackson, Attorney General of the United States, Inter-American Bar Association, Havana, Cuba (Mar. 27, 1941), *in* 35 AJIL 348, 353–54 (1941), bit.ly/47HfD6J.
[31] *Id*. at 9.

Germany's illegal acts of aggression, states were justified in providing support to the victims of that aggression.[32]

The United States has endorsed qualified neutrality as a doctrine (albeit a controversial one), recognizing the doctrine in the Department of Defense's Law of War Manual.[33] It is unclear whether qualified neutrality has been adopted or utilized by other states, as there are few public pronouncements in support of the doctrine. But, in 2022, the concept of qualified neutrality again came to the fore, this time in response to Russia's invasion of Ukraine. Though no state has specifically stated it is acting in accordance with the doctrine of qualified neutrality, the United States and several European allies have arguably remained neutral while providing war materiel in support of Ukraine's defense against the aggression of Russia. Under traditional concepts of neutrality, the provision of such war materiel would violate the law of neutrality, specifically, Article 6 of Hague XIII, as discussed above.[34] However, despite Russian claims of engaging in self-defense or collective self-defense, the international community has recognized Russia's invasion of Ukraine as an act of aggression.[35] Russia has objected to neutral states providing such war materiel in support of Ukraine, but they have not taken actions which would stop that support, nor has the support resulted in an escalation of the conflict beyond its current borders.

The Ukrainian example highlights a difficulty for qualified neutrality regarding who is authorized to determine which state is an aggressor in an armed conflict. The argument is that it is difficult to determine which state is an aggressor in an IAC, as often both sides will claim they are acting in self-defense in response to an act of aggression by the other, and only the U.N. Security Council has been vested with the authority to address such threats to international security.[36] The war in Ukraine demonstrates that there is a fundamental problem with applying such a standard when the alleged aggressor is one of the permanent five members of the Security Council, as the aggressor will veto any resolution declaring they have committed an act of aggression. In lieu of Security Council action, the U.N. General Assembly has asserted the right to make recommendations in the case of, *inter alia*, aggression.[37] Regarding Ukraine, the U.N. General Assembly passed

[32] *Id*. The United States continued to provide support to the British under this theory of qualified neutrality until the bombing of Pearl Harbor in 1941, when the United States entered the war as a belligerent and qualified neutrality was no longer needed as a justification for providing support to the British war effort.
[33] LAW OF WAR MANUAL, *supra* note 8 ¶ 15.2.2.
[34] Hague XIII, *supra* note 14, at art. 6.
[35] *See infra* note 38.
[36] *See* U.N. Charter, arts. 39, 51, Jun. 26, 1945, 59 STAT. 1031.
[37] G.A. Res. 377 (V), Uniting For Peace (Nov. 3, 1950), https://bit.ly/477dIb9 ("Resolves that if the Security Council, because of lack of unanimity of the permanent members, fails to exercise its primary responsibility for the maintenance of international peace and security in any case where

Assembly Resolution ES-11/1, in which it declared in clear terms that the Russian Federation created a crisis through its act of aggression against Ukraine in violation of Article 2(4) of the U.N. Charter.[38] This provides a strong justification for treating Russia as an aggressor and not leaving such a determination solely to the Security Council. Yet, by opening the door of who may declare a state an aggressor, the General Assembly fails to close the door behind itself, potentially leaving such determinations to individual states.

E. Neutrality With Respect to Recognized Belligerents

The law of neutrality generally applies between states and only upon a conflict between two or more states.[39] In other words, the law of neutrality only applies in the context of an IAC.[40] In the case of a NIAC, other obligations are owed between states, but the law of neutrality does not apply. For example, providing materiel support to an insurgency would be viewed as an unlawful intervention in the internal affairs of the victim state, which is an internationally wrongful act.[41] If a state's support or participation on behalf of an insurgency reaches a certain level, it could be viewed as a use of force or even an armed attack.[42]

However, there is an exception to the general concept that the law of neutrality only applies to states, and that is when a NIAC converts to an IAC. One way to convert a NIAC into an IAC is for a rebel faction or an insurgency to

there appears to be a threat to the peace, breach of the peace, or act of aggression, the General Assembly shall consider the matter immediately with a view to making appropriate recommendations to Members for collective measures, including in the case of a breach of the peace or act of aggression the use of armed force when necessary, to maintain or restore international peace and security.").

[38] G.A. Res. ES-11/1, Aggression Against Ukraine (Mar 18, 2022), https://bit.ly/43NpiVS. (The vote was by a vote of 141 in favor, 5 against, 35 abstentions, and 12 absent, and stated, "*Deplores in the strongest terms* the aggression by the Russian Federation against Ukraine in violation of Article 2 (4) of the Charter[.]") (*emphasis in original*).

[39] Bothe, *supra* note 15, at 608.

[40] *Id*. at 610.

[41] *Id*. *See* G.A. Res. 2625 (XXV), Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations (Oct. 24, 1970), https://bit.ly/3KjrBcv (discussing non-intervention and the duty of states to refrain from supporting non-state armed groups in friendly states).

[42] *See* Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14, ¶ 247 (June 27), https://bit.ly/3iTTdrE ("So far as regards the allegations of supply of arms by Nicaragua to the armed opposition in El Salvador, the Court has indicated that while the concept of an armed attack includes the dispatch by one State of armed bands into the territory of another State, the supply of arms and other support to such bands cannot be equated with armed attack. Nevertheless, such activities may well constitute a breach of the principle of the non-use of force and an intervention in the internal affairs of a State, that is, a form of conduct which is certainly wrongful, but is of lesser gravity than an armed attack.").

become a "belligerent" in the conflict. There are at least three paths for such conversion: (1) recognition of the non-state group as a belligerent by the state party to the conflict, (2) recognition of the non-state group as a belligerent by third-party states, and (3) *de facto* conversion of a non-state group into a belligerent due to action by the state party to the conflict.[43] Once an insurgency or rebellion is recognized as a belligerent, the conflict is treated as an IAC for purposes of the law of armed conflict and the law of neutrality applies to the newly recognized belligerent as well as the state party to the conflict.[44]

A state party to a NIAC may decide to recognize rebels or insurgents as a belligerent if they have "acquired a degree of effective control of territory such that they openly challenge the government's claim to represent the State."[45] State parties to internal conflicts are generally reluctant to recognize a rebellion or insurgency as a belligerency, as such conversion seemingly encroaches upon the sovereignty of the state, as it is an acknowledgment that the state does not have effective control over a portion of its territory and people.

The more common approach for conversion of a rebellion or insurgency into a belligerency is for third-party states to recognize the belligerency, as such. The decision to recognize a belligerency is closely tied to the law of neutrality (unless of course the third-party state intended to participate as a belligerent in the conflict), as recognition triggers application of neutrality rules in dealing with both sides of the conflict, *i.e.*, the state party to the conflict and the newly recognized belligerent.[46] This type of recognition of belligerencies goes back at least to the nineteenth century, though a standard for third-party states to recognize a belligerency was developed in the twentieth century.[47]

The standard for third-party States to recognize a belligerency, which has not been used often, requires the following criteria:

- a general state of armed conflict within a State's territory;
- the non-State armed group occupies and administers a significant portion of the State's national territory;
- the armed group acts under responsible chain of command and respects the laws of war; and

[43] *See* Rob McLaughlin, *The Law of Armed Conflict, The Law of Naval Warfare, And a PRC Blockade of Taiwan*, LIEBER INST. WEST POINT: ART. OF WAR (Jan. 30, 2023), https://bit.ly/3Dx54oX.
[44] ROBERT MCLAUGHLIN, RECOGNITION OF BELLIGERENCY AND THE LAW OF ARMED CONFLICT 161 (Michael N. Schmitt ed., 2020).
[45] JAMES UPCHER, NEUTRALITY IN CONTEMPORARY INTERNATIONAL LAW, 5–6 (2020).
[46] MCLAUGHLIN, *supra* note 44.
[47] *See* LAW OF WAR MANUAL, *supra* note 8, ¶ 3.3.3 and associated footnotes.

- circumstances exist that make it necessary for outside States to define their attitude toward the conflict.[48]

Such recognition is normally "restricted to situations in which the third State's interests were materially affected [by the conflict], such as when warfare was occurring at sea that affected the shipping of third States; otherwise, if premature, the third State's recognition of belligerency would amount to intervention in the metropolitan government's domestic affairs."[49]

This standard finds support in the U.S. Department of Defense Law of War Manual,[50] the writings of Hersch Lauterpacht,[51] and specific application of the criteria by the United Kingdom to hostilities between Chinese Nationalists and Communists in the Taiwan Strait in 1956.[52] At that time, the United Kingdom had recognized the Communist People's Republic of China (PRC) as the government of China, while the former Chinese government, the Republic of China (ROC), occupied Taiwan.[53] The ROC had recently landed a military aircraft in Hong Kong (a U.K. dependency at the time), causing a political rift between the United Kingdom and the PRC.[54] In that instance, the Foreign Office of the United Kingdom opined, at the request of the Colonial Secretary of Hong Kong, that it would not be prudent to recognize the Nationalists as a belligerency and apply the law of neutrality to the ongoing confrontation between the Nationalist government and the PRC.[55] The United Kingdom's legal basis for not recognizing a belligerency was that there did not appear to be an armed conflict of a general nature and the ROC did not occupy significant territory belonging to the PRC (never mind that the United Kingdom did recognize the Nationalists were in Taiwan as part of a military occupation).[56] In addition to those legal objections, the Foreign Office also pointed to practical concerns regarding recognizing a belligerency, including that they did not want to anger the PRC or give the ROC greater authority to interdict U.K. merchant vessels in the Taiwan Strait.[57] These

[48] *Id*. ¶ 3.3.3.1. Though it is unclear whether this standard was utilized, in 1979, the Andean Pact (Bolivia, Colombia, Ecuador, Peru, and Venezuela) recognized the Sandinista National Liberation Front (FSLN) as a belligerency in the Nicaraguan conflict. *See* Alonso Gurmendi, *The Last Recognition of Belligerency (and Some Thoughts on Why You May Not Have Heard of It)*, OPINIOJURIS (Oct. 12, 2019), https://bit.ly/454JuDN.
[49] UPCHER, *supra* note 45, at 6.
[50] LAW OF WAR MANUAL, *supra* note 8, ¶ 3.3.3.1.
[51] Hersch Lauterpacht, RECOGNITION IN INTERNATIONAL LAW 175–76 (1947).
[52] *See* U.K. Foreign Office Internal Memorandum (Feb. 22, 1956), https://bit.ly/457qKDA [hereinafter U.K. Memorandum].
[53] *Id*. at 3.
[54] *Id*.
[55] *Id*.
[56] *Id*. at 6–7.
[57] *Id*. at 7–8.

concerns outweighed the benefits of neutrality in the matter, and the episode demonstrated the political considerations built into the recognition of a belligerency.[58]

The final way to convert a rebellion or insurgency into a belligerency is through *de facto* conversion by the actions of the state party to the conflict. One such way for this to occur would be for the state party to engage in an activity that under international law is only permissible in an IAC, such as a blockade. In a NIAC, a state may limit access to its ports (including those over which a non-State group may control), but may only do so within its territorial seas.[59] However, a belligerent state in an IAC may push a blockade beyond the territorial seas if required by the circumstances, as long as it does not interfere with the right of third States to use international waters to trade with other States.[60] So, if there is a conflict between a state and an insurgency and the state party to the conflict decides to conduct a blockade outside of territorial waters, that act could convert the insurgency into a belligerency and the conflict would move from a NIAC to an IAC, bringing with it the law of neutrality.[61]

As mentioned above, there is historical precedent for just such a conversion of a conflict. In the Civil War, the United States conducted a blockade of the rebel forces in the South at the earliest stages of the conflict.[62] As a result, the United Kingdom "characterized the Union's declaration of a blockade on the South as a tacit recognition of Confederate belligerency."[63] The United States ultimately accepted the recognition of the belligerency and the rules that come along with such a recognition, including neutrality, which the United Kingdom and United States would then go on to violate in non-trivial ways, as discussed above. Arguably, this was not in fact a *de facto* conversion, as it took U.K. recognition and U.S. acceptance to truly convert the status of the rebels and the nature of the conflict, and some argue that the declaration of neutrality by the United Kingdom is what actually converted the rebellion into an insurgency.[64]

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[58] *Id*. at 7–10.
[59] McLaughlin, *supra* note 43.
[60] *See generally* LAW OF WAR MANUAL, *supra* note 8, ¶ 13.10; INT'L INST. OF HUMANITARIAN LAW, SAN REMO MANUAL ON INTERNATIONAL LAW APPLICABLE ON ARMED CONFLICTS AT SEA ¶ 96 (Louise Doswald-Beck ed., 1995), https://bit.ly/47Kn8cW ("The force maintaining the blockade may be stationed at a distance determined by military requirements.") [hereinafter SAN REMO MANUAL].
[61] MCLAUGHLIN, *supra* note 44.
[62] McLaughlin, *supra* note 43.
[63] *Id*.
[64] UPCHER, *supra* note 45, at 7. It is worth reiterating that political considerations appear to outweigh legal analysis when states decide whether to recognize a belligerency. There is at least one instance when a non-state party to a conflict should have been recognized as a belligerent but was not for various political reasons. In the Spanish Civil War each party likely met the criteria to be recognized as a belligerency, but third-party states instead focused on recognition of the rightful government,

III. CLASSIFYING A CONFLICT BETWEEN CHINA AND TAIWAN

A. What is Taiwan?

If there is an armed conflict between China and Taiwan, the first question will be to determine the status of Taiwan, which is complicated by its history and, of course, politics. As a result of its ongoing losses to Communist forces, the Chinese Nationalist ruling party, the Kuomintang, moved the ROC government to Taiwan in 1949, continuing to claim itself as the sole government of China.[65] The ROC maintained some legitimacy to that claim until 1971, when the U.N. General Assembly voted to officially recognize the PRC as the only legitimate representative of China and expelled the ROC from the United Nations.[66] The United States eventually recognized the PRC as the sole government of China, though it maintains "unofficial relations with Taiwan, sells defensive arms to Taiwan, supports peaceful resolution of cross-Strait differences, opposes any unilateral changes to the status quo (without explicitly defining the status quo), and states that it does not support independence for Taiwan."[67]

Today, the ROC is a self-governing democracy and claims effective jurisdiction over the island of Taiwan, other outlying islands, and a host of features in the surrounding seas.[68] In addition to being ousted from the United Nations, Taiwan is increasingly isolated in the international community. Honduras became the most recent country to sever ties and diplomatic relations with Taiwan, and instead established diplomatic relations with China in March 2023.[69] This leaves Taiwan recognized by only 13 states.[70] However, as with the United States, more than 100 states still maintain informal relationships with

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resulting in considerable outside involvement in the conflict. There, "[o]ne group of States recognized the nationalists as the de jure government of Spain and furnished it with substantial military assistance, [while other] States concluded an agreement stipulating non-intervention in the conflict." *Id*. In the Nigerian Civil War, which ended in 1970, some third-party states recognized the Biafran rebels as a government, but no state recognized it as an insurgency. *See* David A. Ijalaye, *Was "Biafra" at Any Time a State in International Law?*, 65 AM. J. INT'L L. 551 (1971).

[65] Susan V. Lawrence and Caitlin Cambell, CONG. RESEARCH SERV. IF 10275, *Taiwan: Political And Security Issues*, Jun. 13, 2023, at 1, https://bit.ly/44Ok5i0.

[66] *Id*.

[67] *Id*.

[68] *Id*. *See History*, GOV'T PORTAL OF THE REPUBLIC OF CHINA (2023), https://bit.ly/3q7oMnW.

[69] *Honduras Establishes Ties with China After Taiwan Break*, AP NEWS, Mar. 26, 2023, https://bit.ly/43N1EJj.

[70] The states recognizing Taiwan are Belize, Guatemala, Haiti, the Marshall Islands, Nauru, Palau, Paraguay, Saint Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines, Swaziland, Tuvalu, and Vatican City. Fatma Khaled, *Which Countries Recognize Taiwan Independence? Pelosi Trip Sparks Question*, NEWSWEEK, Aug. 5, 2022, https://bit.ly/3PcEUgs.

Taiwan.[71] The takeaway is that for the purposes of this analysis, Taiwan's government and military are not recognized by other states.

B. Why Does it Matter?

China's stated position regarding Taiwan is that it prefers peaceful unification under a "One Country, Two Systems" approach to governance.[72] However, China has not renounced the use of force in seeking reunification, and even passed The Anti-Secession Law in 2005.[73] That law states that if Taiwan secedes or if the PRC determines that options for peaceful reunification have been exhausted, then "the state shall employ non-peaceful means and other necessary measures to protect China's sovereignty and territorial integrity."[74] Further, President Xi Jinping of China has ordered the People's Liberation Army (PLA) of the PRC to be ready to conduct a successful invasion of Taiwan by 2027.[75]

For its part, the United States is not required by treaty or agreement to defend Taiwan from the use of force by China, even though its policy is to maintain the capacity to do so.[76] Most recently, U.S. President Joseph R. Biden has stated on numerous occasions that the United States would defend Taiwan from Chinese aggression, though his staff later clarified on each occasion that the U.S. position on Taiwan had not changed.[77] In August 2022, U.S. Speaker of the House of Representatives Nancy Pelosi visited Taiwan, the highest-ranking U.S. official to do so since 1997.[78] China responded to Speaker Pelosi's visit with "forceful and coercive military, economic, and diplomatic measures," which included the PLA conducting large-scale military exercises around Taiwan, including training for a joint blockade.[79] For now, the United States continues to provide military aid and sales to Taiwan, primarily focused on staving off an amphibious invasion by the PLA.[80]

Tensions between China and Taiwan remain high and the prospect of a conflict between the two in the not-too-distant future is not remote. Further, if current events in Ukraine are a guide, there is some reason to believe that U.S. efforts to provide military support prior to, and during, an invasion may result in

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[71] *Id*.
[72] Lawrence & Campbell, *supra* note 65, at 2.
[73] *Id*.
[74] *Id*.
[75] *Id*.
[76] *Id*.
[77] *Id*.
[78] *Id*.
[79] *Tracking the Fourth Taiwan Strait Crisis*, CHINA POWER, CTR. FOR STRATEGIC INT'L STUD., Mar. 30, 2023, https://bit.ly/3OheedY.
[80] Lawrence & Campbell, *supra* note 65, at 2.

a prolonged conflict because it will bolster Taiwan's ability to resist. Yet, it is unclear in what form a conflict may begin, as China is preparing for conflict in multiple domains, including amphibious invasion and a sea and air blockade.[81]

C. Is Taiwan a Belligerent in a Hypothetical Conflict? Applying the Standard

If there is an armed conflict between China and Taiwan, would it be a NIAC or an IAC? Based on the foregoing, and leaving aside any future declarations of independence by Taiwan, the starting point for a conflict between China and Taiwan would most likely be a NIAC, as Taiwan is not a state.[82] But there is potential for Taiwan to be recognized as a belligerent in such a conflict, thus converting the situation into an IAC for purposes of the laws of neutrality. Therefore, it is worth assessing whether there is a legal justification for third-party states to recognize Taiwan as a belligerent based on the DoD Law of War Manual's four factor test presented, *supra*, in Section II. The analysis below will largely be based on the assumptions that China will conduct a blockade of Taiwan or an amphibious landing on the main island.

1. Is There a General State of Armed Conflict Within a Territory?

The Geneva Conventions and its Additional Protocols provide the basic standards for determining when either an IAC or a NIAC is taking place. The International Committee of the Red Cross (ICRC) has stated that, under Common Article 2, an IAC "occurs when one or more States have recourse to armed force against another State, regardless of the reasons or the intensity of this confrontation."[83] It is unclear whether there must be some level of intensity to meet this standard, as some argue that mere border skirmishes and isolated acts of violence do not rise to the level of intensity for an IAC,[84] while the ICRC states that minor skirmishes may result in an IAC.[85] According to the ICRC, under

[81] *See* U.S. DEP'T DEF., MILITARY AND SECURITY DEVELOPMENTS INVOLVING THE PEOPLE'S REPUBLIC OF CHINA 126–27 (2022), https://bit.ly/3Ki2MO6.
[82] Recognition of Taiwan as a state is beyond the scope of this paper. Further, there is reason to believe recognition of a belligerency is more likely than recognition of a state with respect to Taiwan, as the latter is far more likely to antagonize China.
[83] Int'l Comm. of the Red Cross, Opinion Paper, *How is the Term "Armed Conflict" Defined in International Humanitarian Law?* Mar. 2008, https://bit.ly/3OflVkN [hereinafter ICRC Opinion Paper].
[84] INT'L & OPERATIONAL LAW DEP'T, THE JUDGE ADVOCATE GEN.'S LEGAL CTR. & SCH., U.S. ARMY, OPERATIONAL LAW HANDBOOK 12 (2022).
[85] INT'L COMM. RED CROSS, CONVENTION (II) FOR THE AMELIORATION OF THE CONDITION OF WOUNDED, SICK AND SHIPWRECKED MEMBERS OF ARMED FORCES AT SEA: COMMENTARY ¶ 259 (2017).

Common Article 3, NIACs "include armed conflicts in which one or more non-governmental armed groups are involved."[86] Looking at Common Article 3 and Article 1(2) of Additional Protocol II, it is generally accepted that there are two criteria for determining when a NIAC occurs, as opposed to an internal disturbance not rising to the level of armed conflict: (1) hostilities must rise to a certain level of intensity, and (2) the non-governmental armed group must have a level of organization to be considered a party to a conflict.[87] In terms of intensity, the standard for a NIAC is generally viewed as being higher than that of an IAC. As such, and considering the logic that the issue at hand is the conversion of a NIAC into an IAC, it makes sense that the NIAC standard must be met before any such convergence can occur.

Applying the NIAC standard to a potential conflict between China and Taiwan, an amphibious landing by the PLA will certainly meet the level of intensity criterion, as will a blockade[88]. However, even with an amphibious landing, there is likely to be an early phase in the conflict, where China is preparing for its amphibious landing, which might complicate the analysis of whether (and when) there is a general state of armed conflict. That said, it is safe to assume that once the shooting in this conflict starts, there will be a general state of armed conflict. Regarding the organization of the non-government armed forces, there is no room for doubt that the Taiwan military has the requisite level of organization to be considered a party to a NIAC.

2. Does the Armed Group Occupy and Administer a Significant Portion of National Territory?

Though Taiwan is only a tiny fraction the size of China, it is still a significant land mass with a sizable population, both larger than many other states. Even if Taiwan were to lose control of swaths of territory early in a conflict, one can assume that Taiwan would continue to occupy a significant enough portion of national territory to meet this criterion during the conflict. The U.K. Foreign Office likely got the analysis of this situation wrong in 1956, as both sides claimed Taiwan as their rightful territory.[89] To argue that Taiwan does not occupy significant Chinese territory would be to essentially treat Taiwan as a state, which has already been addressed. However, due to the peculiar situation of the One China Policy, such a *sui generis* determination by the United Kingdom is understandable.

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[86] ICRC Opinion Paper, *supra* note 83, at 3.
[87] *See* Prosecutor v. Tadić, Case No. IT-94-1-l, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 70 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995), https://bit.ly/3KnIXVB.
[88] SAN REMO MANUAL, *supra* note 60, at § II (recognizing blockade as a method of warfare).
[89] *See* U.K. Memorandum, *supra* note 52.

3. Does the Armed Group Act Under Responsible Chain of Command and Respect the Laws Of War?

The Taiwanese armed forces have not been tested in major conflict in decades, but they train with Western militaries.[90] It is highly likely most states would assume the ROC Armed Forces act under a responsible chain of command and respect the laws of war until they demonstrate otherwise.

4. Do Circumstances Exist That Make it Necessary for Outside States to Define Their Attitude Toward the Conflict?

Unlike the three prior factors, subjective, practical concerns will drive this decision for states. In the first seven months of 2022, it is estimated that approximately 48 percent of the world's shipping containers passed through the Taiwan Strait.[91] Thus, prolonged military activities affecting the Taiwan Strait and trade between third-party states and China and Taiwan are likely to put pressure on states to define their attitudes toward the conflict, specifically to maintain trade with China and Taiwan. However, this is largely a political decision that each state will have to address. With the other conditions presumably met, the perspectives of the involved parties and third-party states are addressed below.

IV. CLASSIFYING THE CONFLICT FROM EACH PARTIES' PERSPECTIVE

A. From China's Perspective

The paramount concern for China with respect to recognition of the conflict with Taiwan as a belligerency is tied to China's unwillingness to provide any acknowledgment of legitimacy to Taiwan. China has committed considerable resources to isolating Taiwan on the international stage, all with an eye toward unification. A conflict is the culmination of those efforts, not an opportunity to recalibrate.

One benefit to China of recognizing Taiwan as a belligerent is, that in an IAC, China would be permitted to conduct a blockade of Taiwan that extends into

[90] Nancy A. Youssef & Gordon Lubold, *U.S. to Expand Troop Presence in Taiwan for Training Against China Threat*, WALL ST. J. (Feb. 23, 2023), https://bit.ly/456cQBS; Ann Wang and Fabian Hamacher, *Taiwan Officer Reveals Details of Rare Interaction with NATO*, REUTERS (Jan. 12, 2023), https://bit.ly/44K29VT.

[91] Kevin Varley, *Taiwan Tensions Raise Risks in One of Busiest Shipping Lanes*, BLOOMBERG, Aug.2, 2022, https://bit.ly/3QkThBw.

international waters (including searches of vessels on the high seas).[92] China's recent drills preparing for joint blockade suggest this might be a strategy it would like to have on the table.[93] The benefit of a blockade is it would make any attempts to provide military support to Taiwan much more difficult, even if a state were to claim it was providing such support under a theory of qualified neutrality. On the other hand, a blockade must be effective to be lawful.[94] For China to conduct an effective blockade would require a significant commitment of naval forces that would thus be unavailable for a cross-strait amphibious landing, which likely makes a strategy of blockade less enticing to PLA planners. Another benefit for China is that Chinese servicemembers captured as a prisoners of war would be entitled to the broader rights and protections provided in IACs under the Geneva Conventions, as opposed to the Common Article 3 protections for NIACs, including the combatant's privilege and prisoner of war status.[95] Even with the benefits mentioned, China will likely prefer to treat the conflict as a NIAC and pressure other states to do the same to avoid strengthening Taiwan's hand in claiming that it should be recognized as a state.

B. From Taiwan's Perspective

Taiwan benefits the most from converting a conflict with China into an IAC. If Taiwan is recognized as a belligerent, then Taiwanese servicemembers captured as a prisoners of war would be entitled to the broader rights and protections provided in IACs as mentioned above.[96] A further benefit would be the right to apply prize law and operate prize courts,[97] which would potentially be a major threat to Chinese merchant vessels (though, taking such prizes would potentially escalate the intensity of the conflict).

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[92] LAW OF WAR MANUAL, *supra* note 8, ¶ 13.10.1. ("Purpose of Blockade and Belligerent Rights Associated With Blockade. The purpose of a blockade is to deprive the adversary of supplies needed to conduct hostilities. A blockade enables the blockading State to control traffic in the blockaded area. A blockade also enables the blockading State to take measures on the high seas to deny supplies to a blockaded area. For example, a blockading State has the right to visit and search vessels on the high seas to enforce its blockade.") (citations omitted) China could choose to conduct domestic law enforcement activities in the territorial seas (and by extension into the contiguous zone) around Taiwan, as China claims those waters as its own territorial seas. This would be similar to the Sri Lankan enforcement efforts with respect to the Liberation Tigers of Tamil Eelam, in which the Sri Lankans specifically did not claim their activities were a blockade, but a maritime surveillance zone. *See* MCLAUGHLIN, *supra* note 44, at 231–32.

[93] U.S. DEP'T DEF, *supra* note 81.

[94] *See* LAW OF WAR MANUAL, *supra* note 8, ¶ 13.10.2.3; SAN REMO MANUAL, *supra* note 60, ¶ 95 ("A blockade must be effective. Whether a blockade is effective is a question of fact.").

[95] Heller, *supra* note 22, at 124.

[96] *Id*.

[97] MCLAUGHLIN, *supra* note 44, at 151.

Additionally, if the conflict is treated as an IAC, Taiwan is more likely to seek and receive support from friendly states through qualified neutrality or collective self-defense, discussed further below.

C. From the U.S. Perspective

The United States will likely find itself in a legal quandary no matter which path it takes. If Taiwan is not recognized as a belligerent, then the rules of NIAC will apply, and any support the United States provides to Taiwan will run the risk of violating the rule against non-intervention, and at some point, could violate the U.N. Charter Art. 2(4) prohibition on the use of force. On the other hand, if Taiwan is recognized as a belligerent, support to Taiwan might violate the law of neutrality, bring the United States into the conflict as a co-belligerent, and similarly run the risk of violating Art. 2(4).[98] However, the recognized belligerency path likely provides the United States with some space to argue under international law for the legality of support to Taiwan that would be foreclosed under the rules of NIAC, as discussed below.

1. Collective Self-Defense

The United States may wish to engage in collective self-defense of Taiwan. There is some question as to whether a third-party state may engage in collective self-defense of a non-state actor recognized as a belligerent. The collective self-defense exception of Article 51 of the U.N. Charter refers to "collective self-defence if an armed attack occurs against a Member of the United Nations."[99] Taiwan in this case is a non-state actor, which is by definition not a member of the United Nations.[100] However, the concept of recognizing a belligerency brings with it the rules of IAC, including neutrality. Arguably, the other side of the neutrality coin is the option for a third-party State to cease being a neutral and instead to become a belligerent. Professor Rob McLaughlin has argued as much:

> [U]nder the doctrine on recognition of belligerency, siding with and supporting a recognized belligerent non-State actor was accepted as a valid abrogation of the otherwise required conduct and status of neutral, which was required of other States. The quid pro quo, of course, is the consequential adoption of adversary belligerent status in relation to the conflict State.[101]

[98] For a discussion on when the provision of material support to a belligerent results in a violation of the law of neutrality, co-belligerency, or a use of force, *see* Schmitt, *supra* note 25.
[99] U.N. Charter, art. 51, Jun. 26, 1945, 59 STAT. 1031.
[100] *See id*. at arts. 3–6.
[101] Rob McLaughlin, *Whither Recognition of a Belligerency*, LIEBER INST. WEST POINT: ART. OF WAR, Sep. 17, 2020, https://bit.ly/477G4SF.

Thus, assuming China could be treated as an aggressor in the conflict, recognition of Taiwan as a belligerent would arguably provide a legal avenue for the United States to enter the conflict engaging in collective self-defense of Taiwan.

2. Qualified Neutrality

Alternatively, the United States may wish to provide support for Taiwan's war efforts without becoming a party to the conflict or violating international law. One path to providing such support to Taiwan while not violating international law would be under the doctrine of qualified neutrality, similar to the current scenario in Ukraine. However, this would require applying qualified neutrality to a non-state actor belligerent, further extending a doctrine that already has limited explicit support (though state practice of providing war materiel to Ukraine in its defense against Russian aggression would suggest there is growing support for the doctrine). Further, providing support to an island nation will likely prove far more difficult than it has in the case of Ukraine.

To invoke qualified neutrality, China would need to be declared the aggressor in the conflict. One difficulty is that most definitions of aggression speak of the use of armed force against a state. The U.N. General Assembly defined aggression in U.N. General Assembly Resolution 3314, providing in Article 1, "Aggression is the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations, as set out in this Definition."[102] Yet, the explanatory note following that definition states, "In this Definition the term 'State' […] [i]s used without prejudice to questions of recognition or to whether a State is a member of the United Nations[.]"[103] One could argue that recognition of a belligerency fits in this definition, however, the better argument is that recognition in this definition is used with respect to a state as opposed to a belligerency, and thus would likely only apply to a situation where Taiwan declares independence (which is not out of the question) or is recognized as a state by other countries. Further, the "or in any other manner…" language could arguably be read to include a violation of U.N. Charter Art. 2(3), which states, "All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered."[104] An amphibious landing or blockade of Taiwan by China could be viewed as a violation of this article. The point here is that a colorable argument could be made to include aggression as triggering a belligerency, which, as discussed above, brings with it many of the rights and obligations of a state for

[102] G.A. Res. 3314 (XXIX), Definition of Aggression (Dec. 14, 1974), https://bit.ly/3TjVNtp.
[103] *Id*.
[104] U.N. Charter, art. 2, para.3, Jun. 26, 1945, 59 STAT. 1031.

the non-state belligerent, potentially including a right to ask other states to invoke qualified neutrality and support the belligerent as a victim of the aggression.

Another argument in favor of an expansive reading Resolution 3314 is that in the preambular language the U.N. General Assembly recognized aggression as being "fraught [. . .] with the possible threat of a world conflict and all its catastrophic consequences," and reaffirmed "the duty of states not to use armed force to deprive peoples of their right to self-determination, freedom and independence, or to disrupt territorial integrity[.]"[105] A conflict between China and Taiwan poses just such a threat of world conflict and would likely impinge on the people of Taiwan's right to self-determination, potentially bringing the situation within the ambit of the concept of aggression.

As discussed above, a Chinese blockade of Taiwan would result in the conflict being treated as an IAC. Additionally, a blockade is specifically recognized under Resolution 3314 as an act of aggression.[106] Thus, a blockade by Chinese forces against Taiwan, particularly at the opening of a conflict or in the earliest stages of the conflict, could serve as a justification for treating China as an aggressor and extending qualified neutrality to Taiwan.

One obvious concern with extending the logic of aggression to a recognized belligerency is the implication this would have for sovereignty and sovereign acts taken prior to the recognition of a belligerency, potentially inviting expanded third-party state involvement in what would otherwise be treated as an internal conflict. Further, the logic is strained in the case of a rebellion or insurgency that eventually meets the criteria discussed above to be recognized as a belligerency. It would make little sense to declare sovereign and internal acts as aggression prior to the existence of an entity for which the state could commit aggression against. And, a force capable of recognition as a belligerent would be a pre-requisite to a claim of aggression, but, a general state of armed conflict is required for recognition of a belligerency. On the other hand, a blockade might be the precise type of action that solves this ordering problem, as it creates a conflict and *de facto* creates a belligerency simultaneously.

As far as declaring China to be an aggressor, there is unlikely to be any supportive declarations from the United Nations regarding aggression in a conflict between China and Taiwan. First, China would veto any such declarations brought for a vote in the Security Council. Second, a resolution similar to U.N. General Resolution ES-11/1 declaring the Russian Federation an aggressor against

[105] Definition of Aggression, *supra* note 102.
[106] *Id*.

Ukraine,[107] is unlikely to receive enough support to pass due to China's successful diplomatic efforts to isolate Taiwan in the international community, as discussed above.[108]

Those concerns aside, the idea of extending qualified neutrality to a situation like Taiwan fits with the historical line of thought from just war theory to neutrality to qualified neutrality. The moral issue is the same for Taiwan as it was for the victims of Germany's aggression in World War II, in that there is a moral imperative in armed conflict to assist the side acting justly and not to do anything to support the wrongdoer.[109]

D. Is Neutrality Practical?

Finally, it is worth returning to the fourth criterion for recognition of belligerency presented in Section II, whether circumstances exist that make it necessary for outside states to define their attitude toward the conflict. This criterion deals with the real-world practicalities of the conflict and contemplates a level of political reasoning, as evidenced by the writings of the U.K. Foreign Office in 1956.[110]

Presumably, most states will want to continue commercial trade with China and Taiwan to minimize the impact of the conflict on the global economy as well as domestic politics. Though few states have official ties with Taiwan, many of the largest economies and regionally interested states have robust trade with Taiwan and China.[111] If states recognize Taiwan as a belligerent, then the doctrine of neutrality provides fairly robust rules for neutral states to continue relationships with the belligerents, so long as they do not provide support for the war effort. China may be wary of such rules, as neutrality bars states from providing war materiel to belligerents, but it does not stop commercial transactions of such materiel between neutral private parties and belligerents (though such trade is often controlled by domestic laws).[112] However, recognizing that at least some states will wish to support Taiwan while not becoming belligerents in the conflict, neutrality (whether or not characterized as neutrality) and qualified neutrality allows space for that support and a mechanism for responding to breaches without expanding the conflict. This same logic has essentially held true in the conflict in Ukraine, where Russia has accepted a level

[107] *See* Aggression Against Ukraine, *supra* note 38.
[108] *See Honduras Establishes Ties with China After Taiwan Break*, *supra* note 69.
[109] *Id*.
[110] *See* U.K. Memorandum, *supra* note 52.
[111] Da-Nien Liu, *The Trading Relationship Between Taiwan and the United States: Current Trends and the Outlook for the Future*, BROOKINGS (Nov. 2016), https://bit.ly/3q015OA.
[112] LAW OF WAR MANUAL, *supra* note 8, ¶ 15.3.2.1.

of support from neutral states to Ukraine (though objecting regularly), while not expanding the conflict. China may be willing to accept a similar scenario to encourage trade and not expand the conflict beyond Taiwan.

Based on military capabilities, arguably the United States is more likely than other states to become a belligerent in a conflict between China and Taiwan. However, there is explicitly no guarantee that the United States will defend Taiwan or make itself a belligerent in such a conflict.[113] The United States may seek a path to provide support to Taiwan in its war effort while not violating international law and not joining the conflict. This is most likely to be the case at the early phases of a conflict, when there is a question about whether to recognize Taiwan as a belligerent and before the United States is able to join as a belligerent. Qualified neutrality may provide a legal justification for such support, though the practical approach to qualified neutrality for Taiwan is fairly limited. If China successfully blockades Taiwan, the ability of states to provide items in support of Taiwan by air or sea under a qualified neutrality approach would be significantly limited. In the case of an amphibious landing by China on Taiwan, the political case is closer to that of Ukraine, in that China may have to accept some level of support by the United States for Taiwan because sea lanes and ports are likely to remain open; meanwhile, the United States would seek to provide that support to Taiwan while preferring not to join a conflict with China. Qualified neutrality provides the breathing space for that scenario.

V. CONCLUSION

In a potential armed conflict between Taiwan and China, there is a compelling case for treating Taiwan as a belligerent and applying the law of neutrality to the conflict. Even if the legal basis for treating Taiwan as a belligerent is satisfied, the decision will ultimately turn on political calculations, and it is difficult to know how states will break on such a determination with potentially enormous consequences. However, once the issue of neutrality is broached, it is safe to assume that it will not end there, and may, depending on the nature and duration of the conflict, turn to whether qualified neutrality can be applied to the scenario.

Extending qualified neutrality to Taiwan would arguably allow the United States (and other states) to provide support in the form of war materiel to Taiwan while not entering the conflict as a belligerent. The difficulty in reaching that position is that it would require treating China as an aggressor in the conflict, which is unlikely to receive support in the U.N. Security Council or the U.N. General Assembly. Instead, the United States (and some coalition of states) would

[113] Michael J. Green, *What Is the U.S. "One China" Policy, and Why Does it Matter?*, CTR. FOR STRATEGIC & INT'L STUD. (Jan. 13, 2017), https://bit.ly/3YfI6w8.

have the legal justification to recognize China as an aggressor outside of the U.N. Charter framework, suggesting neither international consensus nor institutional determinations are required for qualified neutrality. This could be a major development in the doctrine of qualified neutrality. And though there is a distinct possibility that such conditions may be obtained, they are likely to do so without public acknowledgment by any of the states involved.